



<b><u>Decision Ref:</u></b>	2021-0512
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Fixed Rate
<b><u>Conduct(s) complained of:</u></b>	Maladministration (mortgage) Delayed or inadequate communication Level of contact or communications re. Arrears Complaint handling (Consumer Protection Code) Dissatisfaction with customer service Failure to process instructions Maladministration Misrepresentation (at point of sale or after) Refusals (banking) Maladministration (mortgage) Wrongful consideration of forbearance request
<b><u>Outcome:</u></b>	Rejected

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

The complaint concerns the Complainants' mortgage accounts.

**The Complainants' Case**

The first Complainant submits that she was planning to downsize her property business in an orderly fashion and deemed it necessary to carry out extension work ahead of going to the market for one of the properties (**Property A**) to maximise sale proceeds. The first Complainant submits that she sent a letter dated **7 February 2018** to the Provider requesting permission to sell one of her properties (**Property B**) and have mortgage account number 52518\*\*\*\* (**the First Mortgage**) broken down and apportioned between four secured properties in accordance with the original mortgages. The first Complainant advises that the Provider replied to the letter on **8 May 2018** with a satisfactory response.

The first Complainant submits that she had a meeting with the Provider on **25 May 2018** where she proposed a loan for €100,000 to allow her to carry out some extension work on Property A. The first Complainant advises that the Provider did not proceed with this proposal.

In a subsequent meeting on **6 June 2018**, the first Complainant submits that she suggested to the Provider a five month moratorium on two mortgage accounts, the First Mortgage and mortgage account number 7858\*\*\*\* (**the Second Mortgage**, jointly held with the second Complainant), as an alternative to the loan. The first Complainant asserts that the Provider was positively disposed to this option and that the Complainants sent in an application form to the Provider dated **27 June 2018**.

The first Complainant submits that on **17 July 2018**, she received a mobile phone text message from the Provider's representative, X, stating the following:

*"Please accept both my verbal confirmation and this as written confirmation that your moratorium is in place as discussed".*

The Complainants assert that, as a consequence of the text message from the Provider, she diverted her funds towards the building of the extension.

The first Complainant submits that on **1 August 2018**, she received a mobile phone text message from the Provider requesting the payment of the mortgage by 15.00 or she would incur costs. The first Complainant submits that she was advised by the Provider that it sent an email to her dated **23 August 2018** relating to the moratorium. The first Complainant contends that when she reviewed this email correspondence, she was confused by what seemed to be a new loan offer which was referred to as the Alternative Repayment Arrangement (**ARA**). The first Complainant asserts that the ARA form was misleading as it referred to a request to amend the repayment terms of the mortgage. She argues that at no stage did she apply to amend the repayment terms of the mortgage. The first Complainant contends that a moratorium is "*a legally authorised postponement of the fulfilment of an obligation or an agreed suspension of activity*".

The first Complainant argues that one of the special conditions in the Provider's Agreement to Amend Mortgage Loan Offer (**AALOO**) letter of **23 August 2018** relating to the Second Mortgage indicated that the Provider continued to rely upon five listed securities. The first Complainant argues that the imposition of this condition contradicts the contents of the Provider's letter of **8 May 2018** and will prevent freedom to sell individual properties.

The first Complainant submits that she received a letter from the Provider dated **3 September 2018** advising her that she had missed two payments and stating that she needed to pay the mortgage arrears.

The first Complainant asserts that she met with the Provider on **14 September 2018** and advised that the matter was an extremely serious one in terms of her mental health and the ramifications from the demands of the Provider in relation to the missed payments, the arrears and the consequences that follow. She submits that she stated as that meeting on **14 September** that at no stage in the course of the application had the Provider's representative X mentioned the requirement for new loan offers. She submits that she stated that she had sought legal advice to the effect that the Provider was estopped from introducing two new loan offers some two months after the Provider's representative confirmed the moratorium was in place.

The first Complainant submits that she had confidence in representative X's authority to act on behalf of the Provider. She further submits that she relied on X's verbal and written confirmation that her moratorium was in place and made her business plans on that basis.

She argues that X never mentioned anything about "AALOOs" in her dealings with her. She argues that the Provider is estopped from trying to change the terms of the moratorium. She further submits that her written application for a moratorium and signed Mortgage Modification form constitute written consent from her as borrower to vary the monthly mortgage payments for the relevant period as required under General Condition 4 of the terms and conditions of the mortgage loans.

The Complainants resumed mortgage repayments in **January 2019**, at the end of the five month moratorium that they content was in place from **August 2018**.

The Complainants want the Provider to:

1. Honour the moratorium;
2. Refund any additional charges applied to the Complainants' accounts as a result of the Provider not setting up the moratorium;
3. Ensure that any damage to their good name and credit rating is restored;
4. Confirm that the facts of the letter dated **8 May 2018** which confirmed their freedom to sell individual properties be reaffirmed.

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

The Provider argues that the First Mortgage was drawn down in the sole name of the first Complainant on **11 January 2007** and secured by way of charge on four residential investment properties. This was a refinance of previous mortgage loans.

The Provider asserts that it released its security in respect of Property B (one of the four secured properties) in **July 2019**. The Provider states that there are arrears on the loan account of €30,715.48.

The Provider argues that the Second Mortgage was drawn down in the joint names of the Complainants on **28 January 2005** and secured by way of charge on Property A. The Provider states that there are arrears of €60,673.83 on the loan account.

The Provider argues that the mortgage loans in question are buy to let investment properties and are not covered by the Code of Conduct on Mortgage Arrears 2013 (**CCMA**). The Provider submits that the Consumer Protection Code 2012 (**CPC**) applies to the loans.

The Provider submits that the relationship between it and the Complainants is based in contract arising from the fact that the first Complainant signed and accepted the First Offer Letter in **November 2006** and the Second Offer Letter in **January 2005**. The Provider relies on the terms and conditions of the Offer Letters, and in particular on General Condition 4 of the Offer Letters which relates to the repayment of the mortgages. The Provider argues that pursuant to General Condition 4(d), the Provider is entitled (but not obliged) to vary the payment of principal and interest amounts payable in respect of the loans but with the consent of the borrower.

Further, pursuant to General Condition 4(a), the Provider argues that monthly instalments must be repaid unless agreed by it in writing. The Provider argues that it is the responsibility of the Complainants to ensure that monthly mortgage loan repayments are met.

The Provider argues that the First Mortgage entered into arrears on **30 August 2018** by virtue of the first Complainant not meeting five monthly repayments from that date and it has remained in continuous arrears to date. The Provider argues that the Second Mortgage first entered arrears on **1 August 2018** by virtue of the Complainants not meeting five monthly repayments from that date and has remained in continuous arrears to date.

The Provider argues that it is not obliged to offer the Complainants any Alternative Repayment Arrangements (**ARAs**) and the acceptance of any proposal received from a customer (such as the five month moratorium) is at the commercial discretion of the Provider.

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The Provider argues that it issued the AALOOs on each mortgage loan account as requested. The Provider argues it cannot amend the repayment terms of the mortgage loan account without offering this in writing for the Complainants' acceptance. As the Complainants refused to sign, accept and return the AALOOs, the Provider has not been in a position to implement those moratoriums.

The Provider argues that in the absence of signed AALOOs from the Complainants, the mortgage accounts continued to bill for the contractual repayments as set out in the Offer Letters and the accounts went into arrears. The Provider confirms it did not apply any additional charges, fees, interest and surcharges in respect of the mortgage loan accounts.

The Provider submits that it approved an ARA by way of five month moratorium and issued the AALOO by post on **23 August 2018**. The Provider argues that its representative also emailed a copy of the AALOOs to the Complainants and requested that the forms be signed in order for the ARA to put in place. It argues that its representative further stated she would arrange for a courier to collect the forms to expedite matters in order for the moratorium to be implemented on the mortgage loans. The Provider asserts that the Complainants were on notice that all times that they must sign the AALOOs in order to have the moratorium implemented on the accounts.

The Provider submits that its representative has confirmed that it was made clear to the Complainants at all times that the amended loan offers would have to be signed before the moratorium could be implemented. The Provider submits that its representative has also confirmed that her text message of **17 July 2018** should have read that the Complainants' request for the extended moratorium had been approved but the moratorium could not be put in place until the AALOOs were signed and accepted by the Complainants.

The Provider acknowledges that the text message should have been clearer and has apologised for any confusion caused. It argues that the fact remains, however, that text messages are not sufficient acceptance or confirmation of an amendment to a contractual agreement between the Complainants and the Provider. It further argues that the first Complainant is a lawyer and formerly a practising solicitor and so in a position to appreciate and understand the need to sign and accept an agreement to allow the Provider to make a change to the operation of the mortgage loan accounts. It argues that it cannot simply make an amendment to a mortgage loan account without the express written instruction from the customer to do so.

The Provider states that it provided information to the Irish Credit Bureau (**ICB**) and/or Central Credit Register (**CCR**) regarding payments to the accounts. The Provider argues that the Complainants gave consent to the Provider to send information to any credit reference bureau or agency in signing the Offer Letters. As the mortgage accounts went into arrears in the absence of the implementation of the moratorium, the Provider had an obligation to report the arrears to the credit reference agencies as all lenders must provide an honest and truthful report to the ICB. The Provider argues that it cannot amend its records if it is satisfied that the reports which it made are an accurate reflection of the repayments missed by the Complainants.

The Provider has reiterated its continued commitment to implement the moratoriums on a backdated basis on receipt of completed AALOOs and thereafter to amend the Complainants' credit rating with the ICB and/or CCR to show a clear repayment history on the mortgage accounts.

#### **The Complaint for Adjudication**

The complaint is that the Provider agreed and confirmed a moratorium on the Complainants' mortgage accounts and that based on this information, the Complainants diverted funds towards the building of an extension. The Complainants were subsequently advised by the Provider that the moratorium was not in place and that the mortgage accounts were in arrears.

#### **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.

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Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

In so concluding, I am conscious that the version of events submitted by the first Complainant and by the Provider's representative, X, are quite different. Their recollections of the substance of certain meetings and conversations differ.

A Preliminary Decision was issued to the parties on 2 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.

Following the issue of my Preliminary Decision, the Complainants made a submission under cover of their email to this office dated 22 November 2021, a copy of which was transmitted to the Provider for its consideration.

The Provider advised this office under cover of its email dated 26 November 2021 that it had no further submission to make.

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

The Complainants have, in their post Preliminary Decision submission, detailed that the description of the events of above "*has omissions and inaccuracies in the account cited*".

In my Preliminary Decision it had detailed that "*In a subsequent meeting on **6 June 2018**, the first Complainant submits that she suggested to the Provider a five-month moratorium*". However, the Complainants have, in the post Preliminary Decision submission, detailed that "*It is incorrect to cite that [the Complainants] suggested a five month moratorium to [the Provider] at a meeting on the 6<sup>th</sup> June. (sic) 2018*"



The Complainants wish it to be detailed as a “*Correction of Fact*” that the:

*“meeting that took place at [the Complainants] property at [redacted] on the 6th June, involved a discussion about [the first named Complainant’s] proposal to raise a Mortgage of 100k to carry out an extension.*

[named agent of a financial service Provider] *was at that meeting along with [the named agent of the Provider] and [the first named Complainant].*

[The first named Complainant] *terminated the meeting as it became apparent to [her] that seeking a Mortgage from [the Provider] was going to be a fruitless exercise. On the afternoon of June 6<sup>th</sup>, [the first named Complainant] telephoned both [the named agent of the Provider] and [named agent of a financial service Provider].*

[The first named Complainant] *left a voice message for [the named agent of the Provider]. [The first named Complainant] spoke to [named agent of a financial service Provider] about a Moratorium. She directed [The first named Complainant] back to [the named agent of the Provider]. [the named agent of the Provider] returned [The first named Complainant] call on the 7<sup>th</sup> June. [The first named Complainant] raised the issue of seeking a Moratorium. She directed that [The first named Complainant] make a written application to [the Provider].*

The first Complainant has taken issue with X’s version of the conversations and meetings that occurred between them. However, the vast majority of the details in dispute have no bearing on the complaint raised and I therefore have not recited these details, though they have been considered by me.

There is one issue in dispute, however, that I consider to be relevant. The first Complainant has submitted that she was never made aware by X that she would have to sign a letter amending the terms of her mortgages in order for the moratorium to be implemented. X has submitted that the first Complainant was always made aware that there would be such a requirement. Though I accept that this issue is a dispute between the parties, I am of the view that a fair, appropriate and proportionate adjudication in respect of the present complaint is possible in the absence of calling the relevant parties for an Oral Hearing, though I note their respective positions.

The first Complainant has a number of mortgage loan accounts with the Provider. These are in respect of buy to let or investment properties. This complaint concerns two mortgage loans, both of which are secured against investments properties.

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The First Mortgage in the name of the first Complainant alone and the Second Mortgage is in the name of both Complainants, though it is apparent that the second Complainant has no dealings with the property in question (Property A) and the repayments are made by the first Complainant.

By letter of Loan Offer dated **17 November 2006**, the First Mortgage was offered to the first Complainant subject to certain terms and conditions and for a term of 216 months. General Condition 4 provides as follows:

*“(a) For an annuity, or other repayment loan, repayments shall be comprised of principal and interest and any other amounts payable ... The dates for repayment of the Loan are those dates that are from time to time set by the Bank. The amounts of such repayments and the due dates for payment thereof shall be determined by the Bank as its absolute discretion.*

*(b) in the event of any repayment not being paid on the due dates or any of them, or of any breach of the Conditions of the Loan or any of the covenants or conditions contained in any of the security documents referred to in clause 2(a), the Bank may demand an early repayment of the principal and accrued interest or otherwise alter the Conditions of the Loan.*

*(c) ...*

*(d) The Bank may at its absolute discretion, and with the consent of the Borrower, vary any payment of principal, interest or any other amounts payable in respect of the Loan.”*

The security requirements for the First Mortgage were first legal charges over four listed properties, including Property B. The Offer Letter was signed and accepted by the first Complainant on **28 November 2008**.

By letter of Loan Offer dated **18 January 2005**, the Second Mortgage was offered to the Complainants subject to certain terms and conditions for a period of 240 months. The Loan Offer requires that the Property A be mortgaged, and the Special Conditions provides that *“All security is held for all debt”*.

General Condition 4 is in similar terms to General Condition 4 of the first Offer Letter as set out above, subject to General Condition 4(a) containing an additional first sentence as follows:

*“Unless otherwise stated herein or agreed by the Bank in writing, the repayment of the Loan shall be by monthly instalments in arrears by direct debit and the Borrower must effect and maintain a suitable direct debit mandate with the Borrower’s bank or other financial institution.”*

The Offer Letter was signed and accepted by the Complainants on **19 January and 27 January 2005**.

By letter dated **7 February 2018**, the first Complainant requested that the First Mortgage be broken down into four separate mortgage loans to allow her the *“freedom to sell”* one or more of the properties. There was a delay in the Provider responding to this letter which was the subject of a complaint by the first Complainant.

In a letter dated **8 May 2018**, the Provider referred to the first Complainant’s request to split the First Mortgage, which is secured by four separate properties, into four individual mortgages, each secured by one property.

The Provider responded to the request as follows:

*“...the Bank is also satisfied to (sic) an alternative strategy which I will set out below.*

*Strategy A*

*Proceed with splitting the loan into four accounts; the Bank will require you to advise how you wish to apportion the funds. Please note that this will involve four new Letters of Amending Offer...*

*Strategy B*

*The Bank would be amenable to the immediate release of [Property B] without any capital reduction to the mortgage. Furthermore, the Bank would potentially agree to release one of the [other] properties without capital reduction. This would put you in a position where you are free to decide to sell the properties and to provide capital reductions (if any) as you deem appropriate to reduce the mortgage balance.*

*I have arranged for my colleague [X] to contact you in the coming days to discuss these strategies with you and progress your preferred option."*

It appears that the meeting was arranged for **25 May 2018** for the parties to discuss the strategies proposed by the Provider. A further meeting took place on **6 June 2018** to discuss financing for renovations to Property A but this was not pursued. It appears that the first Complainant contacted the Provider by phone later the same day to request a moratorium on the mortgage loans for five months. The first Complainant was advised by phone on **15 June 2018** that she was required to complete a Mortgage Modification form to make this request. I note that there is some disagreement between the parties on the detail of what occurred at these meetings and on these calls but, in my view, those details are not relevant to the complaint.

The first Complainant submitted a Mortgage Modification request under cover letter dated **27 June 2018** requesting a five month moratorium or "Mortgage Holiday" on the First and Second Mortgages. The first Complainant explained that she wished to build an extension on Property A and was generally preparing for downsizing and so engaging in expenditure to prepare the properties. Details of the various properties owned by the first Complainant were provided with the Mortgage Modification request which was signed by both Complainants and dated **27 June 2018**. There was no information or detail in the request concerning the terms of the moratorium, other than as to duration.

It appears that there was a telephone call between X and the first Complainant a number of days later in which X informed the first Complainant that her application for a moratorium had been approved in principle by the Provider. As referenced above, the parties disagree as to whether X informed the first Complainant of the need for her to sign an amended offer letter to implement the moratorium. It appears to be agreed that X informed the first Complainant that the moratorium would not apply for **July** but run from **August** onwards.

The text messages between the first Complainant (**FC**) and X dated **17 July 2018** are central to the present complaint. They read as follows:

*FC: Hi [X], I refer to our last telephone communication and your confirmation that the bank had signed off on my Application for a Moratorium. I would be obliged to receive written confirmation of same at your earliest convenience. Please acknowledge my message. Thank you for your kind assistance. Regards [first Complainant]*

*X: I am not n annual leave at the moment. (sic) Please accept both my verbal confirmation and this as written confirmation that your moratorium is in place as discussed. Kind regards.*

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It appears that the first Complainant received reminders thereafter that her **August** mortgage repayments were due in respect of each of the mortgages. She also received correspondence in respect of missed **August** payments. The first Complainant followed up initially at a branch and then with X who informed her that she had sent her an email with attached letters and forms to be signed in respect of the moratorium on **23 August 2018**.

In her email to the first Complainant of **23 August 2018**, X stated as follows:

*"Please find attached the forms that I need signed in order to put in place officially the 5 month moratorium. As discussed on the phone this moratorium is being back dated to commence August and will run then for 5 months, (August, September, October, November, December) After this both mortgages will return to the Tracker rate.*

*If you let me know when you have signed these forms I will arrange for a courier to have them picked up from you in order to get this in place.*

*Sincere apologies for the delay experienced here."*

A separate letter was sent in respect of both mortgage loans. In respect of each, the Provider's letters of **23 August 2018** provided as follows:

*"We agree to amend the repayment terms of your mortgage.*

*The Information on this Letter is valid as at the date of assessment.*

...

*We refer to your recent request to amend the repayment terms of your mortgage. The attached form (the "Form") sets out the full details of the alternative repayment arrangement (ARA) options being offered to you.*

...

**Acceptance of this ARA**

*if you wish to take up the offer we require you to review, sign and return the enclosed Form. **Please ensure the signed Form (all pages) is returned properly completed to us within 5 weeks of the date of this letter.**"*

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The enclosed Forms were entitled “**Agreement to Amend Mortgage Loan Offer Letter**” (and referred to as AALOOs) and dated **23 August 2018**. In respect of the First Mortgage, the AALOO Form provided as follows:

**“SECTION A. WHAT THIS FORM DOES**

**1. THE ALTERNATIVE REPAYMENT ARRANGEMENT (ARA) IS AS FOLLOWS:**

**1.1 The Borrower and Lender agree that:**

**1.1.1.** *The Lender will not require the Borrower to pay any monthly instalments for 5 month(s) (the “Moratorium Period”).*

**1.1.2.** *After the preceding Moratorium Period, the Borrower will be obliged to repay the Loan on a capital and interest repayment basis over the rest of the period of the Loan so that that the Loan is repaid by 30/01/2025 (the “Maturity Date”). The Loan balance is estimated to be €Y and will include all of the principal (capital), interest and other sums which the Borrower did not pay (and which the Borrower would have been obliged to pay if this Form did not come into force). The Lender estimates that the new repayment amount will be €Z each month.*

*The actual amount of the Loan balance and repayment of instalments may differ (for example if the interest rate changes).*

**1.2 ...**

**1.3 Maturity Date**

**1.3.1.** *This form does not change the maturity date of the Loan. This means the Loan must be repaid over the current mortgage term.*

**1.4 Effective Date**

**1.4.1.** *The Lender agrees that if the Borrower signs and return this Form within the Acceptance Period and complies with all conditions in this Form, the Lender will apply the ARA to the Loan with effect from 17/09/2018.”*

The AALOOs set out further general terms and condition and provided illustrative amortisation tables to demonstrate the effect of the moratoriums in terms of the balance of the loans and the expected repayment obligations as compared with the original loan terms.

The AALOO issued in respect of the Second Mortgage was almost identical, save that it indicated a maturity date of **28 February 2025** and an effective date of **20 July 2018**. Under the Special Conditions in section 2, the AALOO stated as follows:

*“The Lender continues to rely upon the securities listed as follows  
[five listed properties including Properties A and B]”*

I note that the first Complainant accepted in a letter to the Provider dated **7 February 2018** that the four properties already secured in respect of the First Mortgage were “*cross securitized over*” the Second Mortgage when she purchased Property A. This accords with the Special Condition in the Second Offer Letter dated **18 January 2005** which provides that “*All security is held for all debt*”. Accordingly, it would appear that the Second Mortgage was indeed secured against all five properties and I do not understand the first Complainant to have raised any objection on this. I have not been provided with a copy of the relevant mortgages.

The issue as I understand it is that, in the Complainants’ view, the Provider’s continued reliance on all five of the secured properties in the AALOO was contrary to the terms of the Provider’s letter of **8 May 2018**. Having considered the terms of the letter of **8 May 2018**, I do not accept that there was any contradiction here. The letter of **8 May 2018** set out a number of proposals which confirmed the Provider’s attitude towards reviewing the security held in respect of the First Mortgage (and, due to the cross-security in place, the Second Mortgage). It was clarified in the letter that further written agreements would have to be entered into between the parties to alter the security position, which was not done prior to the issue of the AALOOs in **August 2018**. According, the loan in question continued to be secured against all five properties and the Provider was entitled to confirm this in the AALOO. The AALOO did not, in my view, contain an unfair requirement or confirmation in this regard and did not impact on the stated intention of the Provider in its letter of **8 May 2018** to allow for some changes to the security it held. Indeed it appears that the Provider subsequently agreed to release its charge over Property B in **July 2019**, as it had suggested in its letter of **8 May 2018**.

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It appears that there was further communication in **late August/early September 2018** between X and the first Complainant in the course of which X made it clear that she was awaiting the signed AALOOs to implement the moratoriums. In the meantime, arrears letters were sent to the Complainants in respect of missed payments on the accounts.

A meeting was held between X and the first Complainant on **14 September 2018** at which the first Complainant indicated her intention to refuse to sign the AALOOs issued in respect of the moratoriums of the two mortgages. It appears to be accepted that the first Complainant was notified that the Provider could not implement the moratorium in the absence of the signed documentation and without this, the normal monthly repayment amounts would continue to bill on the account.

There appear to have been three key reasons for the first Complainant's refusal to sign the AALOOs:

- a) The first Complainant was of the view that no amendment letters were required in light of X's text message of **17 July 2018**;
- b) The first Complainant was not agreeable to an increase in her monthly repayments on the expiry of the moratorium; and
- c) The first Complainant was of the view that the security referred to in the AALOO was contrary to the Provider's letter of **8 May 2018**.

I have already dealt with the issue of (c) above. I do not accept that the security referred to in the AALOO concerning the Second Mortgage was contrary to the Provider's letter of **8 May 2018** or was otherwise unreasonable.

The first Complainant sent a formal letter of complaint to the Provider dated **17 September 2018** outlining her recollection of events since the letter of **8 May 2018**, including the content of the text message of **17 July 2018**, and her understanding that the moratorium was in place from **August 2018** onwards without a requirement to sign an AALOO.

In its final response letter dated **30 October 2018** addressed to the first Complainant, the Provider stated that its representative spoke to the first Complainant on **15 June 2018** and advised her that a Mortgage Modification Form would need to be completed in order to assess the mortgage accounts for a moratorium. The Provider stated that although it usually restricts approval of a moratorium to accounts secured against a private dwelling house, the Provider's credit department approved the request on the investment properties as an exception for five months based on her excellent track record and long-standing custom.

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The Provider also agreed not to apply the usual pricing policy for buy to let tracker mortgages and offered to allow her to remain on a tracker rate if she accepted the moratorium.

The letter of **30 October 2018** referred to the ***Agreement to Amend Mortgage Loan Offer Letter (AALOO)*** issued on **23 August 2018**. The Provider stated that it cannot amend the repayment terms of the mortgage account without offering this in writing for written acceptance. The Provider stated that the proposed moratorium is amending the terms of the original loan offer. The Provider stated that it understands that its representative text the first Complainant on **17 July 2018** to confirm the moratorium was now in place.

The Provider stated that its representative sent this message on the assumption that the first Complainant had signed the required AALOO in order to implement the facility.

In respect of its letter dated **8 May 2018** regarding possible changes to the security position, the Provider outlined the options proposed to the Complainant in that letter and submitted that no further instruction was received from her in relation to the proposals. On that basis, the Provider stated that the mortgage accounts remained unchanged and that any change to the terms of the existing mortgages would be offered in writing and implemented only on receipt of her written acceptance.

In its letter of **30 October 2018**, the Provider stated that that the first Complainant text its representative in late **August 2018** to enquire as to the status of the mortgages. It stated that she was advised that terms had been issued to her and the representative was awaiting their return.

It stated that the first Complainant requested to meet with the representative and at this meeting the first Complainant advised that she did agree to sign the terms and did not accept that her overall monthly premiums would increase following the moratorium. The Provider stated that arrears correspondence issued to the first Complainant in respect of the accounts were issued automatically in line with the Consumer Protection Code (**CPC**).

The Provider made the following offer:

*“In order to resolve these issues, the Bank can re-issue the AALOO documentation for you to sign in order to implement the approved moratoriums. On receipt of these the moratoriums can be backdated in order to put your account back in order. In the absence of this signed documentation, your account will remain in arrears as you monthly repayment will continue to bill.”*

Following further letters of complaint from the first Complainant (the substance of which has been included and considered in the parties' arguments set out above), the Provider wrote to the first Complainant by letter dated **17 October 2019**. The Provider reiterated that it cannot amend the repayment terms of any mortgage account without the customer's express consent and written authorisation to do so. It stated that in the absence of a mutually agreed and signed AALOO, monthly contractual repayments are that set out in the original loan letter. The Provider stated that its representative has accepted that her text message of **17 July 2018** should have confirmed that the request for the extended moratoriums had been approved (only) as a moratorium cannot be in place until an AALOO was signed and accepted by the customer. The letter also indicated that X had confirmed that she had at all times made clear to the first Complainant when they met that an AALOO would need to be signed by her before the moratorium could be put in place. The Provider accepted that the text message of **17 July 2018** should have been clearer and apologised for that. The Provider argued, however, that the text message was not sufficient acceptance or confirmation of an amendment to a contractual agreement. The Provider reiterated its proposal to reissue the AALOO for the first Complainant to sign, on receipt of which the Provider would backdate the AALOO to clear the arrears on the account. The Provider further offered to amend the relevant credit ratings with the ICB.

The crux of the present complaint is the legal effect, if any, of the text message sent by X on behalf of the Provider to the first Complainant on **17 July 2018**. The first Complainant had applied for a moratorium in respect of the two mortgages at issue for a period of five months. X had already communicated to the first Complainant on a telephone call that the Provider had agreed in principle to the moratorium. In the text message, X confirmed that the moratorium was in place.

I note that the Provider has submitted that X sent the text message on the mistaken assumption that the first Complainant had or would sign the relevant amendment letters. I also note that X was on annual leave at the time and that the Provider accepts that the text message should have clarified that the moratorium was approved but could not be implemented until the signed acceptance of the amended letter of offer had been received. While I accept the good intentions of X in seeking to confirm the approval of the moratorium and during a period of annual leave, the text message was misleading. It appears to have led to a mistaken understanding on the part of the first Complainant that the moratorium was in place without any further requirements.

In spite of this misleading text message, however, I do not accept that the text message in and of itself had a binding legal effect. The moratorium on offer constitutes an amendment to the repayment terms of the two mortgage loans as set out in the respective Offer Letters.

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General Condition 4(d) of the terms and conditions of the mortgage loans provides that any amendments to repayments have to be agreed by the Provider and consented to by borrower. In respect of the Second Mortgage, General Condition 4(a) provides that repayments must be made monthly unless by the agreement of the Provider in writing. Further, the details of the moratorium agreement were not set out in the text message. The importance of clarity in respect of the terms of the moratorium agreement are evidenced by the first Complainant's refusal to sign the AALOOs on the basis that the monthly repayments associated with the mortgage loan accounts would increase on the expiry of the moratorium.

The Complainants have detailed in the post Preliminary Decision submission that:

*"[The first named Complainant] say[s] and believe that [the first named Complainant's] written application for a 5 month Moratorium under the direction and guidance of [named representative of the Provider], implies [the first named Complainant's] consent to vary the terms of the Mortgage Agreements and satisfies General Condition 4(d) of the terms and conditions of [the first named Complainant's] Mortgage Loans"*

In addition to the above the Complainants have further submitted that:

*"[The first named Complainant] say[s] and believe that the written confirmation by [named representative of the Provider] is sufficient to satisfy General Condition 4 (d) of the terms and conditions of [The first named Complainant's] Mortgage Loans".*

However, as detailed above, I do not accept that the text message in and of itself had a binding legal effect. The moratorium on offer constitutes an amendment to the repayment terms of the two mortgage loans as set out in the respective Offer Letters. Further to this I do not believe it is sufficient to state that an action of either party "*implies*" consent to vary the terms of the Mortgage Agreement and I accept the Provider's submission that it cannot amend the repayment terms of the mortgage account without offering this in writing for written acceptance to the Complainants.

Where a customer makes no mortgage repayments for a period of five months, there is a consequence in respect of the remaining balance: it has not reduced by the five repayments contemplated in the Offer Letter. After a moratorium period, there are two main options: (i) monthly repayments must increase to ensure that the mortgage loan is repaid in full within the agreed term of the mortgage loan (as offered by the Provider); or, (ii) the remaining term of the mortgage must be extended by a five-month period to reflect the five monthly payments that were not made in accordance with the Offer Letter.

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It is not clear to me what assumption was made by the first Complainant with regard to these two potential consequences, but this had to be agreed between the parties. The lack of clarity on this issue supports the Provider's submissions that a written agreement to amend the repayment terms of the mortgages was required.

I do not accept that the Provider is estopped from denying the existence of a moratorium from **August 2018** onwards. The doctrine of promissory estoppel operates on a limited basis and generally provides a defence to legal proceedings rather than operating as a cause of action. It does not confer the same level of rights as are conferred by contract. The focus in estoppel cases is the expectation created by the representation and some element of unfairness or unconscionability in allowing the representing party to resile from their promise. To my mind, the Provider has at no time attempted to resile from its offer of a moratorium but has merely required that its terms be agreed in writing.

Further, I am not satisfied that the terms of the representation as contained in the text message of **17 July** were sufficiently unambiguous and clear for the purposes of estoppel. As set out above, there were details of the moratorium that required agreement between the parties in respect of future repayments and which were not dealt with or clarified in the text message.

If it had been the case that the Provider tried to renege on its offer of a moratorium to the Complainants after **17 July 2018** and after the Complainants had already missed their repayments, the Complainants may have been justified in an argument that the Provider could not go back on the confirmation contained in the text message on **17 July 2018**.

As it is, however, the Provider has not sought to withdraw its offer. Instead, it has sought since **August 2018** for the Complainants to sign the amended letters of offer to implement the moratorium.

I have considered the content of the AALOOs in detail, and I can find nothing unreasonable in their terms and conditions. The AALOOs provide that monthly repayments in respect of the two accounts would increase at the end of the moratorium period to reflect the five months of non-payment. This is a necessary consequence of the moratorium to ensure the repayment of the loan within the original terms of the mortgages. There is no suggestion that a term extension was discussed or agreed. The first Complainant may not have contemplated such an increase in her monthly repayments when she applied for the moratorium but this emphasises the need for a written agreement in respect of the moratorium between the parties. As discussed above, I do not consider the stated security position in respect of the Second Mortgage to be an unreasonable term of the AALOO in that it simply reflected the then-current security position.

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The Complainants' have detailed in their post Preliminary Decision submission that *"... would be paid back by way of extension of my Mortgage, by a five-month period, to reflect the five monthly payments of the Moratorium"*. However, as detailed above the written documentation available to me in the form of the AALOOs, provide that monthly repayments in respect of the two accounts would increase at the end of the moratorium period to reflect the five months of non-payment.

If there had been an unreasonable term proposed by the Provider in the AALOOs, the analysis might have been different to reflect the fact that the first Complainant understood that there was no requirement for a written agreement in light of the text of **17 July 2018**. In the absence of an unreasonable term, however, it was appropriate and reasonable for the Provider to insist that the proposed amendments to repayments on the two mortgages (and as agreed in writing between the parties in the Offer Letters) be agreed in writing in the form of the AALOOs.

I appreciate that in respect of non-payment of the **August 2018** mortgage repayments on the two accounts that the first Complainant was operating on the assumption that the moratorium was in place and hence these payments did not have to be made. From **23 August 2018** onwards, however, it ought to have been clear to her that the Provider required her to sign the AALOOs in order to implement the moratorium. This was clarified at the meeting on **14 September 2018**. Despite this, the Complainants opted not to sign the offered ARA or to pay their monthly mortgage repayments until the end of the five month period.

As set out above, I accept that the text message of **17 July 2018** was misleading. It appears to have led to a mistaken assumption of the part of the first Complainant that she was not required to make any mortgage payments for the two accounts from **August 2018** and that she was not required to sign anything further. The misleading impression created by the Provider was clarified by the end of **August 2018**, however, and further clarified at the meeting of **14 September 2018**. The first Complainant was informed of the consequences of failing to sign the amended letters of offer but nonetheless chose not to make mortgage repayments on the two accounts for the five-month period and not to sign the required AALOOs.

In response to the complaint raised by the first Complainant, the Provider's final response letter of **30 October 2018** provided clarity regarding the implementation of the moratorium and confirmed that the Provider could not amend the repayment terms of the mortgage accounts without written acceptance in the form of the AALOOs.

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The Provider's letter offered a reasonable resolution to the issue had arisen. It stated that it could reissue the AALOs for the Complainant to sign to implement the approved moratoriums and these could then be backdated in order to put the mortgage loan accounts back in order.

This offer has been repeated on several occasions in the investigation of this complaint. The Provider has further offered to rectify the Complainant's credit rating with the ICB and the CCR once the moratorium has been implemented and backdated.

Notwithstanding the original problem caused by the Provider in terms of the wording of the text message of **17 July 2018**, I accept that it promptly dealt with the issue that have arisen and offered a fair, reasonable, and practical resolution. This offer has been repeated on several occasions and I understand that the Provider's proposed resolution remains open for the Complainants to accept to resolve their current arrears and credit rating situation.

As I am satisfied that the Provider did what it could to resolve the present complaint promptly and appropriately from the outset, I do not propose to uphold the complaint. I accept that the repayment terms applicable to the loan accounts in question remain as originally agreed and that, therefore, both accounts are in arrears due to non-payment from **August to December 2018**.

In light of the missed payments and the non-implementation of the moratoriums, the Provider was obliged to send arrears letters and notifications to the Complainants in accordance with its obligations under the CPC. If the Complainants wish to amend their arrears position, they have the option to pay the arrears in respect of both accounts, or to sign the AALOs that had been on offer to them since **23 August 2018**.

For the sake of completeness, I do not accept that the more informal process by which payment breaks in respect of the mortgage accounts were agreed by the Provider in the course of 2020 during the Covid-19 pandemic has any bearing on this complaint.

For the reasons set out 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.

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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.**