Decision Ref:	2021-0043
Sector:	Banking
Product / Service:	Tracker Mortgage
Conduct(s) complained of:	Failure to offer a tracker rate throughout the life of the mortgage
Outcome:	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 is secured on the Complainants' private dwelling house.

The loan amount was €190,000 and the term was 30 years. The **Loan Offer Letter** which was signed on **3 October 2006** outlined the interest rate type as *"Fixed 5.39%"* from the date of drawdown until **31 July 2016**, with a tracker interest rate of ECB + 1.15% applying thereafter.

The Complainants' Case

The Complainants submit that they made a number of requests to the Provider to break from the 10 year fixed interest rate period in order to avail of a tracker interest rate as detailed in the Loan Offer Letter. The Complainants state however that the Provider "*advised*" them that a tracker interest rate "*was not available to [the Complainants] on several occasions for 3 years*".

The Complainants state they submitted a subject access request to the Provider on foot of which they received extracts of various verbal and written communications between the Complainants and the Provider during the period from **17 October 2006** to **15 July 2012**.

The communications between the Complainants and the Provider, are highlighted by the Complainants, as follows;

- **11 February 2009** – The Complainants initially requested details of the breakage costs from their fixed interest rate mortgage from the Provider. The Complainants submit that the Provider detailed the breakage costs to the Complainants by way of letter dated **13 February 2009**

- **20 March 2009** - The Provider sent a letter to the Complainants detailing the breakage costs.

- **22 July 2009** - The Complainants requested details of the breakage costs associated with exiting the fixed interest rate period from the Provider. The Provider sent a letter to the Complainants dated **30 July 2009** detailing the breakage costs and offered the Complainants a flexible variable rate of interest of 3.75% or another fixed rate option should they decide to break out of the fixed interest rate.

- **23 September 2010** - The Complainants requested details of the breakage costs from the Provider. By letter dated **24 September 2010**, the Provider detailed the breakage costs to the Complainants

- **24 January 2012** – The Provider confirmed to the Complainants that they would have to remain on their fixed interest rate if they wished to avail of a tracker interest rate at the end of the fixed rate term and if they vacated their fixed rate term early, they could only avail of a variable rate of interest and the tracker interest rate would not be available to them

- **23 April 2012** - The Complainants contacted the Provider's customer complaint team advising that they were unhappy with the Provider's breakage costs and the offer of a standard variable rate if they exited their fixed interest rate early. The Provider advised the Complainants that the breakage costs for exiting their fixed interest rate were covered under the conditions of their Loan Offer Letter and that their mortgage loan account would default to a tracker interest rate at the end of the fixed rate term or once they discharged the breakage costs to exit the fixed rate term. The Complainants requested written confirmation of these details from the Provider.

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The Complainants submit that by letter dated **24 April 2012**, the Provider informed them that if they opted to break their fixed interest rate term early and discharge the breakage costs, their mortgage loan account would default to the then current tracker interest rate of 2.15% (ECB + 1.15%).

On **25 April 2012**, the Complainants submit that they discharged the breakage costs of €4,249.41 to the Provider and their mortgage loan account then defaulted to a tracker interest rate of ECB + 1.15%.

The conduct complained of is that the Provider failed to offer the Complainants a tracker interest rate of ECB + 1.15% pursuant to the terms of their Loan Offer Letter dated **3 October 2006** "*on several occasions for 3 years*" when they sought to break from the 10 year fixed interest rate period.

The Complainants are seeking;

(a) their mortgage loan account to be restored to the tracker interest rate of ECB + 1.15% with effect from **May 2009** when they first contacted the Provider to break out of the fixed interest rate period; and

(b) a refund of all interest overpaid between **May 2009** and **May 2012** consisting of the interest rate they were charged versus the tracker rate of ECB + 1.15%.

<u>The Provider's Case</u>

The Provider submits that the Complainants' mortgage loan account drew down in **October 2006** on a fixed interest rate of 5.39%, which was fixed until **31 July 2016**, with a tracker interest rate of ECB + 1.15% to apply thereafter. The Provider submits that the Loan Offer Letter accepted by the Complainants on **3 October 2006** was "*clear and unambiguous*" as to the applicable fixed interest rate and the default interest rate that would apply on expiry of the fixed interest rate period. The Provider relies on the **Specific Conditions** of the Loan Offer Letter and **General Condition 14 (c) (ii)** of the **Standard Mortgage General Terms and Conditions** in this regard.

The Provider states that the Loan Offer Letter did not outline "*what would transpire on moving off the fixed interest rate product prior to the agreed expiry date*" as the expectation was that the fixed rate would run to **31 July 2016**.

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The Provider contends that there was therefore no requirement to specify alternative available interest rates in the event that the Complainants "*chose to break from their contracted fixed interest rate prior to the agreed expiry date*". The Provider further contends that the terms of the Loan Offer Letter did not provide a "*contractual entitlement*" on the part of the Complainants to a tracker interest rate in the event that they moved off the fixed interest rate prior to **31 July 2016**. In this regard, the Provider asserts that the Complainants could "*not have formed any reasonable expectation*" that they would default to a tracker interest rate if they moved off the fixed interest rate before the agreed expiry date.

The Provider states however that the Complainants were "*free to move*" from the fixed interest rate and choose "*any other commercial interest rate that was available to customers generally at the time of switching, should they have wished to do so.*"

The Provider submits that the Complainants first contacted the Provider to enquire about the costs associated with moving off the fixed interest rate on **11 February 2009** and the Provider responded by way of letter dated **13 February 2009** outlining the breakage costs. The Provider submits that it received no response to its letter of **13 February 2009** from the Complainants nor did it receive payment of the breakage cost amount, therefore, the Complainants' mortgage loan account remained on the fixed interest rate.

The Provider submits that it has no record of the Complainants requesting information, at that time, regarding the interest rates that would be available if they opted to move from the fixed rate of interest prior to the expiry date, or seeking confirmation that the tracker interest rate would be an option if they were to exit the fixed rate early.

The Provider notes that a subsequent correspondence was sent to the Complainants on **30 July 2009** detailing the breakage costs on foot of a request from the Complainants to provide a quote for breakage costs. The Provider states that this correspondence specifically noted that if the Complainants broke out of the fixed interest rate period, the default option which would have been available at the end of the fixed interest rate would no longer be available. The Provider submits that it received no response to its letter of **30 July 2009** from the Complainants nor did it receive payment of the breakage cost amount, therefore, the Complainants' mortgage loan account remained on the fixed interest rate.

The Provider submits that the Complainants raised a complaint with the Provider in **April 2012** in respect of their mortgage loan account defaulting to the Provider's standard variable rate as opposed to a tracker interest rate should they decide to break away from the fixed interest rate.

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The Provider explains that, at the time, it agreed to allow the Complainants to revert to a tracker interest rate as "*a resolution to [their] complaint*". The Provider asserts that this resolution was agreed as "*a gesture of goodwill* and was "*on an exceptional basis*" as the Complainants "*did not have a contractual entitlement to this change in such circumstances.*" The Provider states that it issued the Complainants with a letter on **24 April 2012** confirming that if they moved their mortgage loan account from the fixed rate prior to the agreed expiry date, the Provider would allow the account to default to a tracker interest rate of ECB + 1.15%.

The Provider submits that on **24 April 2012** the Complainants wrote to the Provider requesting that the mortgage account be moved from the fixed interest rate to the agreed tracker interest rate and enclosed a cheque for the early breakage costs. The Provider states that it wrote to the Complainants on **4 May 2012** confirming the interest rate on the mortgage account had been switched to a tracker interest rate of ECB + 1.15%.

In response to the Complainants' contention that the Provider supplied misleading information as to which interest rate would apply if they opted to break out of the fixed rate period, the Provider states that the Complainants were provided with all the "*necessary information and documentation in order for them to make informed decision regarding their interest rate choices*" and the letter to the Complainants dated **22 July 2009** clearly outlined what would occur if the Complainants decided to move from the fixed rate early. The Provider states that it apologises that its "*resolution letter*" dated **24 April 2012** did not "*clearly or explicitly outline*" that the Provider's offer to allow the Complainants to move their mortgage loan account off the fixed interest rate early (subject to the early breakage cost) and to avail of the tracker interest rate of ECB +1.15% was done as a gesture of goodwill, on an exceptional basis.

<u>The Complaint for Adjudication</u>

The complaint for adjudication is that the Provider incorrectly failed to offer the Complainants a tracker interest rate of ECB + 1.15% pursuant to the terms of their Loan Offer Letter dated **3 October 2006** "*on several occasions for 3 years*" when they sought to break from the fixed rate.

<u>Decision</u>

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.

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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 **19 January 2021**, 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.

The Complainants made further submissions to this office by way of email dated **25 January 2021**. These submissions were exchanged with the Provider. The Provider indicated that it would not be making any further submissions by way of email to this office dated **15 February 2021**.

Following consideration of the Complainants' additional submissions and all submissions and evidence furnished by both parties to this Office, I set out below my final determination.

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 **February 2009** and **May 2012**, when a tracker interest rate was applied to the mortgage loan account.

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The Provider issued a **Loan Offer Letter** dated **3 October 2006** to the Complainants which detailed as follows;

"Loan Type:	*Fixed 5.39% Until 310716 Rvts to ECBR+1.15% Capital and Interest*
Loan Amount:	*€190,000.00*
Interest Rate:	*5.39%*
Interest Type:	*Fixed*
Term:	*30 years"*

The **Important Information** section of the Loan Offer Letter details as follows;

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

The **Specific Loan Offer Conditions** attached to the Loan Offer Letter detail as follows;

> *"…*
> *The rate of interest applicable to this loan will be fixed for the fixed rate term specified in the loan offer letter.*
> *…"*

Condition 14 of the **Standard Mortgage General Terms and Conditions (effective from 01/06/2006)** which are supplemental to and form part of the Loan Offer Letter details as follows;

"Interest Rate

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

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

   (i) *The Loan is subject to the Tracker Mortgage variable interest rate at the date of payment of the Loan. This rate will depend on the Loan to Value set out in the Specific Loan Offer Conditions. In the event of a movement in the European Central Bank ("ECB") rate the Lender will adjust the Tracker Mortgage variable interest rate within 30 days of the ECB rate movement;*

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

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

(i) *The rate applicable to the Loan will be fixed at the rate and for the period specified in the Loan Offer;*

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

(iii) *Where, during a Fixed Rate Period, the Lender accepts:*

(A) early repayment of the Loan in full,
(B) a Lump Sum Repayment, or
(C) the conversion of a fixed interest rate Loan to a variable interest rate Loan (or other fixed interest rate Loan),
the Borrower must pay to the Lender a sum equal to the higher of zero or a sum to be calculated in accordance with the following formula:
(Redeemed Amount x (R-R1) xTime) divided by 365
where –

"Redeemed Amount" means the estimated average loan balance between the time of the proposed repayment or interest rate conversion and the end of the relevant Fixed Rate Period, assuming that no such repayment or interest rate conversion takes place and that all Monthly Payments have been made by the Borrower under the terms specified in the Loan Offer. Provided that where a Lump Sum Repayment is made, "Redeemed Amount" shall mean the amount of the Lump Sum Repayment;

"R" means the interest rate available to the Lender for funds placed in the money market on the start date of the relevant Fixed Rate Period for the duration of the relevant Fixed Rate Period;

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"R1" means the interest rate available to the Lender for funds placed in the money market on the date of the proposed early repayment, Lump Sum Repayment or interest rate conversion for the remainder of the relevant Fixed Rate Period; and

"Time" means the number of days from the date of early repayment, Lump Sum Repayment or interest rate conversion to the end of the relevant Fixed Rate Period.

(iv) *If you redeem your Fixed Rate Mortgage and, within 3 months of the redemption, you drawdown a new mortgage with the Lender on the same fixed rate terms as the original mortgage the charge will be refunded. If the new mortgage is for less than the original mortgage the calculation of the charge will be based on the amount of the original mortgage redeemed. The redemption charge will not be payable in the event of death…."*

The Complainants signed the **Loan Acceptance** attached to the Loan Offer Letter on **3 October 2006** on the following terms;

"I/We acknowledge receipt of the General Terms and Conditions and Specific Conditions attached to the Loan Offer. I/We have had the Loan Offer, the Specific Loan Offer Conditions and the General Terms and Conditions explained to me/us by my/our Solicitor and I/we fully understand them. I/We hereby accept the Loan Offer on the terms and conditions specified. I/We undertake to complete the Mortgage Deed as soon as possible.

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

It is clear that the Loan Offer Letter envisaged a fixed interest rate of 5.39% to be applied to the Complainants' mortgage loan account for 10 years until **31 July 2016** and thereafter, the application of a tracker interest rate of ECB + 1.15% for the remaining term of the loan. The terms and conditions attaching to the Loan Offer Letter do not specifically detail the interest rate options available to the Complainants should the Complainants decide to exit the fixed rate period before **31 July 2016** however **Condition 14 (c)(iii)** of the **Standard Mortgage General Terms and Conditions**, as outlined above, details the method of calculating the cost of exiting the fixed interest rate period prior to the agreed expiry date.

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I note from the Provider's internal notes submitted in evidence (and also furnished to the Complainants by way of a subject access request) that in early **February 2009**, the Complainants enquired about moving off the fixed interest rate prior to the expiry of the 10 year fixed interest rate term. The Provider's internal notes detail as follows;

> ***"04 February 2009 12:37***
> *Can you please send breakage costs to customer"*
>
> *"11 February 2009: customer looking for breakage costs"*

On **13 February 2009**, the Provider sent the Complainants a letter detailing the breakage costs of exiting the fixed interest rate which details as follows;

> *"Thank you for your recent query in relation to the current breakage costs applicable to your fixed rate loan.*
>
> *I wish to advise that there are currently breakage costs of €4,927.00 applicable to your account. These figures are valid until 19 February 2009.*
>
> *Should you have any further queries please contact our Customer Service Team on [telephone number]."*

The Provider submits that it does not have any record of the Complainants enquiring about the interest rate products that would be available to them if they chose to move their mortgage from the fixed interest rate before the agreed expiry date.

I have not been provided with any evidence to suggest that the Complainants made such enquiries nor have I been provided with any evidence to suggest that the Complainants discharged the breakage costs outlined above in **February 2009** in order to move away from the fixed interest rate earlier than agreed. Therefore, the Complainants' mortgage loan account remained on a fixed interest rate pursuant to the terms of the Loan Offer Letter.

I note from the Provider's internal notes submitted in evidence that in **March 2009** the Complainants once again enquired as to breakage costs in respect of moving off the fixed interest rate before the agreed expiry date. The Provider's internal notes detail the following in this regard;

> ***"13 March 2009 11:37***
> *Customer would like to receive breakage figures for above account please."*

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On **20 March 2009**, the Provider sent the Complainants a letter detailing the breakage costs of exiting the fixed interest rate which details as follows;

> *"Thank you for your recent query in relation to the current breakage costs applicable to your fixed rate loan.*
>
> *I wish to advise that there are currently breakage costs of €4,921.00 applicable to your account. These figures are valid until 27th March 2009.*
>
> *Should you have any further queries please contact our Customer Service Team on [telephone number]."*

The Provider submits that it does not have any record of the Complainants enquiring about the interest rate products that would be available to them if they chose to move their mortgage from the fixed interest rate before the agreed expiry date. I have not been provided with any evidence to suggest that the Complainants made such enquiries nor have I been provided with any evidence to suggest that the Complainants discharged the necessary breakage costs outlined above in **March 2009** in order to move away from the fixed interest rate earlier than agreed. Therefore, the Complainants' mortgage loan account remained on a fixed interest rate pursuant to the terms of the Loan Offer Letter.

It appears from the Provider's internal notes that the Complainants made a further request for breakage costs in **July 2009**. The Provider's internal notes detail as follows;

> *"22 July 2009 ordered break costs p/s".*

On **30 July 2009** the Provider sent the Complainants a letter detailing the breakage costs of exiting the fixed interest rate which details as follows;

> *"Thank you for your recent query in relation to breaking out of your current fixed rate on your loan.*
>
> *The current fixed rate on your loan is 5.39% until 31/07/2016. Should you wish to break out of this fixed rate there are breakage costs of €4,933.25 applicable to your loan. These figures are valid until 05/08/2009.*
>
> *Please note that if you choose to break out of this fixed rate option at this time, the default option, as outlined in your original letter of offer, which would have been available to you at the end of this fixed rate period e.g. tracker or standard variable, will no longer be available to you.*

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> *Having considered the above information, if you still opt to breakout of your fixed rate you may choose to transfer to our current flexible variable rate of 3.75%.*
>
> *You may also choose to opt for another fixed rate option. Please contact your local [Provider's] loans advisor to discuss our current fixed rate options*
>
> *If you want to break out of your current fixed rate please complete the enclosed authority form and return this to our office with a cheque for the amount of the breakage costs..."*

The **authority form** enclosed with the letter dated **30 July 2009** details as follows;

> "*I hereby authorise [Provider] to remove the current fixed rate of 5.39% from my above mortgage.*
>
> *I have enclosed a cheque in the amount of €4,933.25 in respect of breakage cost fees.*
>
> *I hereby authorise [Provider] to apply the flexible variable rate, currently 3.75% to my mortgage and to adjust the composite monthly repayments accordingly*".

The Provider submits that it did not receive a reply from the Complainants to its letter of **30 July 2009**.

I have not been provided with any evidence in the form of a completed authority form or otherwise to suggest that the Complainants discharged the relevant breakage costs outlined above in **July 2009** in order to move away from the fixed interest rate earlier than agreed. Therefore, the Complainants' mortgage loan account remained on a fixed interest rate pursuant to the terms of the Loan Offer Letter. Further, I have not been provided with any evidence to suggest that the Complainants raised an issue with the Provider, at that time, regarding the fact that the Provider's flexible variable rate would be applied should they decide to move their mortgage from the fixed interest rate before the agreed expiry date.

I note from the Provider's internal notes submitted in evidence that on **7 April 2010**, the Provider "*advised cust[omer] of repayments if he was on a standard variable rate*".

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I note from the Provider's internal notes submitted in evidence that in **September 2010** the Complainants once again enquired as to breakage costs in respect of moving off the fixed interest rate before the agreed expiry date. The Provider's internal notes detail the following in this regard;

> *"**23 September 2010 13:58***
> *Could you send breakage costs to the above customer"*
>
> *"23 September 2010 ordered breakage costs to be sent to customer*
>
> *24 September 2010 redemptions breakage cost letter e4,581.45 valid to 01/10/2010 posted to customer".*

On **24 September 2010**, the Provider sent the Complainants a letter detailing the breakage costs of exiting the fixed interest rate which details as follows;

> *"Thank you for your recent query in relation to breaking out of your current fixed rate on your loan.*
>
> *The current fixed rate on your loan is 5.39% until 31/07/2016. Should you wish to break out of the fixed rate there are breakage costs of €4,581.45 applicable to your loan. These figures are valid until 01/10/2010.*
>
> *If you decide that you would like to go ahead with switching your mortgage to another product, you can discuss the options available to you with our Mortgage Services Team at [telephone number]…"*

I have not been provided with any evidence to suggest that the Complainants replied to or made contact with the Provider in order to discuss their options should they decide to move away from the fixed interest rate before the expiry date. Further, I have been provided with no evidence to suggest that the Complainants discharged the necessary breakage costs outlined above in **September 2010** in order to move away from the fixed interest rate earlier than agreed. Therefore, the Complainants' mortgage loan account remained on a fixed interest rate pursuant to the terms of the Loan Offer Letter.

I note from the Provider's internal notes submitted in evidence that on **24 January 2012**, the Provider *"confirmed to cust[omer] that he will have to stay on fixed rate to avail of rolling onto the tracker rate.[I]f he vacates the fixed rate early he will roll onto a variable and will not be allowed to avail of [t]he tracker rate".*

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The information provided to the Complainants by the Provider on **24 January 2012** is in line with the information detailed by the Provider in its letter to the Complainants dated **30 July 2009** in respect of defaulting to a "*flexible variable rate*" should they decide to break away from the fixed interest rate early. It appears that no action was taken by the Complainants on this occasion in respect of opting out of the fixed interest rate.

The Provider's internal notes from **13 April 2012** detail as follows;

> *"13 April 2012 [Complainants] Can you please send a copy of the loan offer to the customer as he is querying his rate.*
>
> *13 April 2012 [Complainants] Can you please send breakage cost to customer as he is looking to break out of his fixed rate to default onto his tracker rate."*

The Provider has submitted a number of internal emails in evidence detailing the Complainants' query in relation to breaking away from the fixed interest rate before the agreed expiry date. An internal email dated **17 April 2012** and sent at **15.45** details as follows;

> *"Hi [Provider agent]*
>
> *Can you send out a figure for the charge to change from Fixed to tracker and confirm that the rate will be the tracker rate to the following customer please?"*

The Provider's agent responded to the above internal email on **17 April 2012** at **16.05** as follows;

> *"Hi [Provider agent]*
>
> *This is a query for correspondence, as far as I know if the customer is due to roll onto a tracker when their fixed rate period is over this is what will happen, if the customer wishes to break out of their fixed rate they will be put on the SVR. I'm not 100% on this but I have cc'd correspondence on this, I have queried this before so I'm pretty sure they will go onto the SVR if breaking out of the fixed rate.*
>
> *Correspondence Team –*
>
> *Will you please send an FRQ to the customer and I will organise the breakage cost to go out from Redemptions. Could you also confirm if the customer can avail of a tracker rate if breaking out of the fixed rate?*

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Redemptions –
Please send breakage cost figure to customer."

The Provider's correspondence team subsequently sent the following query to another agent of the Provider on **19 April 2012** at **11.19**;

"Hi [Provider agent]

*Customer Account Number [ending **5148**]*

The customer is currently on a fixed rate of 5.39% until 31/07/16 and reverting to a tracker rate. If the customer wishes to break out of this fixed rate by paying the relevant costs involved, will he then be allowed to avail of the tracker rate?

Many thanks"

A response to this query was sent on **19 April 2012** at **11.47** which details as follows;

"Hi [Provider agent]

If they are paying the breakage fee as discussed, then their default rate remains in place, ie if they are willing to pay the breakage costs, then they should be allowed onto the default rate".

A further internal email dated **19 April 2012** was sent at **12:46** noting the following;

"Hi [name of Provider's agent and name of another Provider's agent]

The customer is terrified of reverting to the SVR instead of the tracker and is unwilling to pay the breakage fee until he receives this in writing. Can you please send a letter confirming this to him?"

The Provider issued a letter dated **19 April 2012** to the Complainants which details as follows;

"Thank you for your recent query in relation to breaking out of your current fixed rate on your loan.

The current fixed rate on your loan is 5.39% until 31/07/2016. Should you wish to break out of the fixed rate there are breakage costs of €4,249.41 applicable to your loan. These figures are valid until 26/04/2012.

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If you decide that you would like to go ahead with switching your mortgage to another product, you can discuss the options available to you with our Mortgage Services Team at telephone number [telephone number]."

The Provider's agent subsequently sent an internal email to the Provider's correspondence team on **20 April 2012** at **10.28** noting the following;

"Hi

Please see below

*[Name of First Complainant and account ending **5148**]*

Is looking to break out of a 10 yr fixed rate and revert to the tracker rate. He has received verbal communication that this will happen upon paying the €4200 approx fee but he is understandably fearful that he will revert to SVR.

Can you arrange for confirmation of the former please?

Many Thanks"

It appears from the Provider's internal note that the First Complainant contacted the Provider by telephone on **20 April 2012** to raise a complaint in relation to breaking away from the fixed interest rate. The Provider's internal note of **20 April 2012** at **11:50** details as follows;

"I just received a direct call from the above customer wanting to raise a complaint….

[Name of First Complainant account number ending 5148]
[Contact number]
Details:

Was dealing with DMC over coming off the Fixed rate (no name given) and was dissatisfied with the Breakage cost quoted. The fixed rate is up today and he just found out that he will revert to SVR instead of tracker.

Which he is also unhappy about. He says he was onto Financial Reg's office first and they advised him to call CHC as he had a case for complaint.

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> *Please log as a Tracker Rate complaint".*

The Provider's additional internal notes of **20 April 2012** detail as follows;

> *"20 April 2012 coinf tr rate to cust and approx. new repayment*
> *20 April 2012 copy of loan offer sent to cust".*

The evidence indicates that the First Complainant contacted the Provider by telephone on **20 April 2012** and "*received verbal communication"* that the Complainants' mortgage loan account would default to a tracker interest rate if they broke away from the fixed interest rate prior to the agreed expiry date.

The Provider's internal note dated **23 April 2012** details as follows;

> *"F23 April 2012 CCT- Customer on ten years fixed rate and was unhappy with breakage cost and was advised that he would revert to standard variable rate following breakage of fixed rate. Called client and advised the breakage fee was covered in the conditions of his loan offer. I confirmed that his mortgage would default to a tracker rate at end of fixed rate or after paying breakage cost. Client requested written confirmation of conversation".*

The Provider subsequently issued a letter to the Complainants dated **24 April 2012** which details as follows;

> *"Thank you for your telephone call of 20 April 2012. I am sorry you were unhappy with the service you recently received, but grateful you have taken the time to explain why.*
>
> *I understand your complaint is referring to the fact that you believed your mortgage account would default to a Standard Variable rate of interest following the fixed rate period on your mortgage account. Please let me know if you think I have misunderstood, or missed out any of your concerns.*
>
> *I have thoroughly investigated your complaint, where my investigation involved a detailed review of the mortgage account activity and the corresponding notes in relation to the account.*
>
> *As discussed in your telephone conversation with your Complaint Consultant, [Provider's representative], I can confirm that following the expiry of your fixed rate (or if you decide to pay the breakage cost to break out of your fixed rate early), you*

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will be offered a choice of [the Provider's] full product suite. If you decide not to avail of the options offered I can confirm that your mortgage account will default to a Tracker Rate of the European Central Bank (ECB) rate, currently 1%, plus a margin of 1.15%.

Following my investigation, I regret that I am unable to uphold your complaint as your mortgage has operated in accordance with the terms and conditions of your loan offer. We view the facts of each complaint individually when drawing our conclusions and I hope my explanation helps you understand the reasons behind my decision."

A further letter dated **24 April 2012** was issued from the Provider's correspondence team to the Complainants which details as follows;

"I refer to your recent communication with this office concerning your above-mentioned account.

Please be advised that if you wish to break out of your current rates and pay the breakage costs involved your account will transfer to the tracker applicable which is currently 2.15%.

[...]

I trust the above is to your satisfaction, however, if you have any further queries please feel free to contact us [telephone number]."

The First Complainant sent a signed handwritten note to the Provider dated **24 April 2012**, enclosing a cheque for the breakage fee in the amount of €4,249.41. The handwritten note details as follows;

"I wish to break out of my fixed rate mortgage and default to ECB tracker rate, (currently 1%, plus a margin of 1.15%)

I have attached a cheque for €4,249.41 breakage fee."

The Provider subsequently notified the Complainants by way of a **Product Switch Letter** dated **4 May 2012** that the Complainants' mortgage loan account had switched to a tracker mortgage rate of ECB +1.15% .

The letter dated **4 May 2012** details as follows;

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"I refer to your recent request to alter the terms of your mortgage account. In this connection, I acknowledge that your product switch took place today. The following table details your new repayment amount(s) and the date on which we will collect your new repayment.

Loan Account No.	*New Payment*	*Payment Date*	*Product*	*Repayment Type*
Loan A/c 1	*€630.47*	*09/05/2012*	*Lifetime ECBR +1.15%*	*Capital and Interest*
Total Repayment	*€630.47*			

[...]"

Having considered the Complainants' loan documentation, it is clear that the Loan Offer Letter provided for a fixed interest rate of 5.39% to be applied to the Complainants' mortgage loan account for 10 years until **31 July 2016** and thereafter, the application of a tracker interest rate of ECB + 1.15% for the remaining term of the loan. I note that the terms and conditions of the mortgage loan did not provide for specific interest rate options to be made available in the event of a break in the fixed interest rate period before **31 July 2016**, the agreed expiry date.

However **Condition 14 (c) (iii)** of the **Standard Mortgage General Terms and Conditions** attaching to the Loan Offer Letter details that during a fixed rate period, the Provider accepts that the "*conversion of a fixed interest rate Loan to a **variable interest rate Loan** (or other fixed interest rate Loan)" [**my emphasis**],* the borrower must pay a fee to the Provider. The method by which this fee is to be calculated is detailed in the **Standard Mortgage General Terms and Conditions** and is outlined in earlier paragraphs. Therefore, it is clear that in the event that that Complainants decided to break from the contracted 10 year fixed interest rate period early, the Complainants' mortgage loan account would convert to a variable interest rate loan or an alternative fixed interest rate loan upon payment of the appropriate breakage costs.

The nature of the "*variable interest rate loan*" is not specifically described in **Condition 14 (c) (iii)** of the **Standard Mortgage General Terms and Conditions** however **Condition 14 (c) (ii)**, which also relates to fixed interest rate mortgages, states that the nature of the variable interest rate is one that "*may be increased or decreased by the Lender at any time*". The Loan Offer Letter does not contain any specific condition that a default tracker interest rate would apply to the Complainants' mortgage loan account if they chose to break from their contracted fixed interest rate product prior to the agreed expiry date.

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The Complainants are seeking that their mortgage loan account to be restored to a tracker interest rate of ECB + 1.15% with effect from **May 2009** when they say they first contacted the Provider to break out of the fixed interest rate period and a refund of all interest overpaid between **May 2009** and **May 2012** consisting of the interest rate they were charged versus the tracker rate of ECB + 1.15%.

The evidence shows that the Complainants first enquired about the cost of moving off the fixed interest rate prior to the agreed expiry date in **February 2009** and again in **March 2009** however there is no evidence of the Complainants requesting information regarding the interest rate products that would be available to them if they chose to break away from their contracted fixed interest rate product at those times. In any event, the Complainants did not discharge the appropriate breakage costs in order to move away from the fixed interest rate, therefore their mortgage loan account remained on a fixed interest rate.

The Complainants contacted the Provider again in **July 2009** at which time the Complainants enquired about the breakage fees and the interest rate options available to them if they chose to move their mortgage loan account from the fixed interest rate. I note that the Provider informed the Complainants in writing by way of letter dated **30 July 2009** of the breakage costs of €4,933.25 applicable to their loan. The Provider also informed the Complainants that the default option as outlined in the Loan Offer Letter, in this case a tracker interest rate of ECB + 1.15%, would not be available should the Complainants decide to end the fixed interest rate period before the agreed expiry date. The Provider notified the Complainants that a flexible interest rate of 3.75% would apply or alternatively, the Complainants could opt for another fixed rate option.

It is important for the Complainants to understand that by choosing to break away early from the 10 year contracted fixed interest rate period, the Complainants were essentially altering the terms of their loan agreement with the Provider. As such, it is my view that the Complainants did not have a contractual entitlement to the default tracker interest rate if they chose to move their mortgage loan account off the fixed interest rate product prior to the agreed expiry date.

I am of the view that the interest rate options provided in the letter dated **30 July 2009**, that is the flexible interest rate of 3.75% or an alternative fixed interest, are in line with the interest rate options set out in **Condition 14 (c) (iii)** of the **Standard Mortgage General Terms and Conditions**. In this regard, I accept that the information that the Provider gave to the Complainants in its letter of **30 July 2009** was correct.

If it was the case that the Complainants had any concerns as to the interest rate options made available to them by the Provider at that time, the Complainants could have raised any such issue with the Provider. However, I have received no evidence to suggest that any

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such query was raised. Further, it is clear that the Complainants did not pay the appropriate breakage costs in order to break away from their contracted 10 year fixed interest rate product at that time. Therefore, I am of the view that the Complainants mortgage loan account correctly remained on a fixed interest rate.

The evidence shows that the Complainants enquired once again about the cost of moving off the fixed interest rate prior to the agreed expiry date in **September 2010** and again in **January 2012**. I note that in **January 2012**, the Provider once again informed the Complainants that a variable interest rate would apply should they decide to vacate the fixed interest rate early and a tracker interest rate would not be available. I accept that this is in line with previous information that the Provider gave to the Complainants. There is no evidence to suggest that the Complainants paid the appropriate breakage costs in **September 2010** or **January 2012**, therefore their mortgage loan account correctly remained on a fixed interest rate.

I note that the Complainants, in their post Preliminary Decision submissions dated **25 January 2021**, detail that they were misled as they were "*told at the end of the fixed rate term it would revert to variable rate which clearly states the opposite in the loan offer which was signed*". As detailed above, the Loan Offer Letter dated **3 October 2006** that was signed and accepted by the Complainants details an entitlement to a tracker interest rate of ECB + 1.15% on expiry of the fixed rate term on **31 July 2016**. However, the Loan Offer Letter does not contain any specific condition that a default tracker interest rate would apply to the Complainants' mortgage loan account if they chose to break from their contracted fixed interest rate product prior to the agreed expiry date of **31 July 2016**. The interactions between the Provider and the Complainants, as detailed above, show that anytime the Complainants enquired about the interest rate that would apply if they vacated the fixed interest rate before the expiry date, the Provider informed the Complainants that a variable interest rate would apply and a tracker interest rate would not be available. Therefore, the evidence does not support the Complainants' submission that they were misled in any way as to the applicable interest rate.

I note that the Complainants engaged in a series of communications with the Provider throughout **April 2012** and ultimately lodged a complaint with the Provider in relation to the level of breakage fees required to be paid and the fact that the Complainants were informed that their mortgage loan account would convert to a standard variable rate as opposed to a tracker interest rate should they decide to break away from the fixed interest rate period before the agreed expiry date. I acknowledge that the internal mails between the Provider's agents in **April 2012**, as detailed above, suggest some confusion as to the appropriate interest rate to be applied should the Complainants break away from the fixed interest rate period early. However, I am of the view that the Provider had made it clear to the Complainants since **July 2009** that the default tracker interest rate option would not

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be available if they decided to end the fixed interest rate period before the agreed expiry date.

The evidence shows that upon consideration of the Complainants' complaint in **April 2012** and by means of a resolution, the Provider decided to allow the Complainants to move from the fixed interest rate prior to the agreed expiry date and avail of a tracker interest rate of ECB+ 1.15% as opposed to applying a standard variable rate. I note that the Complainants were in agreement with this approach and subsequently paid the relevant breakage costs and a product switch took place on **4 May 2012** in respect of the Complainants' mortgage loan account.

While it has already been established that the Complainants did not have a contractual entitlement to a specific tracker interest rate if they decided to break away early from their contracted fixed interest rate period, I accept that the Provider, in line with its own commercial discretion, decided to offer the Complainants the option of a tracker interest rate in **April 2012**.

The Provider states in its **Final Response Letter** to the Complainants dated **18 December 2018** that the Complainants were "*allowed*" to move to the default tracker interest rate on "*an exceptional basis*". However, I note that this was not communicated to the Complainants in the Provider's letter of response dated **24 April 2012**. It is unfortunate that the Provider did not clearly explain to the Complainants in its letter dated **24 April 2012** that, although the Complainants did not have a contractual entitlement to the default tracker interest rate if they moved away from their fixed interest rate early, the Provider decided to offer a tracker interest rate as a gesture of goodwill as a means of resolving their complaint.

Had the Provider done so, it may have prevented the Complainants from having to seek further information from the Provider by way of a complaint through this Office. That said, I accept that the Provider was correct in its dealings with the Complainants from **February 2009**, when they first enquired about the cost of moving off the fixed interest rate prior to the agreed expiry date, up until **May 2012**, when the Provider, by its own commercial discretion, agreed to allow the Complainants break away from the 10 year contracted fixed interest rate period before the agreed expiry date and apply a tracker interest rate for the remaining term of the mortgage loan account.

For the reasons set out in this Decision, I do not uphold the complaint.

<u>Conclusion</u>

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

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 February 2021

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.