



<b><u>Decision Ref:</u></b>	2021-0317
<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 Failure to offer a tracker rate at point of sale
<b><u>Outcome:</u></b>	Rejected

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

This complaint relates to four mortgage loan accounts held by the Complainants with the Provider. The mortgage loan accounts that are the subject of this complaint were secured on the Complainants' private dwelling house.

- Mortgage loan sub-account ending **7083** was for the loan amount of IR£36,400 and the term of the loan was 20 years. The Offer of Advance dated **5 January 1990** detailed that the applicable interest rate was "*11.95 % (Subject to variation)*". This loan account was redeemed in full in **January 2010**.
- Mortgage loan account ending **0895** was for the loan amount of IR£12,500.00 and the term of the loan was 12 years. The Offer of Additional Advance dated **27 April 1998** detailed that the applicable interest rate was a variable rate of 7.5%. This loan account was redeemed in full in **June 2010**.
- Mortgage loan account ending **4229** was for the loan amount of €30,000 and the term of the loan was 20 years. The Offer of Additional Advance dated **30 August 2002** detailed that the applicable interest rate was a variable rate of 4.2%. This loan account was redeemed in full in **October 2010**.

- Mortgage loan account ending **8489** was for the loan amount of €20,000 and the term of the loan was 20 years. The Offer of Additional Advance dated **23 November 2005** detailed that the applicable interest rate was a tracker interest rate of 2.95 (ECB + 0.95%). This loan account was redeemed in full in **October 2010**.

### The Complainants' Case

The Complainants detail that they have held a mortgage with the Provider since **1990**. They outline that since then they drew down 3 additional mortgages to fund works to the house.

The Complainants submit that in **2010**, they sought additional credit in the sum of €100,000 from the Provider in order to carry out major works to their house. They submit that the Provider stipulated that in order for them to avail of the additional loan funds requested, they would have to agree to move their existing four mortgage sub-accounts from a tracker interest rate to the Provider's "*standard APR*" rate, which they submit was "*significantly higher*" not only than the tracker rate but also the rates being offered to new customers.

The Complainants submit that they complained about this to their local Provider branch and were informed that this "*was now the [Provider's] policy*" and "*there was nothing [the Complainants] could do*".

The Complainants state that they should have been "*allowed to retain the tracker mortgage*" on their existing mortgage sub-accounts and for the new loan amount to be placed on the Provider's standard variable rate.

The Complainants further submit that a third party Provider offered them a lower interest rate for the same loan amount. They state when they asked the Provider to match the interest rate offered by the third party Provider, it "*refused*" to do so.

The Complainants submit that consequently, they were "*forced*" to "*move*" their mortgage to the third party Provider. They state that this has resulted in the loss of the tracker interest rate on their mortgage sub-accounts with the Provider. They further state that the cost of moving their mortgage was approximately €1,000.

The Complainants state they are "*incredulous*" that the Provider "*have no records of my meeting with the branch manager*" or any other correspondence in relation to the loan application in **2010**.

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The conduct complained of is as follows;

- (a) The Provider would only approve the Complainants' request for additional funding on the condition that they agreed to move their existing mortgage sub-accounts from a tracker interest rate to the Provider's standard variable interest rate; and
- (b) The Complainants were "*forced*" to switch their mortgage to another provider, which resulted in the loss of their tracker interest rate and payment of the costs of moving provider.

The Complainants are seeking;

- (a) Compensation for the difference in the interest rate being paid and the tracker interest rate that would have been paid over the lifetime of the mortgage loan; and
- (b) A refund of the costs incurred by the Complainants in moving their mortgage to another provider.

### **The Provider's Case**

The Provider states that tracker rates were available from the Provider from **late 2001** until **late 2008** when they were withdrawn from the market.

The Provider submits that the Complainants' mortgage loan ending **6424** comprised of 4 sub-accounts, as follows:

- Mortgage sub-account ending **7083** drew down in **September 1990** on a standard variable interest rate over a 20-year term. A tracker interest rate was applied to this sub-account in **August 2003** and the account was redeemed in **January 2010**.
- Mortgage loan sub-account ending **0895** drew down in **May 1998** on a standard variable rate over a term of 12 years. A tracker interest rate was applied in **August 2003** and the account was redeemed in **June 2010**.
- Mortgage loan sub-account ending **4229** drew down on a tracker interest rate in **October 2002** over a 20-year term.
- Mortgage loan account ending **8489** drew down on a tracker interest rate in **January 2006**, over a 20-year term.

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The Provider states that the latter two mortgage sub-accounts ending **4229** and **8489** were redeemed simultaneously as one transaction in **October 2010**.

The Provider submits that the Complainants' proposal for an additional mortgage loan in **2010** did not progress to the full mortgage application stage, and that the Provider would not have sought completion of the full mortgage application and supporting documentation in circumstances whereby the Provider was advised that the Complainants' proposal was not proceeding. It states that the Complainants were not provided with any formal mortgage offer of advance in **2010**.

The Provider details that it has no verbal or written records of information given to the Complainants that they would be required to move their existing mortgage accounts from a tracker interest rate to the Provider's standard interest rate if they wished to draw down additional credit in **2010**. It states that it holds no records relating to any formal discussions with the Complainants or any information submitted by the Complainants.

The Provider further states that it is important to note that there was no onus on the Provider to offer additional, or other, credit facilities in relation to any proposal submitted, rather it was a matter for the Provider's "*commercial discretion as to whether or not to do so.*"

The Provider states that the Provider has a responsibility to ensure that providing new or increased credit facilities does not allow a customer to become over indebted whereby they may experience financial difficulties in making repayments or covering ongoing commitments, and as such all credit facilities were subject to repayment capacity, financial status checks and an affordability assessment. It considers that "*any decisions that may have been reached in relation to the customers' mortgage proposal received in 2010 were credit decisions that the Bank was entitled to make in accordance with its own credit policy and commercial discretion.*"

### **The Complaints for Adjudication**

The complaints for adjudication are as follows;

- (a) The Provider would only approve the Complainants' request for additional funding on the condition that they agreed to move their existing mortgage sub-accounts from a tracker interest rate to the Provider's a standard variable interest rate; and
- (b) The Complainants were "*forced*" to move Providers, resulting in the loss of their tracker interest rate and incurring costs for doing so.

## 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 August 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.

At the outset, it is important to point out the jurisdiction of this office in complaints regarding the provision of credit. This Office can investigate the procedures undertaken by the Provider regarding the credit application in this matter under the **Consumer Protection Code 2012** but will not investigate the details of any negotiation of the commercial terms of a mortgage which is a matter between the Provider and the Complainant, and does not involve this office, as an impartial adjudicator of complaints. This Office will not interfere with the commercial discretion of a financial service provider, unless the conduct complained of is unreasonable, unjust, oppressive or improperly discriminatory in its application to a Complainant, within the meaning of **Section 60 (2) of the Financial Services and Pensions Ombudsman Act 2017**.

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In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainants' mortgage loan documentation. It is also necessary to consider the details of certain interactions between the Complainants and the Provider in **2010**.

**Mortgage sub-account ending 7083**

The **Offer of Advance** dated **5 January 1990** in respect of mortgage sub-account ending **7083** detailed as follows:

*"Acquisition Price: £40,450*

*Amount of Advance: £36,400*

*Term : 20 years*

*Interest Rate (at date of offer): 11.95 %(Subject to variation)"*

The **General Conditions Relating to Advances Made by [the Provider] House Mortgages Sections** detail as follows;

*" ...*

*The monthly repayments will vary if changes in the Home Lan Interest Rate occur. Variations in [the Provider's] Home Loan Rate may occur at any time and notice of each variation will be published at least once in a National Daily Newspaper."*

The Complainants signed the **Acceptance and Authority** on **21 August 1990** 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.  
..."*

I note that the Offer of Advance provided for a variable interest rate of 11.95%. The variable rate in this case was a variable rate which could be adjusted by the Provider.

The Provider submits that a tracker interest rate of ECB + 0.95% was applied to the mortgage account ending **7083** on **1 September 2003**. I note that the Provider issued a letter to the Complainants on **26 August 2003**, detailing as follows:

*"Further to your instructions, I wish to confirm that your original Mortgage has now been converted to the Flexible rate, currently 2.95% (ECB 2.00% plus a margin of 0.95%).*

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*Your net monthly repayment (after deduction of TRS if applicable) at this revised rate will be €375.89 on 1<sup>st</sup> September 2003.*

*If you have any queries or require any further information, please do not hesitate to contact this office."*

The Provider has submitted that the mortgage loan sub-account ending **7083** was redeemed in **January 2010**. No documentary evidence of the redemption of the mortgage account has been furnished in evidence. Nonetheless it does not appear to be disputed between the parties that this is what occurred.

**Mortgage sub-account ending 0895**

The **Offer of Additional Advance** dated **27 April 1998** in respect of mortgage sub-account ending **0895** detailed as follows;

*"1. Amount of Credit Advanced: £12,500.00*

*2. Period of agreement: 12 years 0 months*

*...*

*Interest rate: 7.5000%*

*...*

WARNING

*...*

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

The **General Conditions Relating to Additional Advances** detail as follows;

*"...*

*The monthly repayments will vary if changes in the Home Loan Interest Rate occur. Variations in [the Provider's] Home Loan Rate may occur at any time and notice of each variation will be published at least once in a national daily newspaper. Interest is calculated on a compounded basis."*

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The Complainants signed the **Acceptance** on **29 April 1998** on the following terms:

*"I/We the undersigned accept the within Offer of Additional Advance on the terms and conditions set out above and overleaf."*

It is clear that the Offer of Advance envisaged a variable interest rate of 7.5% to be applied to the mortgage sub-account which could be adjusted by the lender from time to time.

The Provider submits that a tracker interest rate of ECB + 0.95% was applied to the mortgage account ending **0895** on **1 September 2003**. As outlined above, the Provider wrote to the Complainants on **26 August 2003**, detailing as follows:

*"Further to your instructions, I wish to confirm that your original Mortgage has now been converted to the Flexible rate, currently 2.95% (ECB 2.00% plus a margin of 0.95%).*

*Your net monthly repayment (after deduction of TRS if applicable) at this revised rate will be €375.89 on 1<sup>st</sup> September 2003.*

*If you have any queries or require any further information, please do not hesitate to contact this office."*

The **Historic Mortgage Statements** provided in evidence show that the mortgage account **0895** was redeemed on **1 June 2010**. I have not been provided with any other documentary evidence in relation to the redemption of this mortgage sub-account.

**Mortgage sub-account ending 4229**

The **Offer of Additional Advance** dated **30 August 2002** in respect of mortgage sub-account ending **4229** detailed as follows;

*"1. Amount of Credit Advanced: 30,000.00 Eur  
2. Period of agreement: 20 years 0 months*

...

*Interest rate: 4.2000%*

...

WARNING

...

/Cont'd...



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

The Special Conditions attaching to the **Offer of Additional Advance** details as follows;

*"The rate of the [Provider's] Flexible Mortgage tracks ECB rate with a margin which is fixed for the life of the Home Loan term. The margin for this Home Loan is ECB rate plus 0.95%. This margin is dependent on the amount borrowed and the value of the property to be mortgaged."*

The Complainants signed the **Acceptance** on **10 September 2002** on the following terms:

*"I/We the undersigned accept the within Offer of Additional Advance on the terms and conditions set out above and overleaf."*

It is clear that the Special Conditions of the Offer of Advance provided for a tracker variable rate which would track the ECB rate with a margin of ECB + 0.95% fixed for the life of the loan term.

**Mortgage sub-account ending 8489**

The **Offer of Additional Advance** dated **23 November 2005** in respect of mortgage sub-account ending **8489** (previously referenced **6424**) detailed as follows;

- 1. Amount of Credit Advanced: 20,000.00 Eur*
- 2. Period of agreement: 20 years 0 months*

...

*Interest rate: 2.9500%*

...

WARNING

...

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

The **General Conditions Relating to Additional Advances** detail as follows;

"2.

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...

*The monthly repayments will vary if changes in the Home Loan Interest Rate occur. Variations in [the Provider's] Home Loan Rate may occur at any time and notice of each variation will be published at least once in a national daily newspaper. Interest is calculated on a compounded basis."*

The Complainants signed the **Acceptance** of the Offer of Additional Advance on **30 November 2005** on the following terms:

*"I/We the undersigned accept the within Offer of Additional Advance on the terms and conditions set out above and overleaf."*

It appears to me that the Offer of Additional Advance provided for a variable interest rate which could be adjusted by the Provider from time to time.

However, I note that the Provider has submitted that a tracker interest rate of ECB + 0.95% was applied to mortgage sub-account ending **8489** from the date of drawdown. It does not appear to be disputed between the parties that this is the case.

The **Historic Annual Statement** provided in evidence indicates that mortgage loan sub-account ending **8489** drew down on **23 January 2006**.

A letter from the Provider to the Complainants' solicitors dated **23 September 2010** states:

*"Further to your recent enquiry, I wish to advise that the Redemption Figure for the House Loan at House Mortgage Section as at 23/09/10 is Euro 37,274.26 with interest accruing at Euro 1.99 per day. This figure assumes that the most recent monthly repayment, which would have been presented by Direct Debit, has been paid. Should this direct debit be unpaid subsequent to this letter, the amount of that repayment will be due in addition to the redemption figure quoted above.*

*The amount quoted is based on receipt of the redemption cheque at this office on the above date otherwise appropriate daily interest must be added. Where it is anticipated that a Redemption will take place outside this current month, fresh redemption figures should be sought nearer the relevant date in the interest of precision."*

A document entitled **Redemption Enquiry** dated **4 October 2010** details that the outstanding mortgage balance on the Complainants' sub-account ending **4229** was €20,471.86 and €16,517.84 remaining on sub-account ending **8489**.

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I note from the **mortgage loan statements** that the two mortgage sub-accounts ending **4229** and **8489** were redeemed on **4 October 2010**.

It appears that on an unspecified date in **2010** the Complainants were seeking a further advance of funds from the Provider. It is not clear to me from the evidence whether that advance of funds would be secured against the equity in the Complainant's primary dwelling home which was the security for the Complainants' then existing mortgage sub-accounts held with the Provider.

I have not been furnished with any documentary evidence of any discussions which may have taken place between the Provider and the Complainants in relation to the Complainants' proposal for a further mortgage loan.

The Provider has stated that it *"holds no records relating to any formal discussions or information provided to the customers after being informed in 2010 that the customers' proposal was not proceeding to a full mortgage application."*

**Provision 49 of the Consumer Protection Code 2006** outlines as follows;

*"A regulated entity must maintain up-to-date consumer records containing at least the following*

- a) a copy of all documents required for consumer identification and profile;*
- b) the consumer's contact details;*
- c) all information and documents prepared in compliance with this Code;*
- d) details of products and services provided to the consumer;*
- e) all correspondence with the consumer and details of any other information provided to the consumer in relation to the product or service;*
- f) all documents or applications completed or signed by the consumer;*
- g) copies of all original documents submitted by the consumer in support of an application for the provision of a service or product; and*
- h) all other relevant information [and documentation] concerning the consumer.*

*Details of individual transactions must be retained for 6 years after the date of the transaction. All other records required under a) to h), above, must be retained for 6 years from the date the relationship ends. Consumer records are not required to be kept in a single location but must be complete and readily accessible."*

In circumstances where it is submitted that the proposal submitted by the Complainants in **2010** did not proceed to formal application stage, it does not appear that the Provider was required to retain these documents for a period longer than six years from the date the application was received.

Notwithstanding this, it is important for the Complainants to be aware that the Provider was under no obligation to offer them any mortgage or any particular type of mortgage in **2010**. It was a matter for the Provider to decide firstly, if it was willing to offer the Complainants any additional borrowing at the time and secondly, how that offer would be structured.

Whilst I have no reason to doubt the Complainants' recollection, no documentary evidence has been furnished to this office which shows that the Provider informed the Complainants that it would grant their new mortgage application on the condition that the interest rate on the Complainants' existing mortgage accounts was amended from the tracker interest rate to the "*standard APR*" rate.

In any event, it is important for the Complainants to be aware that setting and applying the Provider's lending criteria is a matter that is within its own commercial discretion. There is no evidence before me which shows that the Provider acted in a matter that was unreasonable, unjust, oppressive or improperly discriminatory in dealing with the Complainants' proposal in **2010**.

I note that the Complainants have also submitted that the Provider "*refused to match*" the interest rate they were offered by a third party provider. It is important for the Complainants to understand that the fact that the Complainants were offered a particular interest rate by a separate third party provider did not in any way create an obligation on the Provider to offer the Complainants the same interest rate on a new loan with the Provider.

I do not accept that the Complainants were "*forced*" by the Provider to "*move*" their mortgage to a third party Provider. The choice to redeem the existing mortgage loan sub-accounts in **2010** and take out a new loan on the terms and conditions offered by a third party Provider in **2010** was a choice that was freely made by the Complainants of their own volition.

The Complainants submitted a proposal to the Provider for a further mortgage loan in **2010**. The Provider was entitled and indeed obliged under the **Consumer Protection Code 2006** to assess the suitability and affordability of new lending to the Complainants.

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If it is the case that the Provider was willing to lend the Complainants the amount that they wanted to borrow subject to certain conditions, this was a commercial decision that the Provider was entitled to make. If the Complainants did not want to pursue this option because they were unhappy with the proposed interest rate amendment to be applied to the existing mortgage loans, they could have, and did, decide not to accept this proposal. There is no evidence before me that the Provider acted in a matter that was unreasonable, unjust, oppressive or improperly discriminatory in assessing the Complainants' proposal in **2010**.

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 September 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,**

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and

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

