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Decision Reference: 2020-0103

Complainant unhappy with compensation for not being offered a tracker interest rate at the end of a fixed interest rate period

Susan accepted and signed a mortgage loan offer letter in March 2007 which provided for an initial 3-year fixed interest rate. Susan submitted that under the terms and conditions of the offer letter the bank was contractually obliged to offer her *'the then prevailing tracker rate in April 2010 when [the] fixed rate period expired'*. However, when the fixed interest rate expired in April 2010, Susan was not given the option of a tracker interest rate.

In 2017, as part of the Central Bank directed Tracker Mortgage Examination, the bank identified that a failure had occurred on Susan's account, because the terms and conditions of Susan's mortgage account state that at the end of a fixed rate period she had the option to choose from the then prevailing fixed, variable or tracker interest rates. When the fixed interest rate on Susan's account expired in 2010, the bank had withdrawn tracker rates. Because of this, Susan did not have the option of choosing the then prevailing tracker rate at that time.

The bank detailed that the reason it withdrew tracker interest rates from late 2008 until late 2013 *'was because this rate type would have been prohibitively expensive'*. It stated that as a result, Susan did not suffer any financial detriment as a result of the prevailing tracker not being available during that period. The bank, described the matter to be a *'service failure'* and made a compensation payment of €1,615 to Susan.

In July 2018, Susan appealed the compensation offering to the Independent Appeals Panel established as part of the tracker mortgage examination. The Appeals Panel decided in February 2019 that the appeal was unsuccessful. Susan's complaint was then progressed with the Ombudsman.

Susan argued that although the bank was entitled to change the prevailing tracker interest rate, it was not entitled to withdraw it.

She said that just because the bank stopped offering tracker interest rates to customers between 2008 and 2013 that the prevailing tracker interest rate *'did not vanish into thin air'*. She described the failure of the bank to offer her a tracker rate upon expiry of the fixed rate period in April 2010 as *'a breach of an inherent and fundamental element of the contract'* as opposed to the bank's description of the conduct as a *'service failure'*.

Susan further submitted that the bank had not *'provided any evidence to support its assertion that the Tracker interest rate would have been more expensive than their Variable or Fixed rates which were available during that time'*. She said that a tracker interest rate had the exact same costs as a standard variable rate mortgage, stating *'They are funded from the same sources. The cost of risk is the same. The cost of capital is the same.'*

Susan sought to have the interest rate of ECB + 1.5% applied to her mortgage loan account backdated to April 2010; a refund of the interest overcharged; and compensation at the rate of 15% of the overcharged amount on her mortgage loan account.

The bank responded that because it withdrew tracker interest rates, it was unable to offer Susan a tracker interest rate when her fixed interest rate period ended in April 2010 and that any prevailing tracker interest rate that would have existed in April 2010, would have been much more expensive than the variable rates that were available during that time. The bank submitted since there was no prevailing tracker interest rate available generally by the bank, by not having one to offer *'there was a service failure on the [bank's] part, but there was no breach of contract'*.

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In its submission to the Ombudsman, the bank detailed that to retrospectively calculate what the 'prevailing' tracker rate would have been in 2010, if it had set one at the time, it 'used an international standard mortgage pricing model and the best available objective information to estimate what the prevailing margin and rate would have been at the time, had the bank maintained the rate'. The bank submitted that components such as: (a) funding costs; (b) capital risk costs; (c) capital costs; and (d) operating costs, were used in calculating the estimate.

The Ombudsman found that the bank's offer of redress of €1,615 to Susan for its failure on her mortgage loan account was totally inadequate. The Ombudsman was of the view that the bank failed to comply with an important contractual provision of Susan's mortgage loan in April 2010 by not giving her the option of conversion to a 'tracker interest rate mortgage loan' at the 'then prevailing rate'. Further, and following from its breach, he found that the bank had sought to rely on a sophisticated and unmerited construction of the phrase 'then prevailing rates' in order to deny Susan her contractual rights. The bank initially denied there was any issue with its conduct in April 2010 and subsequently sought to downplay the severity of the breach of contract by classifying it as a 'service failure' in March 2018. The Ombudsman was of the view that the bank's proposed remedy to the breach of contract was unreasonable.

The Ombudsman further found that it was unreasonable for the bank to attempt to retrospectively create the tracker interest rate margin that it argued it would have offered Susan when the fixed interest rate period on the mortgage loan account expired in April 2010, by using post-breach factors that could not have been known to it in April 2010.

The Ombudsman upheld this complaint and directed that the bank apply a once off reduction (write down) of 12% off the capital balance on Susan's mortgage loan account as it stood at the end of the fixed interest rate period which expired on 29 April 2010 (approximately €314,000). He also directed the bank to repay Susan to an account of her choosing, the difference between (1) the amount of interest she actually paid from 30 April 2010 to date, and (2) the amount of interest that she would have paid at the same rate on the reduced (written down) capital balance from 30 April 2010 to date.