



<u>Decision Ref:</u>	2022-0104
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate throughout the life of the mortgage
<u>Outcome:</u>	Rejected

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

This complaint relates to a mortgage loan sub-account ending **3592** 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 Complainants' original mortgage loan account ending **6735** held with the Provider comprised two sub-accounts as follows:

- Sub-account ending **6735(01)** (previously referred to as mortgage loan account ending **4283**) was drawn down in **December 2005** on a discounted standard variable rate of 0.55% and which moved to the standard variable rate in **February 2007**; and
- Sub-account ending **6735(02)** (previously referred to as mortgage loan account ending **3592**) was drawn down in **July 2006** on a 5-year fixed interest rate of 4.45% and which defaulted to a standard variable interest rate in **May 2011**.

The Complainants' Case

The Complainants submit that they signed a "*fixed rate agreement*" in **2006** which stated that sub-account ending **3592** would roll on to a tracker interest rate on the expiry of the fixed rate period. The Complainants state that they were not offered a tracker interest rate on the expiry of the fixed interest rate period in or around **May 2011**.

The Complainants contend that they have requested on numerous occasions for the Provider to supply them with a copy of the “fixed rate agreement”. The Complainants maintain that the Provider confirmed that this “key document is missing”. The Complainants state that this is “a signed form which stated that a tracker would be offered when an agreed fixed rate period ended.”

The Complainants detail that they feel that the Provider, “has not acted in a fair and transparent manner with regards to the Tracker Mortgage Examination.”

The Complainants are seeking the following :

- a) The Provider to “fairly” review their mortgage loan account in a transparent manner “using the 2006 documents”;
- b) The Provider to offer them a tracker interest rate on their mortgage loan account; and
- c) The Provider to retrospectively refund any overpayments made.

The Provider’s Case

The Provider outlines that mortgage loan account ending **6735(01)** was previously referenced as sub-account ending **4283** and mortgage loan account ending **6735(02)** was previously referenced as sub-account ending **3592**.

The Provider submits that the Complainants’ mortgage sub-account ending **4283** drew down in **December 2005** on a discounted standard variable rate of “SVR - 0.55%”. The Provider states that the mortgage sub-account then transitioned to a standard variable rate in **February 2007** upon expiry of the initial discounted period. The Provider details that it remained on the Provider’s standard variable rate until **February 2011** at which time the Complainants selected a fixed interest rate of 4.95% to apply until **31 October 2015**, when it then defaulted to the Provider’s standard variable rate in **November 2015**.

The Provider details that in **July 2006**, the Complainants requested to transfer an amount of €500,000.00 from the balance of their mortgage sub-account ending **4283** to a fixed interest rate of 4.45% to apply until **30 April 2011**. The Provider maintains that this action split the Complainants’ mortgage loan into two separate mortgage sub-accounts.

The Provider states that sub-account ending **4283** *“related to the portion of the mortgage loan that remained on a Discounted Standard Variable Rate of SVR - 0.55%”* and that sub-account ending **3592** was *“a new sub-account created in respect of the portion of the mortgage loan placed on the fixed interest rate of 4.45%, fixed until 30 April 2011.”*

The Provider submits that despite their extensive searches, it has been unable to locate a copy of the Fixed Rate Transfer Authority which facilitated the transaction in respect of the creation of sub-account ending **3592** in **July 2006**. The Provider contends that while tracker interest rates were available from the Provider at this time, *“at no point did [the Provider] offer a product whereby a customer could fix their mortgage loan for an initial period, and upon expiry of this fixed interest period, the mortgage account would move or default to a tracker interest rate.”* The Provider further contends that as *“tracker interest rates were no longer available from [the Provider] when the initial fixed interest rate period expired in April 2011, allied to the fact that the customers had no contractual or other entitlement to a tracker interest rate on this sub-account, [the Provider] was not obliged to offer the customers a tracker interest rate at that time.”*

The Provider details that tracker interest rates were available for selection from **late 2001** until **late 2008** when they were withdrawn from the market. The Provider submits that in **July 2006** when the Complainants converted a portion of their mortgage loan to a fixed interest rate, it was the Provider’s practice to outline the range of interest rate options that were available to customers (to include fixed, variable and tracker interest rates). The Provider states that all lending was subject to credit criteria, eligibility, and terms and conditions.

The Provider contends that it *“provided information to customers, when requested, in relation to the various interest rate options that may have been available at that time.”* The Provider states that its staff *“were not authorised to and did not provide advice to customers as to what interest rate to select.”* The Provider submits that the decision as to what interest rate to select rested with the customers based on what suited their individual circumstances. The Provider further submits that the Complainants in this instance selected a fixed interest rate of 4.45%, fixed until **30 April 2011**.

The Provider details that on **15 April 2011** it wrote to the Complainants, by way of a Product Expiry Letter, advising of the upcoming end of the fixed interest rate period. The Provider states that this *“also outlined the various interest rates, fixed and variable, which were available to the customers at that time.”* The Provider submits a Rate Change Letter of Authority form, was enclosed with the letter, for the Complainants to complete, should they have wished to avail of any of the alternative interest rate options outlined in the letter.

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The Provider explains that tracker interest rates were withdrawn from the market in **late 2008** and for this reason this interest rate type was not included as an option in the letter of **15 April 2011**. The Provider states that in circumstances where the Complainants did not select one of the interest rate options outlined in the Product Expiry Letter, their mortgage sub-account ending **3592** defaulted to the Provider's standard variable rate.

The Provider submits that *"it is important to clarify"* that it did not automatically move any customer's mortgage account to a fixed interest rate. The Provider submits that customers had to *"proactively request this and in doing so complete and sign the required instruction form (in this case the Fixed Rate Transfer Authority form)."* The Provider further submits that it *"could not have amended the customers' mortgage sub-account without receipt or sight of this form signed by the customers."* The Provider maintains that it does *"not believe that the customers could have formed any expectation that their mortgage sub-account would have defaulted to a tracker interest rate when the initial fixed interest rate period expired in April 2011."*

The Provider maintains that it carried out a thorough examination of the Complainants' mortgage loan documentation and all product movements in the Complainants' mortgage journey to ascertain if this created a right to or an expectation of a tracker interest rate. The Provider states that following this review, and in line with the Central Bank's Framework, the Provider concluded that the Complainants' mortgage sub-account ending **3592** was not impacted under the Tracker Mortgage Examination.

The Provider details that the outcome was based on the fact that the Complainants' mortgage sub-account ending **3592** drew down on a fixed interest rate of 4.45%, fixed until **30 April 2011** and then defaulted to a standard variable rate. The Provider asserts that there *"was no entitlement for this mortgage sub-account to move to a tracker interest rate at the end of the fixed interest rate period in April 2011."*

The Complaints for Adjudication

The complaints for adjudication are as follows:

- a. The Provider failed to retain documentation regarding the *"fixed rate agreement"* in respect of mortgage loan sub-account ending **3592** signed in or around **July 2006**; and
- b. The Provider failed to offer the Complainants a tracker interest rate for mortgage loan sub-account ending **3592** on the expiry of the fixed interest rate period in or around **May 2011**.

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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 18 February 2022, outlining the preliminary determination of this office 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, the final determination of this office is set out below.

Before dealing with the substance of the complaint, I note that the Complainants included reference to a data access request made to the Provider in their submissions to this Office. In circumstances where this Office is not the correct organisation to deal with this element of the complaint, it does not form part of this investigation and decision.

In order to determine the complaint, it is necessary to review and set out the relevant provisions of the Complainants' mortgage loan documentation relating to mortgage loan sub-accounts ending **4283** and **3592**. It is also necessary to consider the details of certain interactions between the Complainants and the Provider between **2005** and **2011**.

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The Provider issued an **Offer of Advance** dated **28 November 2005** for mortgage loan account ending **4283** which details as follows:

*"1. Amount of Credit Advanced: 640,000.00 Eur
2. Period of agreement: 35 years 0 months
3. Number of repayment instalments: 420*

*...
Interest rate : 2.9500%*

*...
WARNING*

...

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

The **Special Conditions** of the mortgage loan detail as follows:

"The interest rate as quoted represents a reduction of 0.55% on the present [Provider] Variable Home Loan Rate. The [Provider] Variable Home Loan Rate less 0.55% will apply from initial date of drawdown until 31 November 2006 after which time your interest rate will revert to the then [Provider] Variable Home Loan Rate."

The Complainants signed the **Acceptance and Authority** on **02 December 2005**, in the presence of their solicitor, on the following terms:

"1. I/We the undersigned accept the within Offer of Advance on the terms and conditions set out above and overleaf and in the Bank's standard form of Mortgage.

2. I/We hereby irrevocably authorise my/our Solicitor to give the Undertaking referred to in clause 4(a) of the General Conditions and to do all things necessary to comply with the Undertaking.

3. I/We hereby irrevocably authorise the Bank to pay the Advance through my/our solicitor."

I note that the **Offer of Advance** envisaged that a discounted variable interest rate of 2.95% would apply to the mortgage account until **31 November 2006**, and at the end of the discounted variable interest rate period, the mortgage loan account would revert to the Provider's variable home loan rate of interest.

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It is clear that the Complainants accepted and signed the Offer of Advance dated **28 November 2005** on **02 December 2005** and mortgage loan account ending **4283** was subsequently drawn down.

It appears that the Complainants approached the Provider in **July 2006** seeking to apply a 5-year fixed interest rate of 4.45% to €500,000.00 of their borrowings until **30 April 2011**. I have not been provided with the particulars of this request however I do not believe that this is in dispute between the parties.

In order to facilitate this request, mortgage loan sub-account ending **3592** (now known as mortgage loan account ending **6735(02)**) was created to allow the €500,000 portion of the Complainants' mortgage loan to transfer to a fixed interest rate until **30 April 2011** and the balance of the loan amount remained on a discounted standard variable interest rate under mortgage sub-account ending **4283** (now known as mortgage loan account ending **6735(01)**). The mortgage loan account statements furnished in evidence in relation to mortgage sub-accounts ending **4283** and **3592**, show that a capital credit of €500,000.00 was taken from mortgage sub-account ending **4283** on **13 July 2006** and mortgage sub-account ending **3592** was opened on **14 July 2006** with an opening balance of €500,000.

The Complainants submit that they signed a "*fixed rate agreement*" in **2006** which stated that sub-account ending **3592** would roll on to a tracker interest rate on the expiry of the fixed rate period. The Complainants have provided no evidence of any such agreement. The Provider however submits that the Complainants completed a **Fixed Rate Authority Transfer Form** which outlined that the Provider could offer a further fixed rate or alternative suitable rate options or if such options were not made available by the Provider or if they were made and were not accepted by the Complainants, then the variable Home Loan rate would apply.

The Provider has also outlined in its submissions that "*at no point did [the Provider] offer a product whereby a customer could fix their mortgage loan for an initial period, and upon expiry of this fixed interest period, the mortgage account would move or default to a tracker interest rate*".

The Provider explains that despite extensive searches, it has been unable to locate a copy of the **Fixed Rate Authority Transfer Form** completed and signed by the Complainants in **July 2006**.

I am disappointed to note that a copy of this form that purportedly issued to the Complainants in **July 2006** has not been furnished in evidence to this office by the Provider. **Provision 49** of the **Consumer Protection Code 2006** (CPC 2006) governs retention of records and was not effective until **01 July 2007**. In these circumstances, while I am disappointed that the Provider has failed to retain a copy of the form, there was no breach of the **CPC 2006**.

However, the Provider has furnished this office with a **Fixed Rate Authority Transfer Form** template letter which was in use at that time.

The **Fixed Rate Authority Transfer Form** template letter details as follows:

"The Fixed Rates currently available are:

- *Fixed Rate until [redacted by Provider]*
- *Fixed Rate until [redacted by Provider]*
- *Fixed Rate until [redacted by Provider]*

...At the end of the fixed period: [the Provider] may offer to continue the advance for such a period and at such a fixed rate as it may decide. It may also offer alternative available products. If such offer is made and you elect to accept then you must do so in writing, your acceptance to be signed by all parties to the mortgage and to be received by [the Provider]. If no such offer is made or if an offer is made and no acceptance received as prescribed above, then, from the day following the expiry of any option selected above, the [Provider] Home Loan Rate shall apply in accordance with General Condition 2 of the Offer of Advance originally accepted by you being in the Bank's General Conditions Relating to Advances by [the Provider], which varies Interest Rate, and the said General Conditions relating to the Advances shall be construed accordingly."

Before the expiry of the fixed rate period on mortgage loan account ending **3592**, the Provider issued a **Product Expiry Letter** dated **15 April 2011** which detailed as follows:

*"The fixed rate period on your mortgage is coming to an end on **30/04/2011**, so now it's time to start thinking about your next mortgage deal. Any borrowings you have on this fixed rate will automatically roll to the **Standard Variable Rate (APR 4.4%)**. Your monthly repayment on this rate is included in the table overleaf."*

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The **Product Expiry Letter** further outlined the range of options “currently available” to the Complainants to choose from. These included various fixed and variable interest rate options.

In the absence of a rate selection by the Complainants, the Provider subsequently issued a letter to the Complainants on **17 June 2011** which detailed as follows:

“We wrote to you recently to advise that the product on one or more of your mortgage accounts was expiring. As we have not received any response from you, any accounts on an expiring product have been transferred to our Standard Variable Rate, currently 4.35%.

....

If you would like to discuss the options available to you, please contact our Mortgage Services Team on [telephone number].”

I have not been provided with any evidence that would indicate that the Complainants raised any concerns with the Provider when their mortgage loan account defaulted to the Provider’s standard variable interest rate in **2011**. I note that the Complainants’ mortgage loan account ending **3592** remained on the Provider’s standard variable rate until **29 August 2018**, at which point the Complainants redeemed their mortgage loan account.

Having considered the Complainants’ mortgage loan documentation in its entirety, it appears to me that the Provider was under no obligation to offer the Complainants a tracker interest rate option on expiry of the fixed interest rate period in **2011**. In order for the Complainants to have a contractual right to a tracker interest rate on the mortgage loan sub- account ending **3592** (now known as mortgage loan account ending **6735(02)**), that right would need to have been specifically outlined in the mortgage loan documentation, that was signed by the parties. However, no such right was set out in writing in the **Offer of Advance** (which only provided for a discounted variable interest rate and a standard variable interest rate) or the **Fixed Rate Authority Transfer Form** that was purportedly completed by the Complainants in **July 2006**. Given the nature of the contractual relationship between a mortgagor and mortgagee, it is only right that the mortgagor must consent to any change in the contractual terms before a lender can implement any such change, therefore I accept that a **Fixed Rate Authority Transfer Form** was completed in order to apply a fixed interest rate.

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Neither party has furnished this Office with a copy of the **Fixed Rate Authority Transfer Form** or “*fixed rate agreement*” that was purportedly signed at the time in **2006**. In these circumstances, the best evidence that is available at this time is the template **Fixed Rate Authority Transfer Form** that the Provider has furnished to this Office. This evidences the Provider’s position that it did not offer tracker interest rates as a default rate on fixed rate loans as a matter of policy at the time, and rather offered alternative terms when a customer, such as the Complainants, sought to apply a fixed interest rate to their mortgage loan. I have been provided with no evidence to support the Complainants’ contention that in **2006** they were guaranteed that a tracker interest rate would be applied to their mortgage loan at the end of the fixed interest rate period in **April 2011**.

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



**JACQUELINE O'MALLEY
HEAD OF LEGAL SERVICES**

14 March 2022

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.

