An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2021-0424
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

The complaint relates to a mortgage loan account held by the Complainants with the Provider. The mortgage loan account that is the subject of this complaint was secured on the Complainants' private dwelling house.

The loan was for the sum of €276,000 repayable over a term of 35 years. The **Mortgage Loan Offer Letter** dated **11 August 2004** provided that a fixed interest rate of 3.99% would apply for the first 23 months of the loan, which would thereafter revert to the Provider's standard variable rate.

The Complainants' Case

The First Complainant is an employee of the Provider. The Complainants' mortgage loan account was drawn down in **2004** on a fixed interest rate.

The Complainants submit that in **2007** they opted to apply a staff fixed interest rate to the mortgage loan account *"with the option of rolling to a tracker rate at the end of this fixed rate period."*

The Complainants submit that in **November 2008**, *"it is evident from the mortgage screen of my account that the roll to rate was subsequently changed from rolling to a tracker, to rolling to a SVR. This was a non customer initiated transaction."*

The Complainants submit that when the fixed interest rate period expired in **February 2009**, they were not offered the option of a tracker interest rate for the mortgage loan account.

The Complainants submit that they "*did not have a tracker at any point. However, [they were] led to believe by [the Provider] that [they] would roll to a tracker. [They were] denied this option in February 2009."*

The First Complainant submits that "*at the time*" she asked the Provider's then Head of Mortgages *"for advice on what I should do"* and was told that "*You are set to roll onto a tracker so that's what will happen*". She states however that this did not happen.

The Complainants submit that in **November 2017** they asked the bank to review their case and to explain why they have not received redress *"like many of [the First Complainant's] colleagues, given that [the Complainants were] on the same customer journey as them with the expectation that [they] would roll to a tracker at the end of that fixed rate period."* The Complainants outline that the Provider has *"failed to respond to this particular query. Instead they refer to [our] drawdown in 2004."* The Complainants detail that they tried to engage further with the Provider and were "*shocked*" to be told that the Provider is *"no longer looking at this query in relation to [their] account."*

The Complainants are seeking the following:

(a) The Provider apply a tracker rate of ECB + 0.75%, and

(b) Redress and compensation for overpayments backdating to **February 2009** when the Complainants were switched to the Provider's standard variable rate instead of a tracker interest rate.

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

The Provider details that the Complainants drew down their mortgage loan account on **06 September 2004**. It states that the **Mortgage Loan Offer Letter** dated **11 August 2004** which was signed and accepted by the Complainants on **11 August 2004** provided for a loan amount of €276,000 repayable over a term of 35 years, and a fixed interest rate of 3.99% for the first 23 months, thereafter moving to the Provider's standard variable rate.

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The Provider details that the interest rate was 3.75% at the date of drawdown, fixed until **September 2006**.

The Provider states that there is "*no provision anywhere*" in the Offer Letter for a tracker rate of interest. It states that the variable rate is defined in **General Condition 6(a)** of the **Mortgage Loan Offer Letter** as a rate that *"will vary at the [Provider's] discretion upwards or downwards*". The Provider states that this wording applies to the variable rate provided for in **Part 1** of the **Offer Letter** "*which is clearly not a tracker rate".*

The Provider further states that **General Condition 7(b)** provides that the Provider has sole discretion to provide any further or subsequent fixed rate period and if it does not, or if it does offer a choice of interest rates and the customer fails to exercise that choice, then the interest rate applicable will be the variable interest rate.

The Provider submits that it issued the Complainants a **Product Review Notice** prior to the expiry of the initial fixed rate period which provided a choice of further fixed rates. It states that at that time the staff non-standard variable rate was 3.5% and the Complainants made their own decision to convert their loan to this more favourable rate.

The Provider outlines that the Complainants signed and accepted a **Mortgage Form of Authorisation, Application to Change to Staff Non-Standard Variable Rate Mortgage** on **06 September 2006**. The Provider notes that accordingly, mortgage loan account ending ***8893*** was moved to a staff non-standard variable rate of 3.5% on **07 September 2006.**

The Provider states that the Complainants completed this **MFA** in **2006** in response to the Provider's intranet notice to staff dated **18 August 2006**, which provided information relating to the staff non-standard variable rate, including that it is not a rate that "*tracks*" the ECB rate. The Provider submits that the non-standard variable rate *"was sold transparently and correctly on this question of tracker rates".* The Provider details that the staff non-standard variable rate was a variable rate "*with no temporal limit*", meaning that it would be applied throughout the life of the mortgage "*unless further amended by agreement between the Provider and the Complainants".*

The Provider states that in the budget on **6 December 2006**, the Revenue Commissioners' benefit-in-kind (BIK) reference rate was changed from 3.5% to 4.5% with effect from **1 January 2007** and as a result, the staff non-standard variable rate would increase to 4.5% with effect from **1 January 2007** to avoid staff having to pay BIK. It details that the Provider's staff were advised of this by a communication on its intranet on **7 December 2006.**

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The Provider submits that a memo was issued on its intranet on **21 December 2006** "*comprehensively outlining the details of the staff 2 year fixed rate option, detailing how interest would be calculated taking Benefit-in-Kind into consideration and fully outlining the terms and conditions of the product*".

It states that the terms and conditions of the memo advised that *"Staff will be advised of their rollover option a number of weeks prior to the expiry of the fixed rate term."*

The Provider notes that the terms of this 2-year fixed interest rate product clearly detail that *"Staff will be advised of their rollover option a number of weeks prior to the expiry of the fixed rate term."* It asserts that there "*is no promise here of any type of rate at the expiry of the 2 year fixed period*" and there is "*no promise in the notice of a move to a tracker rate*".

The Provider notes that it communicated further on its staff intranet on **22 December 2006** that staff could now either remain on the staff non-standard variable rate at 4.5% with no BIK applicable; avail of the new staff 2-year fixed rate of 3.95%, subject to BIK; or avail of a staff tracker mortgage of ECB + 0.75% (4.25%) with no BIK applicable. It details that opting for each of these options involved following a different procedure and obtaining a **MFA** for either the 2-year fixed rate option or the tracker rate of ECB + 0.75%. It states that these different options "*were obviously mutually exclusive"* as there was no option to avail of both.

The Provider notes that the staff non-standard variable rate which was applicable to mortgage loan account ending ***8893*** increased on **02 January 2007** *"in line with the Provider's obligations in the* ***December 2006*** *Budget*". The Provider states that the Complainants were provided with options in **December 2006** to change the mortgage account to either a fixed, variable or tracker interest rate. It asserts that the Complainants *"signed and accepted the 2007 MFA in which they elected, of their own volition, to apply for a Staff 2 Year Fixed Rate of 3.95% to the mortgage loan account*".

The Provider details that the Complainants accessed the **2007 MFA** through the page on its staff intranet and submitted this document to the Provider for implementation. The Provider outlines that the **2007 MFA** was implemented on **12 January 2007** and a **Product Switch Letter** was accordingly issued to the Complainants on the same date.

The Provider contends that there is nothing contained in this **MFA** which suggests that the Complainants were entitled to convert to a tracker mortgage rate at the end of the fixed rate period.

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Further, the Provider submits that the **Mortgage Loan Offer Letter** specifies the rate that the Complainants should expect on the expiry of the fixed rate interest period selected by them in the **MFA** signed in **2007**. The Provider asserts that it "*is satisfied that the information available to the Complainants was sufficiently clear and transparent*".

The Provider submits that when the Complainants executed the **MFA** in **2007**, *"the sole purpose*" was to avail of the 2-year fixed interest rate and the **MFA** "*did not change the underlying terms and conditions within the Offer Letter*". It states that the **Mortgage Loan Offer Letter** contains no mention of a tracker interest rate. It states that there "*is no ambiguity, lack of clarity or vagueness*" contained in the **MFAs** signed in **2006** and **2007**, when read in conjunction with the **Mortgage Loan Offer Letter,** regarding the rate that the mortgage loan account would revert to on the expiry of the 2-year fixed interest rate period. It states that the **Mortgage Loan Offer Letter** *"continued to apply subject to any amendments which stem from the 2007 MFA".*

The Provider outlines that the **MFAs** signed in **2006** and **2007** state as follows:

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

The Provider contends that "*it was clear to the Complainants that the General Conditions in the Offer Letter remained in force when they signed the 2006 MFA and the 2007 MFA*."

The Provider submits that its *"internal operating system requires that all fixed rates, when set up on the system, list a roll to rate. It was an operational requirement to list a nominal rate, but the actual rate, available in default of choice, at the end of a fixed term would be determined by the mortgage rates offered by the Provider at that time and the mortgage agreement made between the Provider and the customer. This is an internal operating system which is not accessible by mortgage customers and does not represent a communication to customers."*

The Provider states that on this basis, "*the presence of content on an internal system does not convey any right or legitimate expectation as to the rate a mortgage loan account would roll to upon expiry of a fixed rate period as it does not form part of the governing loan documentation or communication with the Complainants*".

The Provider states that on **09 October 2008**, it issued a notice on its staff intranet to all staff members, which stated that it would no longer offer customers or staff tracker mortgages with effect from **10 October 2008.** It states that *"The notice was directed to staff customers for whom that development would be relevant.*

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The notice said that no new tracker rates would be provided for new or existing mortgages. However, the notice made clear that the Provider would continue to honour any mortgage contract that contained a commitment on the Provider's part to allow the customer avail of a tracker mortgage of ECB + 0.75% in the future. The Complainants were not such customers."

The Provider states that the notice included the opening paragraph that customers would be "*rolling to ECB +0.75% as per their original signed mortgage agreement".* It states that the Provider acknowledged that this notice *"could have benefited from further clarification and therefore wrote individually to each customer on the Staff 2 year fixed rate in November 2008 to set out fully the position".*

The Provider details that the Provider's approach in respect of offering a tracker rate to customers upon expiry of a fixed rate, *"fell into two categories. First, existing customers were able to avail of tracker rates from February 2007 [to] 10 October 2008, until same were withdrawn. Second, existing customers could only avail of tracker rates where they had a contractual entitlement to a tracker rate contained in their offer letters. The Complainants did not have a contractual entitlement to a tracker rate, and therefore the Provider did not offer one in the 2009 MFA."*

The Provider submits that a **rate options letter** was sent to the Complainants prior to the expiry of the 2-year fixed rate period, in **January 2009**. The Provider details that the Complainants signed and accepted a **MFA** in **2009** electing to apply a variable interest rate of 3.75% to their mortgage loan account. It submits that if the Complainants had failed to select an interest rate in **February 2009**, their mortgage loan account would have reverted to the Provider's standard variable rate, being the "*default*" rate. The Provider asserts that this "*accorded correctly with General Condition 7(b) of the **Offer Letter***". The Provider submits that when the Complainants signed the **2009 MFA**, tracker rates were no longer offered by the Provider and the Complainants had no contractual entitlement to be offered a tracker rate of interest.

The Provider "*wholly refutes"* the Complainants' contention that they were "*led to believe"* by the Provider's then Head of Mortgages that their mortgage account would roll to a tracker interest rate. It submits that there is no evidence supporting the Complainants' assertion. It submits that the Complainants' contractual documentation clearly states that the mortgage loan account will roll to a variable rate on the expiry of the fixed rate interest period. In addition, the Provider contends that "*it is entirely inconsistent for the Complainants to suggest that they relied on such a statement regarding their mortgage loan account rolling to a tracker rate of interest, whilst at the same time signing the 2009 MFA*".

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The Provider notes that it does not have any evidence to suggest that the Complainants were in contact with the Provider prior to signing the **2009 MFA** or that they were relying on any assurances given to them by the Provider.

The Provider submits that it was at all times open to the Complainants between **February 2007** and **October 2008** to approach the Provider with a request to move their mortgage loan account to a tracker interest rate.

It states that if the Complainants had moved from the **January 2007** fixed rate to a tracker rate during this time, this move would have been subject to a funding fee upon that conversion, as articulated in the **2007 MFA**.

In addition to the foregoing, the Provider submits that "*It is important to note that the Offer Letter forms the contractual basis of the relationship between the Provider and the Complainants and it is on this legal binding contract which the Provider relies*." The Provider contends that the **Offer Letter** does not contain any contractual entitlement to a tracker interest rate and "*the existence of content on the Provider's internal system does not alter the content of the Offer Letter*".

<u>The Complaint for Adjudication</u>

The complaint for adjudication is that the Provider incorrectly changed the interest rate on the Complainants' mortgage loan account on the expiry of the fixed interest rate period in **February 2009** to a standard variable rate instead of a tracker interest 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. 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.

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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 **05 October 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.

Following the issue of my Preliminary Decision, the Complainants made a further submission under cover of e-mails to this office dated **07 October 2021** and **05 November 2021**, copies of the which were transmitted to the Provider for its consideration. The Provider has not made any further submission.

Having considered the Complainants' additional submissions and all submissions and evidence furnished by both parties to this office, I set out below my final determination.

I note from the outset that the Complainants, in their post Preliminary Decision submission dated **07 October 2021**, submit that "*[a] colleague recently had their complaint upheld in 2021. They also never had a tracker rate nor completed an MFA to advise rolling to a tracker rate*". In this submission, the Complainants also question "*How can your office give two different outcomes for the same complaint, with the same documentation provided?"*.

It is important to highlight that every Decision made by me is based on a careful consideration of the individual facts and circumstances of each particular complaint. In circumstances where each complaint to this office is decided on its own merits, it is not appropriate for me to consider the Complainants' submission insofar as it relates to complaints involving other customers. In any event, I note that the facts and circumstances concerning the Complainants' mortgage loan in the present complaint are different from those arising in my previous Legally Binding Decision to which the Complainants refer.

In order to determine this complaint, it is necessary to consider the relevant provisions of the Complainants' mortgage loan documentation and to consider certain interactions between the Provider and the Complainants between **2006** and **2009**.

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The Provider issued a **Mortgage Loan Offer Letter** to the Complainants, dated **11 August 2004**.

Part 1 – The Statutory Loan Details of the **Mortgage Loan Offer Letter** details as follows:

"1. Amount of Credit Advanced		*€276,000*
2. Period of Agreement		*35 Years*
3.	*Number of Repayment <u>Instalments</u>*	*<u>Instalment</u> <u>Type</u>*
	23	*Fixed at 3.990% until 4 August 2006*
	397	*Variable at 3.550%*
	…	
	APR:*	*3.7%*

…

**Annual Percentage Rate of Charge"*

Part 2- The Additional Loan Details of the **Mortgage Loan Offer Letter** details as follows:

"11. Type of Loan:	*Repayment*
12. Interest Rate:	*3.990% Fixed"*

The **Mortgage Loan Offer Letter** also details the following:

> ***"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."***

Part 3 – The General and Special Conditions of the **Mortgage Loan Offer Letter** details 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. 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 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) 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 0.1% 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 draw down****.*

(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 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.

(c) 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 will be liable today a sum to be calculated in accordance with the following formula: (Amount x (R-R1) x Time) divided by 36500 and for the purpose of this formula, the variables are defined as follows: "Amount means the average balance of the amount repaid early or converted from the date of repayment or conversion to the end of the fixed rate term, allowing for scheduled repayments;

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in the case of an endowment loan, this will equal the full amount of the early repayment or conversion. "R" means the cost of funds for the Lender for the fixed rate period as incorporated in the existing interest rate applying to the Loan. "R1" means the interest rate available to the Lender for funds placed in the money market on the date of early repayment or conversion for the remainder of the relevant fixed rate period.

"Time" means the number of days from the date of early repayment or conversion to the end of the relevant fixed rate period.

(d) At the Borrower's request, the Lender may, at its absolute discretion agree to add any sum payable in accordance with clause 7(c) to the principal amount from time to time owing and this may be accommodated at the discretion of the Lender by way of: (i) an adjustment to the amount of the regular repayments during the remaining term of the Loan; or (ii) an adjustment to the number of repayments within the remaining term of the Loan; or (iii) an adjustment in the amount of the final repayment; or (iv) an adjustment in the term of the Loan AND it shall be a condition of any such adjustment that then Borrower shall immediately effect, maintain and assign to the Lender a suitably amended Life Policy (of Endowment Policy as appropriate) in respect of this additional amount."

The Borrower's **Acceptance and Consents** was signed by the Complainants on **11 August 2004** on the following terms:

> *"I confirm that I have read and fully understand the Consumer Credit Act, set out above, and the terms 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 Letter** provided for a fixed interest rate for 23 months with a variable rate which "*may vary upwards or downwards*" to apply thereafter.

The Provider issued an internal communication through its staff intranet on **18 August 2006** which detailed as follows:

> *"…*
>
> ***New Staff Non-Standard Variable Mortgage – rate 3.50%***

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… a market leading rate with no Benefit in Kind applying

This mortgage rate is available for all new and existing mortgage business and includes both PDH (Private Dwelling House) and RIL (Residential Investment Lending).

…

[The Provider] Mortgages are delighted to offer you our new staff non-standard variable mortgage at just 3.50%.

Key benefits for our staff:

- *Market Leading rate*
- *No Benefit in Kind*
- *Not directly linked to ECB interest rate movements (see below) – important given predicted interest rate increases over coming 6 months*
- *Simple and easy to avail of.*

For more details, including answers to the following, please see the attached memo. …"

The **Memo** attached to the internal communication of **18 August 2006** provides as follows:

"…

As you will be aware, we currently offer staff a choice of two preferential mortgage rates – 3.00% or 4.00% (note the 3% preferential rate currently attracts benefit in kind) and a PDH tracker mortgage at ECB + 0.85%, currently 3.85%.

[The Provider] are delighted to offer you our new staff non-standard variable rate mortgage at just 3.50% currently.

…

<u>What is a Non-Standard Variable Rate Mortgage?</u>
The non-standard variable rate mortgage tracks two key indicators, the Revenue Commissioners BIK (Benefit-in-Kind) Reference Rate and the One-Month COF (Cost of Funds).

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<u>The rate applying to the staff non-standard variable rate mortgage will be whichever is the higher of these two indicators at any given time. This is to ensure that you will never pay BIK on this mortgage under current Revenue rules.</u>

…

The non-standard variable mortgage does not track ordinary ECB interest rate movements, which impact on our standard variable and tracker rate products.
…"

The Complainants completed an **Application to Change to Staff Non-Standard Variable Rate Mortgage ("Staff Mortgage Rate") Mortgage Form of Authorisation** on **06 September 2006**.

This **Mortgage Form of Authorisation** states as follows:

"The Staff Mortgage Rate is a variable interest rate and shall be the <u>higher</u> of the following two key indicators: (1) The prevailing Revenue Commissioners BIK (Benefit in kind) reference rate; (2) The prevailing one month Cost of Funds reference rate (which is equivalent to the one month EURIBOR rate issued by [the Provider] Global Markets on a daily basis.

APPLICATION FOR CHANGE OF INTEREST RATE

I/We wish to apply for the Staff Mortgage Rate as detailed above for my/our mortgage loan (the "Loan")

…

I/We wish to change to the rate selected above at the expiry of my/our current fixed rate period.

…

CONSUMER CREDIT ACT NOTICES

…

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

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The **Acknowledgement and Agreement** section of the **Mortgage Form of Authorisation,** which was signed by the Complainants on **06 September 2006** states as follows:

> *"I acknowledge that following the acceptance by the [Provider] of this Application the terms and conditions applicable to the Loan shall 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. *In converting the Loan from a fixed rate to the Staff Mortgage Rate, I understand that I will be liable to pay a funding sum to the [Provider] calculated in accordance with the condition contained in the Offer Letter applicable to the Loan or in as set out below (whichever is the lesser)*
   …

2. *In the event of the Borrower (or both Borrowers where both are members of the permanent staff of [the Provider]) ceasing to be employed by [the Provider] the Staff Mortgage Rate shall cease and the interest rate applicable to the Loan shall immediately revert to the prevailing Homeloan Variable Rate or such other rate which the [Provider] may, at its absolute discretion, offer to the Borrower.*

3. ***In converting the Loan to a Staff Mortgage Loan**, I agree that the interest rate applicable to the Loan is a variable interest rate and may vary upwards or downwards. The rate shall be the higher of the following two key indicators: (1) the prevailing Revenue Commissioners BIK (Benefit in kind) reference rate; (2) the one month Cost of Funds reference rate (which is equivalent to the one month EURIBOR rate issued by [the Provider] Global Markets on a daily basis). In the event that the Staff Mortgage Rate is certified by the [Provider] to be unavailable for any reason the interest rate applicable to the Loan shall be the prevailing Home Loan Variable Rate. Notification of any change in the interest rate shall be given in accordance with Condition 6 (b) of the general Conditions of my original **Offer Letter.***

4. *Condition 6(c) of the General Conditions of my original Offer Letter is not applicable for the duration of the Lon when the interest rate is the Staff Mortgage Rate.*

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

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It is clear to me that the **Mortgage Form of Authorisation**, as accepted and signed by the Complainants dated **6 September 2006**, envisaged a staff variable rate to apply to the Complainants' mortgage loan account. The **Mortgage Form of Authorisation** further detailed that if the Complainants ceased to be employed by the Provider then the staff interest rate would no longer apply and the interest rate applicable to the loan would switch to the "*prevailing Homeloan Variable Rate*" or such other rate which the Provider may, at its absolute discretion, offer to the Complainants.

The Provider issued an internal communication through its intranet on **7 December 2006** which outlined as follows:

> *"Staff non-standard variable rate mortgage*
>
> *An update regarding Budget 2007 (RoI) and its effect on the staff non standard variable rate mortgage.*
>
> *An announcement from Personal Lending*
>
> *The staff non standard variable rate mortgage, which was launched in August of this year, tracks two key indicators, the Revenue Commissioners BIK (Benefit-in-Kind Reference Rate and the One-Month COF (Cost of Funds) …*
>
> *In Budget 2007, which was announced yesterday, the Minister for Finance increased the Reference Rate to 4.5%, which has a direct impact on the staff non-standard variable mortgage rate. The change will come into effect on 1 January 2007.*
>
> *We are currently working to identify the impact of this change and plan to communicate to all staff next week.*
>
> *No action is required from you at this point."*

The Provider issued another internal communication through its intranet on **21 December 2006** which detailed as follows:

> *"Staff 2 year Fixed Rate*
>
> *Information on the staff 2 year fixed rate- The closing date for applications has passed*
>
> …

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Will there be Benefit-in-Kind?

Yes, you will be liable for Benefit-in-Kind (BIK) if you opt for new staff 2 year fixed rate mortgage. BIK will be charged at the appropriate rates …

Terms & Conditions

- *This product is available on both PDH and RIL mortgages/properties in the Republic of Ireland*
- *This product is not available for new staff applications submitted via a Broker or Mortgage Intermediary.*
- *This product is only available for PDH and RIL related expenditure/finance. You cannot avail of this product and rate for commercial purposes.*
- ***Staff will be advised of their rollover options a number of weeks prior to the expiry of the fixed rate term.*** [my emphasis]
- *If you are currently on the 4.00% preferential fixed staff rate and opt for this product, you will have the option to switch back to the preferential rate once per tax year.*
- *If you are currently on the 3.00% preferential staff fixed rate you will NOT have the option to switch back to this rate. If you want to keep your 3.00% fixed rate do not take out our new staff 2 year fixed rate mortgage,*
- *If you are currently on a fixed rate and would like to break out of that fixed rate to avail of the staff 2 year fixed rate mortgage then a funding fee may be applicable.*

  …"

The Provider issued another internal communication through its intranet on **22 December 2006** which detailed as follows:

"Staff Non-Standard Variable Rate Mortgage (RoI)

An update on the Staff Non-Standard Variable Rate Mortgage currently at 3.5%
…

In the budget on 6 December 2006, the Revenue Commissioners Benefit-in-kind (BIK) Reference Rate was changed from 3.5% to 4.5% with effect from 1 January 2007 in Ireland.

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As a result the rate on the staff non-standard variable rate mortgage will have to increase to 4.5% with effect from 1 January 2007 to avoid staff having to pay BIK.

A notice to this effect will issue to all staff on this product in due course in line with the terms and conditions but staff should note that the new repayment amount will be effective from 1 January 2007.

Staff Mortgage Options

In the light of these changes we are delighted to be able to announce a new range of staff options, which we have put together for you, our customers. These have resulted from negotiations to secure the best possible product options for staff. As a result of these changes, staff can now avail of the following options:

Option	***Rate***	***Note***
Remain on Staff Non-Standard Variable Rate	*4.5%*	*No BIK applicable*
New Special Staff 2 Year Fixed Rate	*3.95%*	*Subject to BIK*
Staff Tracker Mortgage	*ECB + 0.75% (4.25%)*	*No BIK applicable*

…

b) You can avail of our new special staff 2 Year Fixed Rate which will be priced at 3.95% …

Staff will be advised of their rollover options a number of weeks prior to the expiry of the fixed rate term.

The staff 2 year fixed rate represents excellent value for both RIL's and PDH loans in a volatile interest rate environment. All the latest indications are that the ECB rate will increase a number of times throughout 2007.

…

Please note that this product option is only available for a limited period of time i.e. until 19 January 2007.

…

/Cont'd…

c) You will also have the option to convert to the staff tracker mortgage. This was priced at ECB + 0.85%, currently 4.35% and was only available for PDH mortgages.

We are now delighted to be able to tell you that we have secured agreement to offer this tracker product to staff at ECB + 0.75%, i.e. current 4.25%. This mortgage rate is available for all new and existing mortgage business and includes both PDH (Private Dwelling House) and RIL (Residential Investment Lending).
…"

The Complainants subsequently completed and signed an **Application to Change to Staff 2 Year Fixed Rate Mortgage 3.95%, Mortgage Form of Authorisation** on **09 January 2007**. This Application, signed by the Complainants states as follows:

"APPLICATION FOR CHANGE OF INTEREST RATE:

I/We wish to apply for the Staff 2 Year Fixed Rate 3.95% Mortgage Rate fixed to 4th February 2009 as detailed above for my/our mortgage loan (the "Loan")

**Note: If you change from a fixed rate during the fixed rate period, you may be liable to pay a funding sum to the Bank. See conditions overleaf."*

The **Acknowledgement and Agreement** section of the Mortgage Form of Authorisation signed by the Complainants on **9 January 2007** details as follows:

"I acknowledge and agree that:-

***In converting the Loan from a fixed rate to the Staff 2 Year Fixed Mortgage Rate, I understand that I will be liable to pay a <u>funding sum</u> to the [Provider] calculated in accordance with the formula set out above under 'Early Repayment'**.*

1. *In the event of the Borrower (or both Borrowers where both are members of the permanent staff of [the Provider]) ceasing to be employed by [the Provider] the Staff Mortgage Rate shall cease and the interest rate applicable to the Loan shall immediately revert to the prevailing Homeloan Variable Rate or such other rate which the [Provider] may, at its absolute discretion, offer to the Borrower.*

2. ***If the loan is to be converted to a Tracker Mortgage Loan**, I agree that the interest rate applicable to the Loan is a variable interest rate and may vary upwards or downwards. The interest rate applicable to the Loan is a variable interest rate and may vary upwards or downwards.*

/Cont'd…

The interest rate shall be no more than the rate notified above the prevailing European Central Bank Main Refinancing Operations Minimum Bid Rate ("Repo rate") for the term of the Loan. Variation in interest rate shall be implemented by the [Provider] not later than close of business on the 5th working day following a change in the Repo rate by the European Central Bank.

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

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

The mortgage loan statements provided in evidence indicate that the 2-year staff fixed interest rate of 3.95% was applied to the Complainant's mortgage loan account in **January 2007**.

It is clear to me that the **Mortgage Form of Authorisation**, as accepted and signed by the Complainants dated **9 January 2007**, envisaged a 2-year fixed rate of 3.95% to apply to the Complainants' mortgage loan account. The **Mortgage Form of Authorisation** further detailed that if the Complainants ceased to be employed by the Provider then the staff interest rate would no longer apply and the interest rate applicable to the loan would switch to the "*prevailing Homeloan Variable Rate*" or such other rate which the Provider may, at its absolute discretion, offer to the Complainants. I note that the Mortgage Form of Authorisation also outlined what would transpire if the Complainants chose to convert the mortgage loan to a tracker mortgage loan. I do not consider that this reference to a tracker mortgage loan in the Mortgage Form of Authorisation is sufficient to amount to a contractual entitlement on the part of the Complainants to a tracker rate of interest. Rather, the Provider was setting out the terms and conditions applicable to a tracker mortgage loan if the Provider offered a tracker interest rate to the Complainants.

The Complainants contend that the mortgage screen of their account shows that their roll to rate was changed "*from rolling to a tracker, to rolling to a SVR in **November 2008***". The Complainants assert that as a result of this change, they were denied a tracker mortgage rate in **February 2009.**

/Cont'd…

However, the Provider submits that it amended the Complainants' mortgage loan account ending ***8893***, as the operating system required the selection of a nominal rate when a new rate was set up on the system.

The Provider issued an internal communication through its staff intranet on **9 October 2008** which detailed as follows:

> ***"An update on staff mortgage options***
>
> *[The Provider] no longer offers customer or staff tracker mortgages with effect from start of business Friday 10 October 2008*
>
> ***An announcement from Consumer Banking***
>
> *Staff trackers are therefore not available for any new or existing staff mortgages, with the exception of those that are currently either on the staff tracker mortgage of ECB +0.75% or those rolling to ECB +0.75% as per their original signed mortgage agreement (see existing staff mortgage section below).*
>
> ***1. New staff mortgage applications***
>
> *New staff applications are entitled to avail of the best customer rates available on the matrix. Currently the best rates are:*
>
> - *2-Year Fixed Rate (currently 5.20%)*
> - *Variable LTV products. The best available rates are: for residential property, 5.30%, or for investment property, 5.65%*
>
> ***2. Existing staff mortgage accounts***
>
> - *Staff 2-Year Fixed Rate: rate currently 3.95%*
>
> *Staff who are currently on Staff 2-Year Fixed Rate – currently 3.95% - will roll to ECB +0.75% with no BIK implications as per their original signed mortgage agreement at the end of their 2-year fixed period. Staff will receive notification 30 days prior to the end of their fixed rate term. This notification will also offer a range of fixed and variable rate products. If you do not respond to this notification, your account will automatically default to the Staff Tracker ECB + 0.75%.*

/Cont'd…

- *Staff Tracker Mortgage: ECB + 0.75%*

Staff that are currently on the Staff Tracker of ECB +0.75% will remain on this product. This product does not attract BIK.

3. Existing staff wishing to switch to alternative product options

To avail of any of the Variable LTV based product options (5.30% for Residential property and 5.65% for investment properties) staff will need to complete a Mortgage Form of Authorisation (MFA) for either Bank or [Provider] depending on where the account is held. The MFA will need to be completed and signed by all parties on the mortgage account.

Please print off and complete the appropriate Mortgage Form of Authorisation below to switch to either of these options."

It appears to me that the purpose of the this notice was to inform staff customers that the Provider was removing staff tracker interest rates from its suite of mortgage products available to new and existing staff customers except for those staff customers who were (i) already availing of a tracker interest rate and (ii) were due to roll-over to a tracker interest rate on the expiry of a fixed interest rate period in line with the terms of their individual mortgage loan agreements. Upon considering the Complainants' mortgage loan documentation, I note that their mortgage loan account was never on a tracker interest rate of ECB + 0.75% at any stage and there was no contractual provision in their mortgage loan agreement to stating that their mortgage loan account would roll-over to a tracker interest rate at any stage.

The Complainants submit that the roll-to rate on their mortgage loan account was amended from tracker to variable on the Provider's internal system on **10 November 2008**. It is not entirely clear to me from the evidence, the circumstances in which the **repayment change history screenshot** was generated and furnished to the Complainants. In any event I am of the view that this internal note in and of itself has no bearing on the Complainants' entitlement, contractual or otherwise, to the tracker interest rate of ECB + 0.75%.

On **20 November 2008**, the Provider issued a letter to the Complainants which states as follows:

"I am writing to let you know about Staff Fixed Rate Mortgage rollover options, which came into effect on the ***7th November 2008****.*

/Cont'd…

*As you may be aware, [the Provider] removed tracker mortgage products for new customers on **10th October 2008.** All major financial institutions have also removed their tracker products at this stage. We then assessed the impact of the removal of trackers on Fixed Rate customers at the time of their roll-over.*

The key finding is that those currently on a fixed rate fall into one of two categories-

1. *Those who opened their mortgage account on a fixed rate, or took the option of further fixed rates at previous roll-over times, will have a tracker option on their roll-over letter, as per the terms and conditions of their **Letter of Offer**.*
2. *Those who moved into a fixed rate from another product, by signing a **Mortgage Form of Authorisation,** will not have a tracker option on their roll-over letter. The signed **Mortgage Form of Authorisation** supersedes the original **Letter of Offer**.*

As, according to our records, your mortgage(s) is currently on the 3.95% staff fixed rate, you will fall into one of the two categories above.

…

As outlined above

- *If you are in category 1 you will receive your roll-over letter with the staff tracker (ECB +0.75%) option, as well as the options offered below*
- *If you are in category 2 you will receive you roll-over letter with the options outlined below.*

Homeloans

Staff Preferential Rate (for all loan amounts)	*4% (subject to BIK)*
Highly Competitive 2 year fixed rate	*Currently 4.75%**
Variable LTV Rate	*Currently 4.50%**

If you do not respond to the roll-over letter, we will automatically roll your mortgage to the Variable LTV based rate, currently 4.50%.

…

This letter is for your information only. There is no action required by you at this time. Your roll-over letter will issue about 4 weeks before you are due to roll off your fixed rate."

/Cont'd…

The Complainants, in their post Preliminary Decision submission dated **05 November 2021**, submit that pursuant to the **Consumer Protection Code 2006**, "t*he Provider owes a duty to its customers, including its employee customers*" to ensure that all communications are "*clear and comprehensible*" and that "*key items are brought to the attention of its customers*".

The Provider's letter to the Complainants dated **20 November 2008** clearly outlined that given the Complainants *"moved into a fixed rate from another product",* being the staff non-standard variable rate of 3.5%, by signing a Mortgage Form of Authorisation, they fell into category 2, as outlined above and therefore would not in fact have a tracker option on their "*roll-over letter*". The Provider's letter dated **20 November 2008** clearly informed the Complainants of the interest rate options that would be available to them at the end of the fixed interest rate period to include a staff preferential rate, a further 2-year fixed interest rate or a LTV variable rate. The contents of the Provider's letter dated **20 November 2008** could not therefore have reasonably led the Complainants to believe that they would roll-over to a staff tracker interest rate option of (ECB +0.75%).

The Complainants have also submitted that the Provider's then Head of Mortgages led them to believe that they would roll to a tracker interest rate at the end of the fixed interest rate period in **January 2009**. It is not clear to me when this purported interaction with the Complainants took place. I have not been provided with any documentary evidence which supports the Complainants' submission in this regard.

The Complainants signed a **Mortgage Form of Authorisation** selecting the staff home loan LTV variable rate of 3.75% on **09 January 2009** and **10 January 2009** respectively. I note that a LTV variable rate was one of the options listed in the Provider's letter dated **20 November 2008**. The form states as follows:

> *"I/we wish to apply for the interest rate indicated below for my/our Mortgage Loan (the "Loan") upon the expiry of my/our existing rate."*

The **Acknowledgement and Agreement** section of this **Mortgage Form of Authorisation**, states as follows:

> *"I acknowledge that following 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 said conditions and agree to be bound by them.*

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I acknowledge and agree that:-

1. *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 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. *If a variable rate applies to the Loan the Lender may vary it upwards or downwards and the Lender may notify me of such variations in any manner provided for in the terms and conditions applicable to the Loan.*
4. *If I select a tracker variable rate:- (a) the rate will be no more than the percentage above the prevailing European Central Bank ("ECB2) Main Refinancing Operations Minimum Bid Rate ("Repo Rate") shown on the first page of the Form of Authorisation; (b) variations in the interest rate will be implemented by the Lender not later than the 5th working day following a change in the Repo Rate by the ECB; (c) if the Lender certifies at any time that the Repo Rate is unavailable for any reason the interest rate applicable to the Loan shall be the appropriate variable rate.*
5. *I may not select a tracker variable rate unless the terms and conditions applicable to the Loan expressly entitle me to.*
6. *If any variable interest rate other than a tracker variable rate applies to the Loan at any time, any term or condition applicable to the Loan which provides that a variable rate applicable to the Loan (i) shall be no more than a specified percentage above the Repo Rate or (ii) shall change following any change in the Repo Rate, shall no longer apply to the Loan.*
7. *In the event of the Borrower (or both Borrowers where both are members of the permanent staff of [the Provider] ceasing to be employed by the [Provider], the interest rate applicable to the loan shall immediately revert to the prevailing variable rate or such other rate which the [Provider] may at its absolute discretion, offer to the Borrower.*

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

It is clear that the **Mortgage Form of Authorisation**, as accepted and signed by the Complainants in **January 2009**, envisaged an LTV variable rate of 3.75% to apply to the Complainants' mortgage loan account.

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Following consideration of the Complainants' mortgage loan documentation, it is clear also that the **Mortgage Loan Offer Letter** dated **11 August 2004** did not contain a contractual entitlement to a tracker interest rate at inception of the loan or indeed during the term of the loan. Rather, the **Mortgage Loan Offer Letter** provided for an initial fixed interest rate with a variable rate to apply thereafter. The Complainants subsequently signed a **Mortgage Form of Authorisation** on **6 September 2006** to apply the staff non-standard variable rate of 3.50% to the mortgage loan account. They signed another **Mortgage Form of Authorisation** on **9 January 2007** to apply a 2-year staff fixed rate of 3.95% to the mortgage loan account until **January 2009**. Again, I do not consider these Mortgage Forms of Authorisation to have conferred any entitlement to a tracker interest rate mortgage on the Complainants.

However, prior to the expiry of the 2-year fixed interest rate, the Provider issued an internal communication to its staff customers through its staff intranet on **9 October 2008**.

It appears to me that the purpose of the Provider's internal communication was to notify its staff customers that it intended to withdraw its tracker interest rate offerings from **10 October 2008**, the day after the Provider circulated its internal communication. The Provider's staff intranet notice specifically outlined what would happen to existing staff customers who were on a 2-year fixed interest rate of 3.95% at that time. The staff notice stated that staff who were currently on a 2-year staff fixed interest rate of 3.95% would *"roll to ECB +0.75% with no BIK implications as per their original signed mortgage agreement at the end of their 2-year fixed period".*

The staff notice also advised staff customers that they would receive a notification 30 days prior to the end of their fixed rate term which would offer a range of fixed and variable rate products, however if they did not respond to this notification their mortgage loan account would *"automatically default to the Staff Tracker ECB + 0.75%".* The Complainants' mortgage loan account was never on a tracker interest rate of ECB + 0.75% at any stage and their mortgage loan documentation contained no entitlement to a tracker interest rate be it at the end of a fixed interest rate period or at any stage during the term of the loan. Therefore, it would appear to me that the Provider's reference to mortgage loans on the 2-year staff interest rate, which would "*roll to ECB + 0.75% with no BIK implications as per their original signed mortgage agreement at the end of their 2-year fixed period*", in the staff intranet notice dated **09 October 2008** was not intended to apply to the Complainants' mortgage loan account.

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The Provider submits that it was at all times open to the Complainants between **December 2006** and **10 October 2008** to approach the Provider with a request to move their mortgage loan account to a tracker interest rate. It does not appear to me from the evidence that the Complainants contacted the Provider in this regard during this period.

For the avoidance of doubt, the evidence shows that the Complainants' mortgage loan account was never on a tracker rate of interest. The evidence shows that the choice to take out the mortgage loan on the terms and conditions offered by the Provider was a choice that was freely made by the Complainants.

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

Conclusion

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

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.

GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

18 November 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,

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(ii) a provider shall not be identified by name or address, and

(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.