



<u>Decision Ref:</u>	2021-0260
<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**

This complaint relates to two of the mortgage loan accounts held by the Complainants with the Provider. The mortgage loan accounts that are the subject of this complaint are both secured on the Complainants' principal private property.

The mortgage loan account ending **3936** was for the loan amount of IR£47,000 and the term of the loan was 20 years. The Letter of Approval dated **10 March 1998** outlined the loan type as "*Preferential Annuity Discounted*" and the interest rate as "*3.000% Variable*".

The mortgage loan account ending **5548** was for the loan amount of IR£90,149.00 and the term of the loan was 201 months. The Letter of Approval dated **16 July 2001** outlined the loan type as "*Annuity*" and the interest rate applicable to the loan was a five-year fixed rate of 5.850%.

The Complainants' Case

The Complainants detail that they took out mortgage account ending **3936** in **1998** to purchase their home. They state that the second mortgage account ending **5548** was taken out in **2001** to fund a house extension.

The Complainants submit that they contacted the Provider in **February 2006** to inform the Provider they had received *"a very competitive offer"* of a tracker interest rate of ECB + 0.70% from a third-party Provider.

They state that they enquired about obtaining a more favourable interest rate on their mortgage accounts and further indicated that they were *"looking to repay all existing loans & replace with 1 large loan"*. They submit that the Provider's representative made them a *"counter offer"* of a tracker interest rate of ECB + 0.95%. They state that *"Based on this offer, we understood that our existing mortgages taken out in 1998 & 2002 could avail of tracker mortgages at any time in the future."* The Complainants detail that therefore they *"decided to stay with"* the Provider as it was *"matching competitor offers"*.

The Complainants submit that there was *"no ambiguity"* in the Provider's correspondence with them in **February 2006** that they were being offered a tracker interest rate in respect of all four mortgage loans held by them with the Provider. They assert that the Provider did not stipulate that the offer of the tracker interest rate *"was subject to contract, time limited in any way or subject to any other approval process"*. They further state that they were not advised by the Provider to seek any independent legal or financial advice, or that they *"needed to change [their] existing contracts with [the Provider] to accept the offer."*

The Complainants submit that the Provider was *"struggling to cope"* with its volume of mortgage related business during the *"Celtic Tiger period 2006 to 2008"* and was operating with a *"lack of proper systems and procedures, inadequate warnings and no paperwork to back up rate decisions"* which it agreed with its customers. The Complainants state that they *"would not be in this position"* if the Provider had properly recorded the *"offer"* of a tracker interest rate on its system in **2006**.

The Complainants submit that the Provider sent them a **Mortgage Form of Authorisation (MFA)** for each of their mortgage accounts ending **3936** and **5548** in **December 2006**, which only outlined the option to apply a further fixed rate for a period of five years and *"excluded all other options that we were entitled to and [had] previously agreed with [the Provider] earlier in 2006"*. The Complainants state that they *"queried the form with the branch by phone & email, we were told they would correct their mistake on the system to ensure we would be offered a tracker rate in the future after coming off a fixed rate"*. They state that therefore they *"clearly understood based on advice from [the Provider's representative] in 2006, we would not be excluded from a tracker rate after the fixed period expired. This advice was relied upon to fix our mortgage in 2006"*.

The Complainants submit that *“Despite these assurances”* in **2006**, they were not offered a tracker interest rate on the expiry of the five-year fixed interest period in **December 2011**. They assert that the MFAs issued to them prior to the expiration of the fixed period in **2011** *“should have included a tracker rate option”* but this *“entitlement was incorrectly denied and excluded despite our email request to the [Provider’s representative] on 28 November”*. They submit that the Provider did not give them *“any options or advice to challenge this decision or any alternative options to appeal”*.

The Complainants detail that the Provider has *“honoured the agreement made in February 2006”* in respect of their two other mortgage loans which are not the subject of this complaint. Both accounts are operating on a tracker interest rate.

The Complainants outline that their four mortgage loan accounts are all secured on their Private Dwelling Home and that they view the loans as *“one mortgage”* and not four separate loans.

The Complainants are seeking for a tracker interest rate to be applied to their mortgage loan accounts ending **3936** and **5548**.

The Provider’s Case

The Provider submits as follows with respect to the Complainants’ two mortgage loan accounts which are the subject of this complaint:

Mortgage loan account ending 3936

- The **Letter of Approval** for the mortgage loan account ending **3936** issued on **10 March 1998** and was accepted by the Complainants on **12 March 1998**. The Provider states that the Letter of Approval does not contain an entitlement for a tracker rate of interest as tracker interest rates were not available at that time.
- The Provider notes that, notwithstanding the agreed terms pursuant to the **1998 Offer Letter**, the interest rate was amended on the mortgage loan account upon entering the following agreements:
 - The Complainants amended the interest rate on the account to a staff preferential interest rate of 4.00% by way of an **Employee Preferential Home Loan Offer Letter** dated **27 August 1999** which they accepted and signed on **3 September 1999**. The rate was implemented on **9 September 1999**.

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- By **Mortgage Loan Offer** Letter dated **16 July 2001** the Complainants applied a one-year fixed interest rate of 5.65% to the account, reverting to a standard variable rate thereafter.
- The Complainants opted to apply a five-year fixed interest rate of 5.65% to the mortgage loan account on **21 May 2002** by way of **Mortgage Form of Authorisation**.

Mortgage loan account ending 5548

- The **Letter of Approval** for the mortgage loan account ending **5548** issued on **26 April 2002** and was accepted by the Complainants on **30 April 2002**. The mortgage loan account was drawn down on **27 May 2002** on a five-year fixed interest rate of 4.79%, with a standard variable rate applying thereafter. The Provider states that there is no provision for a tracker interest rate in the **2002 Offer Letter**.

The Provider details that on **3 January 2006** the Complainants emailed the Provider seeking to confirm the penalty for breaking the fixed mortgage interest rate on both mortgage loan accounts. The Provider outlines that there were a number of interactions between the parties in this regard, including a request from the Complainants to clarify what was the *“best tracker rate”* the Provider could offer, as they had been offered a tracker rate of ECB + 0.70% from an alternative Provider. The Provider states that it informed the Complainants that it could not match the offer of ECB + 0.70% and that its tracker interest rate was ECB + 0.95%.

The Provider asserts that it *“never formally “offered” a tracker interest rate of ECB + 0.95%”* to the Complainants. It states that it did not issue an MFA to the Complainants at any point offering them a tracker interest rate on the mortgage loan accounts following the discussions with the Complainants in **2006**. The Provider details that instead, it issued **Mortgage Forms of Authorisation** in respect of each mortgage loan account at the request of the Complainants to break from the fixed interest rate that applied to their accounts and to apply a further fixed interest rate for a period of five years.

The Provider submits that the Complainants were given *“no assurances”* by the Provider that were contrary to the Offer Letters and the subsequent MFAs. It asserts that all documentary evidence indicates that it acted appropriately in dealing with the Complainants and informed the Complainants of the interest rates which were available at that point in time, which included a tracker interest rate.

The Provider states that the Complainants' mortgage loan documentation "*clearly evidences that the Complainants were fully aware that a tracker rate of interest would not be available upon the expiry of the fixed term.*" The Provider submits that the mortgage loan accounts never operated on a tracker interest rate, nor did they have any entitlement to such a tracker rate.

The Provider details that in **December 2006** the Complainants sought to restructure both mortgage loan accounts ending **3936** and **5548**. It states that on **21 December 2006** the Complainants accepted and signed two **Mortgage Forms of Authorisation** to apply a five-year fixed interest rate of 4.79% to both accounts, which were applied on the same day.

The Provider asserts that the effects of the **2006 MFAs** on both mortgage loan accounts are clear and that there is nothing contained in the MFAs "*to suggest that the Provider was obliged to provide the Complainants with a tracker rate of any sort at the end of the 5 year fixed rate period.*" The Provider notes that each of the MFAs confirm that save as set out in each form, all terms and conditions set out in the Offer Letters remain unchanged.

The Provider states that there is no provision for a tracker interest rate in either of the Offer Letters; rather they both outline that the interest rate shall vary at the Provider's discretion. The Provider asserts that there is "*no ambiguity, lack of clarity or vagueness*" in the **2006 MFAs** when read in conjunction with the Offer Letters in respect of the interest rate which the mortgage accounts would revert to on the expiry of the five-year fixed interest rate period. The Provider relies on **General Condition 7(b)** of both mortgage loan agreements in this regard which states that on the expiry of a fixed rate period, the Provider has sole discretion to provide a further fixed period, and in circumstances where a fixed rate is not provided, or the Complainants fail to select an interest rate, the "*Loan will revert to a variable rate.*" With respect to the term "*variable rate*" the Provider refers to **General Condition 6** of the Offer Letters. It states that the variable rate is "*commonly referred to as a 'standard variable' rate*", which does not have a reference rate or an additional fixed margin, "*and so is not a tracker rate of interest.*"

The Provider states that it issued a further MFA in respect of each mortgage loan account on **5 December 2011** which provided "*a full range of options for movement upon the expiry of the fixed rates for the benefit and ease of the Complainants.*" It details that the Complainants were offered a variable LTV rate and fixed interest rates for 2-, 3- and 5-year terms. It details that the Complainants completed both MFAs on **15 December 2011** and elected to apply the variable rate option of 3.95% to both mortgage accounts.

The Complaint for Adjudication

The complaint for adjudication is that the Provider wrongfully failed to offer the Complainants a tracker interest rate on mortgage loan accounts ending **3936** and **5548** upon the expiry of the fixed interest rate periods in **December 2011**.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainants were given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision, I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on 2 July 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.

In the absence of additional submissions from the parties, within the period permitted, I set out below my final determination.

The issue to be determined is whether the Provider wrongfully failed to offer the Complainants a tracker interest rate on mortgage loan accounts ending **3936** and **5548** upon the expiry of the fixed interest rate periods in **December 2011**.

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In order to ascertain if the Provider did act inappropriately, it is necessary to review and set out the relevant provisions of the Complainants' mortgage loan documentation and to consider the interactions between the Provider and the Complainants in **2006** and **2011**. I will deal with each mortgage loan account in turn.

Mortgage loan account ending 3936

The Provider issued a **Mortgage Loan Offer Letter** for account ending **3936** to the Complainants dated **10 March 1998**, which provided for an advance of IR£47,000 over a term of 20 years.

The **Important Information** section of the Loan Offer, set out the following:

<i>"3. & 4.</i>	<i>Number of Repayment <u>Instalments</u></i>	<i>Instalment <u>Type</u></i>	<i>Amount of each <u>Instalment</u></i>
	<i>240</i>	<i>Variable</i>	<i>£260.48"</i>

The **Additional Information** section of the Loan Offer outlined that the interest rate was *"3.000% Variable"* and the loan type was *"Preferential Annuity Discounted"*.

The bottom of **page 1** of the Loan Offer details:

*"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 relevant sections of the **Conditions** to the **Mortgage Loan Offer** detail as follows:

"(D) (i) In the case of a variable rate loan, the interest rate at any time will vary according to the prevailing interest rate at that time subject to these Conditions.

(ii) In the case of a fixed rate loan, the interest rate is fixed for the number of years stated in the Offer, subject to these Conditions."

...

(H) (i) If a fixed interest rate applies to the Loan, this is the prevailing interest rate at the date of this Offer.

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Due to fluctuations in interest rates, the Bank cannot guarantee that the fixed rate so specified will apply to the Loan on drawdown. The Borrower(s) may accept the fixed rate prevailing at the time of drawdown or may choose the variable rate prevailing at that time.

(ii) The Bank shall have sole discretion to provide any further fixed rate period If the Bank does not provide such a further fixed rate period or if the Bank offers the Borrower(s) a choice of rate at the end of a fixed rate period and the Borrower(s) fail(s) to exercise that choice, then in both cases the Loan will revert to a variable rate."

The Complainants signed the **Acceptance & Consent** on **12 March 1998** confirming that they *"accept this Mortgage Loan Offer on the within terms and conditions."* The **mortgage loan statements** show that the loan was drawn down on **25 March 1998**.

It is clear to me that the **Mortgage Loan Offer** envisaged a variable interest rate of 3.00%. 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 by the Provider from time to time.

The Complainants amended the interest rate on the mortgage loan by way of an **Employee Preferential Homeloan Letter of Offer** dated **27 August 1999** which detailed:

"I am pleased to provide you with a [Provider] Employee HomeLoan/Home Improvement Loan subject to the terms and conditions which are contained on the following pages for your convenience.*

...

<i>Amount of loan</i>	<i>91,300</i>	<i>...</i>
<i>Interest Rate % (fixed)</i>	<i>4%</i>	<i>Term 18 years</i>
<i>...</i>		<i>Commencing 23/9/99</i>

Purpose Re-rate existing 3% loan ([ending] 3936) and fixed rate loan (pending] 2597) to a staff 4% loan.

..."

The **Terms and Conditions** of the **Letter of Offer** detailed:

“2. INTEREST

Subject to the provisions of Conditions 3 below, interest at the fixed rate during the period of the loan, will be calculated on the daily balance outstanding, and shall be compoundable at such quarterly or other periodic rests as the Bank shall in its absolute discretion determine.

3. VARIATION OF INTEREST AND COMPULSORY REPAYMENT

In the event of the Borrower or either or both of them (in the event of there being more than one Borrower) ceasing to be an employee of the Bank as and from a particular date (“the cessation date”) then on or before the date which is 6 months after the cessation date the Borrower may be required by the Bank to repay the loan in full together with accrued interest to date of repayment and in addition any other amounts payable to the Bank in connection with the loan or any security held thereof. If the Bank requires repayment as aforesaid then the Bank will give to the Borrower 30 days prior notice in writing thereof. In the event of no such notice for repayment being given by the Bank under this Condition 3, the Bank shall continue to advance the loan to the Borrower subject always to the terms and conditions of this Letter of Offer.

The interest rate applicable to the loan will be the variable interest rate prevailing from time to time and at any time as and from the cessation date to the date of repayment in full of the aforementioned amounts.”

The **Form of Acceptance and Consent** was signed and accepted by the Complainants on **3 September 1999** on the following terms:

“We accept the offer of facilities and the terms and conditions as set out in the Employee Home Loan Letter of Loan”.

It is clear to me that the **Loan Offer** envisaged a staff fixed interest rate of 4.00%. The Terms and Conditions outlined that in the event that the Complainant’s employment with the Provider ceased, the interest rate applicable to the loan would be the variable interest rate. Again, the variable rate in this case was a variable rate which could be adjusted by the Provider from time to time.

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I note from the **mortgage loan statements** that the staff fixed rate of 4.00% was applied to the mortgage loan on **9 September 1999**.

A further **Mortgage Loan Offer** for account ending **3936** was issued to the Complainants on **16 July 2001** which details as follows:

“Part 1

(The Statutory Loan Details)

...

- | | |
|-------------------------------------|------------|
| 1. Amount of Credit advanced: | £90,149.00 |
| 2. Period of Agreement: | 201 months |
| 3. Number of repayment Instalments: | 201 |

...

Part 2

(The Additional Loan Details)

- | | |
|--|--------------|
| 11. Type of Loan (e.g. Annuity or Endowment): | Annuity |
| 12. Interest Rate and whether Fixed or Variable: | Fixed @5.65% |
| 13. Fixed Rate Period (if interest rate is fixed): | 12 Months |

...

This is an important legal document. You are strongly recommended to seek independent legal advice before signing it. This Offer Letter is regulated by the Consumer Credit Act, 1995 and your attention is drawn to the Notices set out on the last page of this Offer Letter.”

The relevant sections of the **General and Special Conditions** to the **Mortgage Loan Offer** detail as follows:

“6. Variable Interest Rates

- a) *Subject to clause 6 (c), at all times when a variable interest rate applies to the Loan the interest rate chargeable will vary at the Bank’s discretion upwards or downwards. If at any time a variable rate of interest applies, repayments in excess of those agreed may be made at any time during the term of the Loan without penalty.*

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- b) *The Bank shall give notice to the Borrower of any variation of the interest rate applicable to the Loan, either by notice in writing served on the Borrower in accordance with clause 1 (c) above, or by advertisement published in at least one national daily newspaper. Such notice or advertisement shall state the varied interest rate and the date from which the varied interest rate will be charged.*
- c) *Notwithstanding anything else provided in this Offer Letter, the varied applicable interest rate shall never, in any circumstances, be less than 0.5% over one month's money at the Euro Inter Bank Offered Rate (EURIBOR).*

7. Fixed Interest Rates

- a) *The Bank may at its absolute discretion permit the Borrower to avail of a fixed interest rate in respect of all or any part of the principal sum borrowed. In the case of a fixed rate loan, the interest rate shall, subject to these Conditions, be fixed from the date of draw down for the fixed period stated in this Offer Letter. **The fixed rate of Interest set out in this Offer Letter is the fixed rate which would apply were the Loan drawn down today. There is no guarantee that the fixed rate so stated will be available when the Loan is in fact drawn down. The actual fixed rate that shall apply shall be the Bank's fixed rate available for the fixed period selected by the Borrower at the date of draw down.***
- b) *The Bank shall have sole discretion to provide any further or subsequent fixed rate period. If the Bank does not provide such a further or subsequent fixed rate period or if the Bank offers the Borrower a choice of interest rate at the end of any fixed rate period and the Borrower fails to exercise that choice, then in either case the interest rate applicable to the Loan will be a variable interest rate.*

...

11. Special Conditions

- (a) *The following special conditions apply to the Loan*

/Cont'd...

- (i) *The Borrower/s must take out and assign to the Bank in accordance with General Condition '3' hereof, a Life policy for the revised term of the Loan.*
- (ii) *This offer letter amends all previous offer letters in respect of this Loan.*
- (iii) *The period of agreement/term of your Loan has been amended and is hereby extended to 201 months."*

The **Acceptance and Consents** section of the **Mortgage Loan Offer** was signed by the Complainants on **19 July 2001**, which states as follows:

1. *"I confirm that I have read and fully understand the Consumer Credit Act notices, set out above, and the term and conditions contained in this Offer Letter and I confirm that I accept this Offer Letter on such terms and conditions."*

It is clear to me that the **Mortgage Loan Offer** envisaged a fixed interest rate of 5.65% for an initial period of 12 months, with a variable interest rate applying thereafter. Again, 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 **Special Conditions** provided that the Mortgage Loan Offer amended all previous loan offers in respect of the loan and extended the term of the loan to 201 months. The Complainants accepted the **Mortgage Loan Offer**, having confirmed that they fully understood the terms and conditions set out in the Offer Letter.

A screenshot of the Provider's internal record of the **Rate History** of the mortgage loan has been provided in evidence which details that a fixed interest rate of 5.85% was applied to the account on **21 May 2002**.

No other documentary evidence of this rate change has been provided. Nonetheless it is not disputed between the parties that a fixed interest rate of 5.85% was applied to the account at that time.

Mortgage loan account ending 5548

A **Mortgage Loan Offer** for mortgage loan account ending **5548** was issued to the Complainants on **26 April 2002** which details as follows:

"Part 1

(The Statutory Loan Details)

...

1. *Amount of Credit advanced:* €160,000

/Cont'd...

2. *Period of Agreement:* 20 Years

3. *Number of Repayment Instalment* 4. *Amount of each*

<u>Instalments</u>	<u>Type</u>	<u>Instalment</u>
60	Fixed at 5.850%	€1,129.88
180	Variable at 4.740%	€1,051.47"

...

Part 2 - The Additional Loan Details

11. *Type of Loan:* Repayment
12. *Interest Rate:* 5.850% Fixed

...

Part 4 - The Special Conditions

...

(a) *The following Special Conditions apply to the Loan:*

(i) *This advance is issued in addition to your existing home loan references [accounts ending 2597 and 3936].*

...

This is an important legal document. You are strongly recommended to seek independent legal advice before signing it. This Offer Letter is regulated by the Consumer Credit Act, 1995 and your attention is drawn to the Notices set out on the last page of this Offer Letter.

The relevant sections of the **General Conditions** to the **Mortgage Loan Offer** detail as follows;

6. Variable Interest Rates

(a) *Subject to clause 6(c), at all times when a variable interest rate applies to the Loan the interest rate chargeable will vary at the Lender's discretion upwards or downwards.*

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If at any time a variable rate of interest applies, repayments in excess of those agreed may be made at any time during the term of the mortgage without penalty.

- (b) The Lender shall give notice to the Borrower of any variation of the interest rate applicable to the Loan, either by notice in writing served on the Borrower in accordance with clause 1(c), or by advertisement published in at least one national daily newspaper. Such notice or advertisement shall state the varied interest rate and the date from which the varied interest rate will be charged.*
- (c) Notwithstanding anything else provided in this Offer Letter, the varied applicable interest rate shall never, in any circumstances, be less than 0.1% over one month's money at the Euro Inter Bank Offered Rate (EURIBOR).*

7. Fixed Interest Rates

- (a) The Lender may at its absolute discretion permit the Borrower to avail of a fixed interest rate in respect of all or any part of the Loan. In the case of a fixed rate loan, the interest rate shall, subject to these Conditions, be fixed from the date of draw down for the fixed period stated in this Offer Letter. The fixed rate of interest set out in this Offer Letter is the fixed rate which would apply were the Loan drawn down today. There is no guarantee that the fixed rate so stated will be available when the Loan is in fact drawn down. The actual fixed rate that shall apply shall be the Lender's fixed rate available for the fixed period selected by the Borrower at the date of drawdown.*
- (b) The Lender shall have sole discretion to provide any further or subsequent fixed rate period. If the Lender does not provide such a further or subsequent fixed rate period or if the Lender offers a Borrower a choice of interest rate at the end of any fixed rate period and the Borrower fails to exercise that choice, then in either case the interest rate applicable to the Loan will be a variable interest rate.*
..."

The **Consumer Credit Act Notices** section on **page 5** of the Offer Letter states as follows;

"If your mortgage loan is at any time at a variable rate, please note:

/Cont'd...

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

The **Acceptance and Consents** section of the **Mortgage Loan Offer** was signed by the Complainants on **30 April 2002**, which states as follows;

1. *"I confirm that I have read and fully understand the Consumer Credit Act notices, set out above, and the term and conditions contained in this Offer Letter and I confirm that I accept this Offer Letter on such terms and conditions."*

It appears to me that this **Mortgage Loan Offer** envisaged a fixed interest rate of 5.85% for a period of five years and on the expiry of the five-year period, a variable interest rate which could be adjusted by the Provider would apply to the account. The Complainants accepted the **Mortgage Loan Offer** on **30 April 2002**, having confirmed that they fully understood the terms and conditions set out in the Offer Letter.

I note that the First Complainant emailed the Provider on **3 January 2006** at **10:58am** as follows;

"Can you confirm the penalties to break the following fixed mortgages

**Account [ending 3936]*

**Account [ending 5548]*

**Mortgage Account??? [sic] Monthly repayments €691 over 8 years taken out in August 2005, 1 year fixed rate.*

All payments for the above come out of our joint account [ending 7155]

Can you also answer the following questions?

**I am considering borrowing additional funds on my home to make other investments in property, can [the Provider] organise?*

**What is the maximum I can borrow? My income is basic €125,000 basic plus guaranteed bonus of €35k per year, [Second Complainant] my wife basic income is €40k per year. My plan would be to repay all existing loans & replace with 1 large new loan.*

/Cont'd...

**Can you organise a sterling mortgage in the UK if I need it?*

I would appreciate if you could get back to me ASAP. My mobile is [Complainant's mobile number]."

The Provider's representative replied by email on **3 January 2006 at 15:11pm** as follows;

"On Account [ending 3936] there is a penalty of 4493.00 to break out and Account [ending 5548] [is] 3804.00 and finally there is no breakage cost [on] the Equity Release recently drawn down.

[The Provider] can organise a top up to fund other investments.

The Maximum you can borrow on your family home presently working off a valuation of 850k is 680k this doesn't include your existing mortgages [sic] so you would need to take this amount off, this is a rough estimate we could look for more if needed.

Our Business Centre could organise a Mortgage for you in U.K. but you need to contact either [redacted] or [redacted] to speak to them on this."

In the Complainant's email to the Provider on **4 January 2006** he stated the following:

"Can you give me a better idea on the maximum I can borrow? a house very similar to ours, 6 doors up is currently on sale at €1.4m. I think our house would be between €1.2m & €1.5m.

Do you think the mortgage centre will do a deal on the fixed fees? A lot of banks are offering great deals to switch to them at the moment, my preference would be to stay with [the Provider]. Some mortgage brokers are rebating commissions from other lenders for new mortgages.

Can you give me a contact number & email for the investment centre, just want to get an idea on UK rates etc."

The Provider responded to the Complainant by email on **23 January 2006 at 10:29am**:

"I have checked this out with [the Provider] Mortgages and we cannot waive these funding fee's [sic] on your Mortgage Accounts.

/Cont'd...

These rates were bought by [the Provider] for 5yrs at the time when you fixed so this is the charge for breaking out of this agreement.

If you have any queries you can contact me at the number below or else drop me a[n] email."

In his email of **23 January 2006 at 10:39am**, the First Complainant stated as follows;

"Can you let the mortgage centre know that through a mortgage broker I am being offered the following deal

- *Refund of broker commission*
- *Free legal fees to switch*
- *If I go with [third party provider] they are also offering me €5k to switch based on a €500k mortgage. I may borrow more through my self administered pension fund.*

My plan is to borrow €500k now, €400k approximately will repay existing loans, the balance will be used to top up my pension fund through AVC. In addition I want to use my self administered pension fund to borrow a further €400k to €500k to invest in commercial property. Would [the Provider] be interested in advancing this extra loan to my Self Administered Pension Fund? What is the maximum ratio they will lend to a self administered pension fund?

If I have to pay the fixed fees to break my existing mortgage, will [the Provider] mortgages match the above offer to stay with [the Provider]? I would really prefer to stay with [the Provider] as I have been a customer for over 25 years but the offers from other lenders are too good to walk away from. What is [the Provider] going to do to match these offers?"

There is no evidence that the Provider responded to this email.

The Complainant sent a further email to the Provider's representative on **9 February 2006 at 11:04am** which stated as follows;

"Sorry to trouble you again but I now have a much clearer idea of what I want to do. Firstly can you please confirm the following?

/Cont'd...

- *Current break fees for my 2 fixed mortgages accounts [ending **3963** and **5548**], you gave me a penalty in January, see email below but I am sure this has changed*
- *Can you give me the balance on my 4 mortgage accounts [ending **3963**, **5548**, **1098**] & the one I took out in August 2005 for €60,000. I need to know the debt I owe.*
- *Are there any other costs if I close my mortgages & transfer to a new bank.*

What is the best rates [the Provider] can give me if I want to pay off al[l] the above mortgages, I know I will have to pay a penalty & I want a top up by €60k. I think my total debt to be repaid is €390K approximately plus break fees plus extra borrowings of €60k. What is the best tracker, I have been offered ECB + 70 basis points from [third party provider], can [the Provider] match this. What is the best 1 year fixed rate from [the Provider]?"

The Provider's representative responded to the Complainant's email on **9 February 2006** at **11:32am** as follows;

*"On Account Number [ending **3936**] breakout fee is 3996 and on Account [ending **5548**] break out is 3392.*

Balances

*Account [ending **3936**] 175,417.76*

*[ending **55448**] 145380.36*

*[ending **1098**] 13,269.04*

*[ending **1889**] 56,482.00*

No other costs if you close your Mortgage and move. I have checked with our Mortgage dept and they could not match your offer with [the third party provider] our rate would Ecb +.95. Our 1 yr Fixed is 3.09%."

The Complainant responded on **9 February 2006** at **12:13pm**:

"Has the 1 year fixed rate increased? I thought it was 2.94% in January. Can I still get the 1 year of 2.94% if I stay with [the Provider] on the basis it was available in January?"

If I do stay with [the Provider], I presume there would be no problem repaying existing mortgages €391k approx plus penalty €7.4k, topping up by €50k to C60k & having a new term of say 15 years for everything?"

/Cont'd...

Can you make me any other offers to stay?"

The Provider's representative answered the Complainant by email on **9 February 2006** at **13:39pm** as follows:

"the 1 yr fixed was 2.75 but this was back in December we could'nt [sic] give you 2.94 on a fixed rate. Our [Discounted] Variable rate is 2.94%.

This is all we can offer [and] the tracker rate i offered you before."

It does not appear, based on the evidence that is before me that there were any further discussions at that point in time between the parties in respect of applying a tracker interest rate to the mortgage loan accounts ending **3936** and **5548**.

Having considered the evidence, I accept that no formal commitment was given by the Provider to the Complainants during the discussions in **February 2006** that a tracker interest rate could be applied to the mortgage loan accounts "*at any future point in time*". A discussion had taken place with respect to the interest rates available for the mortgage loan accounts and the Provider's representative indicated that a tracker interest rate of ECB + 0.95% was available. If the Complainants wished to pursue the option of applying a tracker interest rate of ECB + 0.95% on the mortgage loans, the Complainants could have requested for the tracker rate to be applied to the accounts. However, there is no evidence before me which suggests that the Complainants made such a request. It is important for the Complainants to understand that there was no commitment or obligation on the Provider, contractual or otherwise, to provide them with a tracker rate option either in **February 2006** or at any future point.

The Provider's internal mail dated **8 March 2006** in respect of mortgage account ending **5548** details as follows;

"The customer request for a term extension on this account has been approved and a Mortgage Form of Authorisation (MFA) has been issued directly to them. Once we receive the signed MFA and the revised life policy, we can update the mortgage account."

The **Mortgage Form of Authorisation – Application for Extension/Reduction in Term** in respect of account ending **5548** issued to the Complainants detailed:

"Application for Extension/Reduction in Term of Mortgage Loan (the "Loan") – Please select as appropriate

/Cont'd...

- ~~Extend Mortgage Term~~
 Reduce Mortgage Term

I/We wish to apply for the revised term indicated below for my/our Loan:-

Current Maturity Date:

New Maturity Date:

The **Acceptance and Agreement** section of the **MFA** which was signed by the Complainants on **26 March 2006** outlined:

“Please read carefully before signing this form. Where there is more than one borrower, any references to “I” or “my” are to be construed as references to “we” or “our” respectively.

I acknowledge that following the acceptance by the Bank 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 :-

1. *That following acceptance of this Application by the Bank and compliance by me with the terms and conditions thereof, the term of the Loan will be revised from the date of the commencement of the Loan;*
2. *That the term of my Loan will be extended/reduced as notified to me by the Bank and I shall make such revised repayments as notified to me;*
- ...
5. *Save as set out in this Form of Authorisation all the terms and conditions applicable to the Loan remain unchanged.”*

I note that the Provider’s internal mail dated **1 June 2006** states as follows;

“We have received the signed Mortgage Form of Authorisation and the revised life policy details for the term extension request on this account and the details have now been changed. Confirmation will issue shortly to the customer.”

The Provider’s internal mails dated **15 December 2006** state as follows in respect of each mortgage account:

/Cont’d...

Account ending 3936	<i>"Customer wishes to restructure this account to:</i> <ol style="list-style-type: none"><i>1. Break this fixed rate and fix again for 5years @ 4.79%</i><i>2. Reduce the term from 11years to 7years.</i><i>3. Have the repayments now coming out monthly commencing 28th January 2007, not every two weeks.</i><i>4. Please advise them of [their] new repayment amount."</i>
Account ending 5548	<i>"Customer wishes to restructure this account to:</i> <ol style="list-style-type: none"><i>1. Break this fixed rate and fix again for 5years @ 4.79%</i><i>2. Have the repayments now coming out monthly commencing 28th January 2007, not every two weeks.</i><i>3. Please advise them of [their] new repayment amount."</i>

The Provider's internal mails dated **18 December 2006** outline as follows:

"have today sent cust[omer] MFA for 5yr fixed 4,85% - [please] advise cust that today's penalty will be [€]6473 which is payable thru your funding fee ac in the br. if cust amend the rate, amend term to 28.4.2014 and pay mthly the new payments will be [€]2240.26, trust this answers all your questions"

*"Sorry but I need to correct a little of the last mail issued to you. Please note that the funding fee due is payable to the CMC a/c [ending **0033**] with the mortgage a/c reference noted on the docket. When the rate is amended the fee will be added to the mortgage a/c after the amendment is completed".*

It does not appear from the evidence that the Complainants opted to reduce the term of the mortgage loan account ending **3936** at that time.

The Provider wrote to the Complainants by letter dated **18 December 2006** in respect of account ending **5548** which outlined as follows:

/Cont'd...

“Further to your request to change your current mortgage product, I am very pleased to offer you the following range of attractive options:-

Description	Rate	Projected Standard Repayment
5 YEAR FIXED RATE	4.790%	€419.07

*To avail of your selected option, please **tick** the relevant rate on the enclosed Mortgage Form of Authorisation. Please **sign and date this form** and return it to us at [the Provider’s address] before 1/01/2007. Unfortunately, we cannot hold the above choice of rates open after this date.*

...

If we do not hear from you by 1/01/2007, your current mortgage product and rate will continue to apply in accordance with your loan offer until we receive further instructions from you.”

I have not been provided with any such letter in relation to mortgage loan account ending **3936**. Nor has the Provider given any explanation as to why this letter has not been furnished.

Provision 49 of the **Consumer Protection Code 2006** governs retention of records and was not effective until **01 July 2007**. In these circumstances, while I am disappointed that the Provider has failed to provide a copy of this letter, there was no breach of the CPC 2006.

Notwithstanding this, I note that signed **Mortgage Forms of Authorisation** have been provided in evidence in relation to both mortgage accounts ending **3936** and **5548**.

Both **Mortgage Form of Authorisations** outline as follows:

Description	Rate
5 YEAR FIXED RATE	4.790%

The reverse side of each of the **Mortgage Forms of Authorisation** contains a section titled **Acknowledgement and Agreement** and details as follows:

“Please read carefully before signing below. Where there is more than one borrower, any reference to “I” or “my” are to be construed as references to “we” or “our” respectively.

/Cont’d...

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.*
- 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. Save as set out in this Form of Authorisation, all the terms and conditions applicable to the Loan remain unchanged."*

The **Mortgage Forms of Authorisation** which were signed by the Complainants on **21 December 2006** outlined that, with the exception of the conditions set out in the forms, the terms and conditions of their mortgage loans remained "*unchanged*". There was no entitlement to a tracker rate outlined in the terms and conditions of the Complainants' loans.

It appears to me that the Provider offered the Complainants a fixed interest rate on their mortgage loans in **December 2006** in accordance with **Condition 7(a)** of the **General and Special Conditions** of the Complainants' Mortgage Loan Offers, which outlines that the Provider in its "*absolute discretion*" may permit the Complainants to "*avail*" of a fixed interest rate.

/Cont'd...

Condition 7(b) of the **General and Special Conditions** outlines what will happen at the end of a fixed interest rate period. **Condition 7(b)** outlines that the Provider has the “*sole discretion*” to provide the Complainants with “*any further or subsequent*” fixed rate period or if the Provider offers the Complainants a choice of interest rates and the Complainants failed to exercise that choice, then the interest rate applicable to their mortgage loan would be a variable interest rate. This variable rate was one which could vary at the Provider’s discretion in accordance with **Condition 6(a)** of the **General and Special Conditions**.

Having considered the mortgage loan documentation, it is clear to me that the Complainants did not have a contractual entitlement to a tracker interest rate and accordingly there was no contractual or other obligation on the Provider to offer the Complainants a tracker interest rate on their mortgage loan accounts either in **December 2006** or at any future point. No evidence has been provided to me of any discussions or dialogue between the Provider and the Complainants at this time which supports the Complainants’ submission that they were informed by the Provider’s employee in **December 2006** that a tracker interest rate would be made available to them at the end of the 5 fixed interest rate period.

The Complainants signed the **Acknowledgement and Agreement** section of both Mortgage Forms of Authorisation on **21 December 2006** and confirmed that they accepted the fixed interest rate on the terms and conditions set out therein. The **mortgage loan statements** show that the fixed interest rate of 4.79% was applied to both accounts on **21 December 2006**.

I note that the Complainants completed a **Mortgage Form of Authorisation – Application for Extension/Reduction in Term** in respect of account ending **3936** on **23 June 2008** which outlined as follows;

“Application for Extension/Reduction in Term of Mortgage Loan (the “Loan”) – Please select as appropriate

- Extend Mortgage Term*
- Reduce Mortgage Term*

I/We wish to apply for the revised term indicated below for my/our Loan:-

Current Maturity Date: 28/04/2014

/Cont’d...

New Maturity Date:

The **Acceptance and Agreement** section of the **MFA** which was signed by the Complainants on **26 June 2008** contains the same text as outlined in the Term Extension MFA detailed above. For the sake of brevity, I have not requoted it here.

I note that the Provider issued a further **Mortgage Form of Authorisation – Application for Extension/Reduction in Term** to the Complainants in respect of account ending **3936** on **25 April 2009**.

The form outlined;

“Application for Extension/Reduction in Term of Mortgage Loan (the “Loan”) – Please select as appropriate

Extend Mortgage Term

Reduce Mortgage Term

~~I~~We wish to apply for the revised term indicated below for my/our Loan:-

Current Maturity Date:

The **Acceptance and Agreement** section of the **MFA** set out the same terms as those outlined in the Term Extension MFA detailed above and again, for the sake of brevity, I have not requoted it here. The Complainants signed the form on **5 May 2009** instructing the Provider to extend the term of the mortgage loan to **28 March 2027**.

Prior to the expiry of the five-year fixed interest rate, the Provider issued **interest rate options forms** to the Complainants in respect of mortgage loan account ending **3936** and **5548** on **5 December 2011**.

It is disappointing that a copy of the **rate options letters** that would have issued to the Complainants with the forms have not been furnished in evidence to this office, nor has the Provider provided any explanation as to why the letters have not been furnished.

/Cont'd...

Provision 49 of the Consumer Protection Code 2006 (which was fully effective from **01 July 2007**) outlines as follows;

“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.”

There is no indication that the mortgages have been redeemed or disposed of in any way. 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, in the absence of any explanation, why this correspondence has not been furnished by the Provider. This is disappointing.

Both options forms outlined the following interest rate options:

<i>“2 Year Fixed (PDH)</i>	<i>4.950%</i>
<i>3 Year Fixed (PDH)</i>	<i>5.450%</i>
<i>5 Year Fixed (PDH)</i>	<i>6.050%</i>
<i>Existing Variable LTV Rate PDH</i>	<i>3.950%”</i>

The Complainants completed the forms on **15 December 2011** and selected the variable LTV rate of 3.950% for both mortgage loan accounts.

/Cont’d...

The Complainants are of the view that they were entitled to be offered a tracker interest rate when the fixed interest rate period expired in **December 2011**. As outlined above, the Complainants did not have a contractual or other entitlement to a tracker interest rate on their mortgage loan accounts ending **3936** and **5548**, and accordingly, there was no contractual or other obligation on the Provider to offer the Complainants a tracker interest rate on these accounts in **December 2011**, or at any other time.

If the Complainants wished for the tracker interest rate of ECB + 0.95% to be applied to the accounts in **February 2006** they could have requested that the Provider apply this rate to the mortgage accounts at that time. Even if the 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.

Based on the evidence before me it does not appear to me the Complainants pursued the option of a tracker interest rate of ECB + 0.95% for accounts ending **3936** and **5548** in **February 2006** and instead opted to apply a five-year fixed interest rate to the mortgage accounts in **December 2006**.

I note that the Complainants have submitted that two of their mortgage loan accounts which are not the subject of this complaint, were transferred to a tracker interest rate at their request in **2006**. They state that all four mortgage loan accounts are secured on their Private Dwelling House and that they view the accounts as "*one mortgage*". It is important for the Complainants to understand that each mortgage loan is governed by the terms and conditions applicable to that particular mortgage loan. The fact that all of the Complainants' mortgage loans were secured on the same property does not entitle the Complainants to the same interest rates on all mortgage loan accounts.

For the reasons set out 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

28 July 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.