



<b><u>Decision Ref:</u></b>	2021-0516
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Tracker Mortgage
<b><u>Conduct(s) complained of:</u></b>	Failure to offer a tracker rate throughout the life of the mortgage
<b><u>Outcome:</u></b>	Rejected

**LEGALLY BINDING DECISION  
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

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

The loan amount was €300,000 and the term of the loan was 35 years. The Mortgage Loan Offer Letter which was signed by the Complainants on **18 September 2006** detailed that the interest rate was "3.500% Variable".

**The Complainants' Case**

The Complainants submit they were originally issued a mortgage loan offer letter by the Provider dated **11 August 2006** providing for a staff preferential variable rate of 3.85% that would "be no more than 0.85% above the European Central Bank Main Refinancing Operations Minimum Bid Rate ("Repo Rate") for the term of the loan." The Complainants contend that one of the Provider's representatives told them that their monthly repayments could be less if they opted for a different staff interest rate.

The Complainants detail that they were then issued with an amended mortgage loan offer letter dated **23 August 2006** which provided for a staff preferential variable rate of 3.5%, which the Complainants say they signed "*based on this advice*". The Complainants state that the Provider "*never explained what the difference was between the first letter dated 11th August and the letter date[d] 23<sup>rd</sup> August*" or that they would be losing their right to the tracker interest rate that was originally offered to them.

The Complainants maintain that they do not know why they were not offered the tracker interest rate in the amended mortgage loan offer letter. The Complainants contend that both letters state that the interest rate applied is "*the staff preferential rate*" and therefore, the Complainants believed that they "*were getting the same rate*" on both letters. The Complainants note that their mortgage loan was drawn down on **20 October 2006** in the amount of €300,000.00 on a staff preferential variable rate of 3.5%.

The Complainants submit that in **January 2007**, they were advised by a representative in a branch of the Provider to "*go on a fixed rate given rate uncertainty at the time*" but were not informed that by applying a fixed interest rate they "*would in fact be giving up [their] right to being offered a tracker rate in the future*". The Complainants note that they opted to apply a 2-year staff fixed interest rate of 3.95% to their mortgage loan account on **16 January 2007** by completing a **Mortgage Form of Authorisation**.

The Complainants assert that the **Mortgage Form of Authorisation** from **2007** references tracker interest rates being applicable and therefore it was their "*understanding that once the fixed rate term had expired, that [their] mortgage would automatically go onto a tracker mortgage*".

On **20 November 2008**, the Provider issued a letter to the Complainants which they submit stated that the Provider had removed tracker mortgage products for "*new customers*" and "*existing customers fell into 2 categories*". The Complainants state that they were not "*new customers*". The Complainants contend that they "*should have been offered the option of a tracker rate*" on the expiry of the fixed interest rate period in **January 2009** based on the **Mortgage Form of Authorisation** that they signed in **January 2007**.

The Complainants further submit that they telephoned the Provider in **January 2017** and were informed by an agent of the Provider that their mortgage loan account was originally on a tracker interest rate.

The Complainants are seeking the following:

- That their mortgage be "*put on a Tracker*";

- To be “reimbursed for the overpayments made”; and
- To be “compensated for the opportunity lost for how this overpayment could have been invested”.

### **The Provider’s Case**

The Provider submits that its internal systems indicate that a mortgage loan application was submitted on behalf of the Complainants for a “*standard commercial staff rate of tracker plus .85% (3.85%)*”. The Provider details that a **Mortgage Loan Offer Letter** was issued to the Complainants dated **11 August 2006** for the sum of €300,000 with an applicable interest rate of ECB + 0.85% but “*This Offer Letter was not returned by the Complainants to the Provider.*”

The Provider states that on **23 August 2006** the Complainants requested a new mortgage loan offer letter “*in line with the new staff variable rate mortgage*” and a new revised **Mortgage Loan Offer Letter** dated **23 August 2006** issued to the Complainants. The Provider asserts that the cover letter accompanying the revised **Mortgage Loan Offer Letter** dated **23 August 2006** stated, “*This Offer Letter supersedes and replaces all previous versions of this Offer Letter issued to you in respect of this loan*”.

The Provider submits that the Complainants drew down a mortgage of €300,000 on **20 October 2006** for a term of 35 years under **Mortgage Loan Offer Letter** dated **23 August 2006** which was signed and accepted by the Complainants on **18 September 2006**. The Provider details that the applicable interest rate was a staff non-standard variable rate of 3.50% for a period of 417 months.

The Provider states that it is satisfied that the **Mortgage Loan Offer Letter** dated **23 August 2006** is clear and unambiguous as to the interest rate applicable to the mortgage loan account upon draw down. In response to the Complainants’ submission that they were advised by a representative of the Provider to draw down on a staff preferential variable rate, and not the tracker rate of interest, the Provider states that it has “*no record of such advice being given to the Complainants.*” The Provider states that it was for the Complainants themselves to decide on what interest rate was the most suitable for them.

The Provider asserts that “*Insofar as the Provider’s Representative allegedly represented to the Complainants that the staff preferential variable rate was lower than the staff preferential tracker rate at that time, this was factually correct, the rates being 3.50% and 3.85% respectively.*”

The Provider submits that in its “*respectful view*”, it is more likely that the Complainants determined that the lower variable rate of interest suited their needs best at that particular time.

The Provider states that it is “*entirely clear*” from **Special Conditions 4(a)(iii) and 4(a)(v)** of the **Mortgage Loan Offer Letter** dated **23 August 2006** that “*the mortgage loan account would draw down on a staff preferential variable rate as provided for in the Offer Letter of 23 August 2006, and not a staff preferential tracker rate of interest*”. The Provider states that it is satisfied that the **Mortgage Loan Offer Letter** dated **23 August 2006** did not provide any contractual entitlement to a tracker rate of interest.

The Provider states that in summary:

*“the Complainants were initially offered a staff preferential tracker rate of interest at the time of application for the mortgage loan. However, the Complainants did not accept the Providers offer and a subsequent offer was made, by way of a further offer letter dated 23 August 2006 which included a staff preferential variable rate. The Complainants accepted the 23 August Offer Letter and drew down on a staff preferential variable rate, having been clearly made aware that this differed from a tracker rate in operation.”*

The Provider details that on **16 January 2007**, the Complainants signed and accepted a **Mortgage Form of Authorisation** to apply a 2-year staff fixed interest rate of 3.95% which was implemented on **19 January 2007**. The Provider details that it is satisfied that the information available to the Complainants around the time of signing the **Mortgage Form of Authorisation** in **January 2007** was “*sufficiently clear as to what rate the loan account would switch to further to the completion of the MFA.*”

The Provider details that it can find no evidence of a meeting between the Complainants and a representative of the Provider in **January 2007** during which the Complainants were advised to move to a fixed interest rate given “*uncertainty at the time*”. The Provider notes that in circumstances where the **Mortgage Form of Authorisation** was completed in a branch of the Provider, the Provider would not hold records of any such interactions other than the completed **Mortgage Form of Authorisation**. The Provider further notes that it was not obliged to retain any such records given “*the application was made over 13 years ago*”.

The Provider details that it issued a press release in **early October 2008**, which provided as follows:

*"[The Provider] today announces that we will no longer offer Tracker Rate Mortgages for new homeloan business. This is effective from the start of business on Friday 10th October 2008..."*

The Provider explains that when the fixed interest rate period expired in **2009**, *"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 states that on **15 January 2009**, the Complainants signed and accepted a further **Mortgage Form of Authorisation** to convert their mortgage loan to a staff home loan variable rate of 3.75%, which was implemented on **19 January 2009**. The Provider submits that on **6 April 2010**, the Complainants signed and accepted another **Mortgage Form of Authorisation** to convert their mortgage loan to a fixed interest rate of 3.15% for a period of 2 years, which was implemented on **8 April 2010**.

The Provider states that on **10 April 2012**, the mortgage loan account switched to the Provider's home loan variable rate, in line with the terms and conditions of the **Mortgage Loan Offer Letter** and in the absence of the Complainants selecting an alternative option prior to expiry of the fixed rate period. The Provider maintains that on **21 June 2015**, the Complainants signed and accepted a **Mortgage Form of Authorisation** dated **15 June 2015** to convert the mortgage loan to a staff preferential rate of 4.00%, which was implemented on **24 June 2015**.

The Provider further submits that on **2 January 2018**, the Complainants signed and accepted a further **Mortgage Form of Authorisation** dated **14 December 2017** to convert their mortgage loan to a fixed rate of 3.00% for a period of 3 years which was implemented on **9 January 2018**. The Provider submits that the mortgage loan remains on this rate to date.

In response to the Complainants' submission that the Provider *"never explained the difference to [them] between the first letter dated 11th August and the letter date 23<sup>rd</sup> August"* or that they would be losing their right to the tracker interest rate originally offered, the Provider notes that it has no record of any interactions with the Complainants between the issuance of the first mortgage loan offer letter on **11 August 2006** and the second mortgage loan offer letter on **23 August 2006**. The Provider submits that *"it is ultimately for the Complainants to satisfy themselves as to the interest rate that they wish to draw down on."*

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The Provider further submits that it was available *“at all times between the signing of the Offer Letter on 18 September 2006 and drawn down on 20 October 2006 for the Complainants to request to draw down on the tracker rate of interest, and not on the variable rate of interest”*. However, the Provider submits it has no record of any such request.

The Provider contends that it is of the view that **Special Condition 4(a)(v)**, and **General Conditions 6(a) and 7(b)** of the **Mortgage Loan Offer Letter** dated **23 August 2006** are clear, concise and comprehensible, and that the Complainants accepted those conditions when they signed and accepted the **Mortgage Loan Offer Letter** dated **23 August 2006** and the **Mortgage Form of Authorisation** in **2007**. The Provider *“respectfully”* submits that the Complainants *“were on notice of the fact that a variable interest rate which could be amended at the Provider’s discretion, rather than a tracker interest rate, would apply to the mortgage loan account in default of an alternative interest rate being offered and/or selected upon expiry of any fixed rate period.”*

The Provider maintains that in relation to the telephone conversation between the First Complainant and a representative of the Provider on **10 January 2017**, it is satisfied that *“whilst the First Complainant was indeed incorrectly advised that the mortgage loan account had been on a tracker rate of interest, that this statement was immediately corrected by the Provider’s Representative, in that the Provider’s Representative accurately described the rate history of the mortgage loan account in 2007.”*

### **The Complaints for Adjudication**

The complaints for adjudication are as follows:

- a. The Provider failed to advise the Complainants that the amended letter of offer dated **23 August 2006** did not provide for a tracker interest rate;
- b. The Provider failed to advise the Complainants that the Mortgage Form of Authorisation signed in **January 2007** did not provide for a tracker interest rate on the expiry of the fixed interest rate period; and
- c. The Provider failed to offer the Complainants a tracker interest rate on the expiry of the fixed interest rate period in **January 2009**.

## Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The 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 23 November 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.

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

The Provider issued a **Mortgage Loan Offer Letter** dated **11 August 2006** to the Complainants which detailed as follows:

<i>"Amount of Credit Advanced:</i>	<i>€300,000.00</i>
<i>Period of agreement:</i>	<i>35 years</i>

...

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*Interest Rate : 3.850 % Variable”*

The **Special Conditions** of the **Mortgage Loan Offer Letter** dated **11 August 2006** detailed as follows:

“ ...

*(iii) The interest rate applied to the Loan is a staff preferential rate. In the event of the Borrower (or both Borrowers where both are members of the permanent staff of the Lender) ceasing to be employed by the Lender for any reason, the interest rate applicable to the Loan shall immediately revert to the prevailing Homeloan Variable Rate or such other rate which the Lender may, at its absolute discretion, offer to the Borrower.*

*(iv) The interest rate applicable to the Loan is a variable interest rate and may vary upwards or downwards. The interest rate shall be no more than 0.85% above the European Central Bank Main Refinancing Operations Minimum Bid Rate ("Repo Rate") for the term of the loan. Variation in interest rates shall be implemented by the lender not later than close of business on the 5<sup>th</sup> 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 in accordance with General Condition 6(b) of this Offer Letter. In the event that, or at any time, the Repo rate is certified by the Lender to be unavailable for any reason the interest rate applicable to the Loan shall be the prevailing Home Loan Variable Rate.”*

This mortgage loan offer provided for a staff preferential tracker interest rate of ECB + 0.85%. I note that the Complainants did not sign or accept this Mortgage Loan Offer Letter.

It appears that there were subsequent discussions between the Provider and the Complainants as to the most suitable interest rate. The Complainants submit that they were advised by a representative of the Provider to draw down on a staff preferential variable rate rather than a tracker rate of interest. I have not been provided with any documentary evidence of any such discussions from any of the parties to this complaint. Nevertheless, the parties appear to accept that following receipt of the **Mortgage Loan Offer Letter** dated **11 August 2006**, the Complainants requested a staff preferential variable rate of 3.5% for the loan.

The Provider subsequently issued a letter dated **23 August 2006** to the Complainants enclosing a **Mortgage Loan Offer Letter** dated **23 August 2006**.

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The letter dated **23 August 2006** details as follows:

*“Dear [Complainants],*

*I am delighted to let you know that [the Provider] (“the Bank”) has approved your mortgage application. This approval is subject to the revised terms and conditions contained in the enclosed Mortgage Loan Offer (“Offer Letter”).*

***This Offer Letter supersedes and replaces all previous versions of this Offer Letter issued to you in respect of this loan.***

**Step 1 - WHAT SHOULD BE DONE NOW**

- (a) Please make sure that all Applicants sign and date one copy of the Offer Letter and return it to your mortgage adviser. You should retain the other copy for your records. This is an important legal document, which forms the legal basis for the loan. It also sets out the security required by the Bank. You are strongly recommended to seek legal advice prior to accepting the Offer Letter.*
- (b) Make sure that all attached documents are fully completed and returned to your mortgage adviser. Additional documents were attached to your previous Offer(s) and these need to be completed also.*
- (c) Please make sure that you comply with the Conditions Precedent, which are contained in Part 3 of the Offer Letter. Once we have everything we require under these Conditions and you have accepted the Offer, we will confirm to you in writing. If any of the documentation mentioned in Part 3 of the Offer Letter has already been provided, please disregard the request.*

**Step 2 - HOW TO GET YOUR LOAN CHEQUE**

- (a) Make sure you comply with the Special and General Conditions as outlined in the Offer Letter.*
- (b) Your Solicitor will need to comply with our legal requirements and has already been supplied with our Solicitor's Pack.*
- (c) You will need to send us the original policies for both your Property Insurance and Life Assurance.*

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*Loan cheques are issued by the Bank to your Solicitor.*

*If you have any questions, please do not hesitate to contact us. Please have your application number handy to help us identify your specific application. You can find this number at the top of this letter.*

*Thank you for choosing [the Provider] for your mortgage needs.”*

The **Mortgage Loan Offer Letter** dated **23 August 2006** details as follows:

1. *“Amount of Credit Advanced: €300,000.00*
2. *Period of agreement: 35 years*
  

3. <i>Number of Repayment <u>Instalments</u></i>	<i>Instalment <u>Type</u> Variable at 3.500%</i>	4. <i>Amount of each <u>Instalment</u> €1,253.56</i>
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- ...  
APR\*: 3.5%
- ...  
\*Annual Percentage Rate of Charge”

**Part 2- The Additional Loan Details** of the **Mortgage Loan Offer Letter** dated **23 August 2006** details as follows:

- “11. Type of Loan: Repayment*
- 12. Interest Rate: 3.500% Variable”*

**Part 4- The Special Conditions** of the **Mortgage Loan Offer Letter** dated **23 August 2006** details as follows:

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

*....*

*(iii) This offer replaces our offer of 11/08/2006.*

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*(iv) The interest rate applied to the Loan is a staff preferential rate. In the event of the Borrower (or both Borrowers where both are members of the permanent staff of the Lender) ceasing to be employed by the Lender for any reason, the interest rate applicable to the Loan shall immediately revert to the prevailing Homeloan Variable Rate or such other rate which the Lender may, at its absolute discretion, offer to the Borrower.*

*(v) In the event of the Borrower (or both Borrowers where both are members of the permanent staff of the Bank or [the Provider]) ceasing to be employed by the Bank or [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 Bank may, at its absolute discretion, offer to the Borrower. 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 two following 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] on a daily basis). In the event that the Staff Mortgage Rate is certified by the Bank 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 the original offer letter.”*

The **Mortgage Loan Offer Letter** dated **23 August 2006** 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.”***

**General Conditions 6 and 7 of Part 5 – The General Conditions of the Mortgage Loan Offer Letter** dated **23 August 2006** 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 Loan 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 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; 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 Complainants signed the **Borrower's Acceptance and Consents** of the **Mortgage Loan Offer Letter** on **18 September 2006** on the following terms:

*"I confirm that I have read and fully understand the Consumer Credit Act notices, 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."*

The **mortgage loan statements** provided in evidence show that the Complainants drew down the mortgage loan on **23 October 2006**.

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The **Mortgage Loan Offer Letter** dated **23 August 2006** envisaged that a staff preferential variable interest rate of 3.50% would apply to the mortgage loan which may “*vary at the Lender’s discretion upwards or downwards*”. If the Second Complainant ceased to be employed by the Provider, then the applicable staff mortgage interest rate would no longer apply and the Provider’s home loan variable rate would apply instead.

The terms of **Mortgage Loan Offer Letter** dated **23 August 2006** do not contain reference to a tracker interest rate applying to the Complainants’ mortgage loan, unlike the previous **Mortgage Loan Offer Letter** dated **11 August 2006**, which provided for a staff tracker interest rate. However, it is clear from the **Special Conditions** outlined above that **Mortgage Loan Offer Letter** dated **23 August 2006** replaced **Mortgage Loan Offer Letter** dated **11 August 2006**, therefore the latter loan offer was no longer valid.

In order for the Complainants to have a contractual right to a tracker interest rate on their mortgage loan, that right would need to have been specifically outlined in the mortgage loan documentation that was signed by the Complainants. However, no such right was set out in writing in the **Mortgage Loan Offer Letter** dated **23 August 2006**, which was signed by the Complainants on **18 September 2006**.

If the Complainants were not happy with or did not fully understand the terms of **Mortgage Loan Offer Letter** dated **23 August 2006**, including the type of interest rate that would apply, the Complainants could have decided not to accept the revised offer made by the Provider, or they could have requested a tracker interest rate for the mortgage loan before accepting the offer. Instead, the Complainant signed the **Borrower’s Acceptance and Consents** on **18 September 2006** confirming that he had read and fully understood the terms and conditions contained in the **Mortgage Loan Offer Letter** dated **23 August 2006**.

The Complainants appear to have approached the Provider in **January 2007** to discuss the interest rate on their mortgage loan account at which time the Complainants submit that a mortgage advisor in the Provider’s branch advised them to switch to a fixed interest rate. I have not been provided with any evidence of any such interactions between the parties at this time save for an internal communication that issued from the Provider through its staff intranet on **21 December 2006** which detailed as follows:

*“...the Revenue Commissioners BIK (Benefit-in-Kind) Reference Rate was changed from 3.5% to 4.5% with effect from 1<sup>st</sup> January 2007.*

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

*....As a result of these changes staff can now avail of the following options:*

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**A) Remain on the staff non-standard variable rate mortgage**

...This rate is 4.5% with effect from 1<sup>st</sup> January 2007. No BIK applicable.

**B) Convert to a Staff Tracker Mortgage**

You will also have the option to convert to the staff tracker mortgage at ECB + 0/75% i.e currently 4.75%. No BIK applicable. This mortgage rate is available for all new and existing mortgage business and includes both PHD (Private Dwelling House) and RIL (Residential Investment Lending).

...N.B. For those staff currently on a staff tracker rate of ECB + 0.85% there is no need to take any action – your accounts will automatically be switched to the new rate of ECB + 0.75%.

**C) Special Staff 2 year Fixed Rate.**

...This product and rate is subject to BIK at the appropriate rates, i.e. difference between the rate 3.95% and the Revenue Commissioners Reference Rate (4.5% with effect from 1st January 2007) at your marginal tax rate.

Please note that this product option was only available for a limited period of time i.e. until 19<sup>th</sup> January 2007. All applications, MFA'S (Mortgage Form of Authorisation) must have been received by this date to qualify for this fixed rate..

**Staff 2 year Fixed Rate**

**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.
- **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.*
- ..."

This notice provided that staff selecting the 2-year fixed interest rate would be "advised of their rollover options a number of weeks prior to the expiry of the fixed rate term". It does not state that staff availing of the 2-year fixed interest rate would roll on to a tracker interest rate at the end of the fixed period.

I note that on **2 January 2007** the staff non-standard variable rate applying to the mortgage loan account increased from 3.50% to 4.50%.

The Complainants completed a **Mortgage Form of Authorisation** on **16 January 2007** selecting the 2-year staff fixed interest rate of 3.95%. The **Mortgage Form of Authorisation** details as follows:

*"APPLICATION FOR CHANGE OF INTEREST RATE:*

*I/We wish to apply for the Staff 2 Year Fixed Rate 3.95% Mortgage Rate 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** was signed by the Complainants on **16 January 2007** and 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 funding sum to the [Provider] calculated in accordance with the formula set out above under 'Early Repayment'.*

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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 Bank 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. 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 [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 staff fixed rate of 3.95% was applied to the Complainants’ mortgage loan account on **19 January 2007**.

It is clear to me that by signing the **Mortgage Form of Authorisation** on **16 January 2007**, the Complainants agreed to apply a 2-year staff fixed interest rate of 3.95% to their mortgage loan account. The **Mortgage Form of Authorisation** further detailed that if the Second Complainant, who was employed by the Provider, 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.

While the **Mortgage Form of Authorisation** had the effect of amending the applicable interest rate on the Complainants' mortgage loan from a variable interest rate to a fixed interest rate, the terms and conditions of the **Mortgage Loan Offer Letter** dated **23 August 2006** still applied. Therefore, **General Condition 7 of Part 5 – The General Conditions** of the **Mortgage Loan Offer Letter** dated **23 August 2006** in relation to fixed interest rates, as outlined above, applied to the Complainants' mortgage loan account from **January 2007**. Consequently, on expiry of the fixed interest rate period, the Complainants could be offered a further fixed interest rate or any other available rate or in the absence of selection of an interest rate by the Complainants, the Provider's standard variable interest rate would apply.

I note that the **Mortgage Form of Authorisation** also outlined what would transpire if the Complainants chose to convert their 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 Provider subsequently 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%)*

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- *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%.*

- *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.”*

A letter from the Provider dated **20 November 2008** has been furnished in evidence. The recipient details are redacted. Nonetheless it does not appear to be disputed between the parties that this letter was sent to the Complainants.

The letter dated **20 November 2008** details as follows:

*“Re: Staff Fixed Rate Mortgage 3.95%*

*Dear [redacted]*

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

*As you may be aware, [the Provider] removed tracker mortgage products for new customers on the 10<sup>th</sup> 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 per our contractual commitments to you and the terms and conditions of your agreement with us, this letter outlines your options.*

*It is very important to note that as we have introduced similar steps for customers, if we were to treat you as a staff member differently, it would be deemed preferential and would incur BIK. The options available to you now (with the exception of the Staff Preferential 4%) are all exempt from BIK.*

*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 your roll-over letter with the options outlined below.*

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### **Homeloans**

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

*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%.*

*Please note only staff on the 3.95% fixed rate can move the full amount of their mortgage into the 4%. This is an exception for this group of staff. For staff on all other products, normal limits apply.*

### **RIL (Residential Investment Loan)**

<i>Highly Competitive 2 year fixed rate</i>	<i>Currently 4.95%*</i>
<i>Variable LTV Rate</i>	<i>Currently 4.85%</i>

*If you do not respond to the roll-over letter, we will automatically roll your mortgage to the Variable LTV based rate, currently 4.85%.*

*These rates above are highly competitive and we continue our policy of offering our staff the best available customer rates.*

*A communication was issued on [Provider's intranet] on the 9th of October indicating that the Tracker Mortgage would be available on roll over – this preceded our final assessment on our withdrawal from Tracker Mortgages and represented the most accurate information available at the time. The subsequent assessment of the impact of the decision to remove the Tracker Mortgages has led to the outcome outlined in this letter. We apologise for any confusion this has caused.*

*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."*

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 would not in fact have a tracker option on their "roll-over letter".

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Prior to the expiry of the 2-year staff fixed interest rate in **January 2009**, the Provider's internal notes show that the Provider issued a **Product Review Notice** to the Complainants on **22 December 2008**. The Provider has submitted a copy of the **Mortgage Form of Authorisation** that issued to the Complainants prior to the expiry of the fixed interest rate period. The **Mortgage Form of Authorisation** details as follows:

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

<i>Selected Rate</i>	<i>Description</i>	<i>Rate</i>
<input checked="" type="checkbox"/>	STAFF H/L LTV VARIABLE (PDH)	3.75%
<input type="checkbox"/>	2 Year Fixed Staff PDH	4.450%"

The Complainants signed the **Mortgage Form of Authorisation** on **15 January 2009** and selected to apply a staff LTV variable rate to their mortgage loan account. I note from the mortgage loan account statements submitted in evidence that a rate of 3.75% was applied to the Complainants' mortgage loan account on **19 January 2009**.

The interest rates offered to the Complainants on expiry of the fixed interest rate period are in line with **General Condition 7 (b)** of the **Mortgage Loan Offer Letter** dated **23 August 2006** which provides that upon expiry of a fixed interest rate period, the Complainants could be offered a further fixed interest rate, and in the absence of selection of a rate by the Complainants, the mortgage loan account would convert to a variable rate of interest. There was no obligation on the part of the Provider, contractual or otherwise, to offer the Complainants a tracker interest rate on the expiry of the 2-year fixed interest rate period in **January 2009**. I further note that the Provider had withdrawn tracker interest rate mortgages from its mortgage product offering in **October 2008** therefore tracker interest rates were no longer available in **January 2009**.

The Provider submits that it was at all times open to the Complainants between **August 2006** and **10 October 2008** to approach the Provider to 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 to apply for a tracker interest rate. In any event it would have been a matter within the Provider's commercial discretion to decide whether it wished to accede to any such request for a tracker interest rate in circumstances where the Complainants had no contractual entitlement to one.

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I note that the First Complainant contacted the Provider by telephone in **January 2017** to query whether a more competitive interest rate could be applied to the Complainants' mortgage loan account. The Complainants submit that during this call, the Provider's representative indicated that the Complainants' mortgage loan account was previously on a tracker interest rate. A recording of this telephone call has been submitted in evidence by the Provider. Having considered the content of the call, I note that towards the end of the call, the First Complainant queried whether the Complainants' mortgage loan account formed part of the tracker mortgage review. I note that while the Provider's representative initially incorrectly indicated the Complainants' mortgage loan account was on a tracker interest rate in **2007**, the Provider's representative subsequently noted that in fact the Complainants' mortgage loan account was previously on a fixed interest rate of 3.95% and rolled to the Provider's standard variable interest rate in circumstances where tracker interest rates had been "*removed*" by the Provider. The Provider's representative furnished the First Complainant with the relevant contact details of the Provider's tracker mortgage team if he wished to have the mortgage loan account reviewed. I do not consider this discussion between the parties to have conferred any entitlement to a tracker interest rate on the Complainants.

Following consideration of the Complainants' mortgage loan documentation, it is clear that the **Mortgage Loan Offer Letter** dated **23 August 2006** 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** dated **23 August 2006** provided for a staff preferential variable interest rate of 3.50%. The evidence shows that the choice to take out the mortgage loan on the terms and conditions offered by the Provider pursuant to **Mortgage Loan Offer Letter** dated **23 August 2006** was a choice that was freely made by the Complainants. Moreover, the Complainants acknowledged that they fully understood the terms and conditions contained in the **Mortgage Loan Offer Letter** dated **23 August 2006**, to include the nature of the applicable interest rate. If they did not understand them, it was a matter for the Complainants to seek independent legal and/or financial advice in relation to the terms of the mortgage loan agreement.

The Complainants subsequently signed a **Mortgage Form of Authorisation** on **16 January 2007** to apply a staff 2-year fixed rate of 3.95% to the Complainants' mortgage loan account until **January 2009**. I am satisfied that the terms of this **Mortgage Form of Authorisation** together with the **Mortgage Loan Offer Letter** dated **23 August 2006** were clear as to what would transpire after the fixed interest rate period ended. Further, I do not consider the **Mortgage Form of Authorisation** to have conferred any entitlement to a tracker interest rate mortgage on the Complainants.

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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 staff 2-year 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%"*.

However, the Complainants' mortgage loan account was never on a tracker interest rate of ECB + 0.75% at any stage. Therefore, it is clear 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** did not apply to the Complainants' mortgage loan account.

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 in **2009** and the subsequent amendments to the Complainants' mortgage loan account were choices that were 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**

15 December 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.**