An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2019-0418
Sector:	Banking
Product / Service:	Credit Cards
Conduct(s) complained of:	Maladministration Incorrect information sent to credit reference agency
Outcome:	Substantially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint concerns the administration of the Complainant's credit card account with the Provider.

The Complainant's Case

The Provider sets out that the Complainant opened a credit card account in 1998. From the correspondence submitted by the Complainant it appears that in November 2010 the Provider sought payment of the balance that had accumulated on the account, issuing a final demand notice for this through an entity acting on its behalf.

In disputing the debt and protesting receipt of debt recovery correspondence, it seems that in July 2011 the Complainant sought a copy of the original consumer credit agreement in relation to the credit card account. In July 2011, an entity acting on behalf of the Provider wrote to the Complainant seeking the balance owing on the account and setting out that where a formal demand was not met that its policy was to pass information to *"Licensed Credit Reference Agencies"*.

In a letter dated 9 August 2011, the Provider sets out that *"the card agreement has been misfiled and despite searching [the Provider's] records [the Provider] has been unable to*

locate it". It sets out that notwithstanding its inability to locate a copy of his credit card agreement and failure, therefore, to meet the requirements of section 43 of the Consumer Credit Act 1995 (CCA 1995), as amended, that *"the credit agreement is not void and [the Complainant's] obligations to make payments to [the Provider] under the credit agreement remain"*.
The Provider also told the Complainant, in a letter dated 21 November 2011 that the *"[the Provider] could not provide a copy of [the Complainant's] original agreement"*. It went on to confirm that the Complainant's *"account is registered on [his] credit file as a defaulted account and will remain on [his] credit file for 5 years from the date of registration. This default will affect [the Complainant's] ability to obtain credit in the future"*. The Provider further set out in a letter dated 13 December 2011 that, in accordance with the data retention procedures in effect in 1998, "*after six years of the account opening date, [the Complainant's] application form was securely destroyed"*, The Provider forwarded *"copies of all correspondence [it had] on the file regarding the account"* at that juncture together with transcripts of some calls.

In January 2018 the Provider details that the Complainant contacted it in relation to correspondence it had sent confirming that information on the disputed account would be furnished to the Central Credit Register (CCR). The Provider set out that it was obliged to furnish the information to the CCR in circumstances where the Complainant's obligations under the agreement remain valid. The Provider also referred to the Complainant's comments that the debt was statute barred and set out that *"this does not have any impact on the account registering with the CCR as such the above account will register with the CCR in line with the letter to [the Complainant]".*

The Complainant is seeking that the Provider removes information regarding the Complainant's account from the CCR. The Provider has submitted in correspondence dated 5 January 2018 that *"all banks are legally obliged to report this information to the CCR"*.

The Complainant also seeks that the Provider and/or the Provider's agents desist from pursuing him for repayment of the Complainant's alleged debt. In response to this request the Provider submitted to the Complainant, on 9 April 2018, that *"[it] does not consider this account to be in dispute and the indebtedness on this account remains due and payable"* and that *"[the Provider] is unable to agree to your request to not pursue you for the debt, or to prevent your details being registered under the CCR"*.

The Complainant submits that the Provider is obliged to comply with section 49 of the Consumer Credit Act 1995.

Where any of the Provider's conduct in respect of which the Complainant made a complaint to this Office does not relate to a long term financial service and occurred more than 6 years before the Complainant submitted his complaint to this Office (on 30 April 2018), section 51(1) of the Financial Services and Pensions Ombudsman Act, 2017 as amended, does not allow this Office to investigate that complaint. Therefore any such conduct will not be investigated as part of this adjudication.

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The Complaints for Adjudication

That the Provider wrongfully sought payment from the Complainant for a credit card debt while unable to provide the Complainant with a copy of the credit agreement which documents the Complainant's alleged liability;

That the Provider referred the Complainant's credit card account to a debt recovery agent who wrongfully issued correspondence seeking payment of the alleged debt; and, wrongfully reported the Complainant's failure to pay the alleged debt to credit reference agencies.

The Provider's Case

The Provider accepts that it is unable *"to enforce the agreement"* within the meaning of section 43 of the CCA 1995, but submits that this does not mean the Complainant does not have to repay the debt.

It also acknowledges that certain information in correspondence which issued from entities acting on its behalf was incorrect (incorrect currency notations, for example).

However, it maintains that it is entitled to continue to seek repayment from the Complainant, and it asserts that it is obliged to report the account to the CCR. It states that the account was never reported to the Irish Credit Bureau.

It also claims that the debt is not statute barred as the account has been the subject of correspondence within the last 6 years, albeit accepting that the Complainant has not acknowledged debt in that period.

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 Complainant was 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.

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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.

I issued my Preliminary Decision to the parties on 27 September 2019, 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 parties made the following submissions:

1. Letter from the Provider to this Office dated 14 October 2019.

2. E-mail from the Complainant, together with attachments, to this Office Dated 16 October 2019.

3. Letter from the Provider to this Office dated 24 October 2019.

The above submissions were exchanged between the parties.

Having considered these additional submissions and all of the submissions and evidence furnished to this Office, I set out below my final determination.

The account was opened in 1998. The Complainant has not claimed that he did not open such account or that he never obtained the benefit of use of any such credit card. His position is essentially that the Provider is not in a position to fulfil the necessary criteria to enforce the debt (or even to seek collection of it), and is not entitled to report it to the CCR. Fundamentally, his position is that the Provider cannot take any steps in relation to the debt if it cannot produce a copy of the original agreement.

According to the Provider's submissions, the account was closed in December 2012.

The Provider accepts that the account was domiciled in the Republic of Ireland and that Irish law is applicable.

The provisions of the CCA 1995 at issue in this complaint are as follows:

> *"38. A creditor shall not be entitled to enforce a credit agreement or any contract of guarantee relating thereto, and no security given by the consumer in respect of any money payable under the credit agreement or given by a guarantor in respect of money payable under such a contract of guarantee as aforesaid shall be enforceable against the consumer or guarantor by any holder thereof, unless the requirements set out in this Part have been complied with:*

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Provided that if a court is satisfied in any action that a failure to comply with any of the above requirements, other than section 30, was not deliberate and has not prejudiced the consumer, and that it would be just and equitable to dispense with the requirement, the court may, subject to any conditions that it sees fit to impose, decide that the agreement shall be enforceable." [emphasis added]

Section 38 relates to Part III of the CCA 1995 which deals with the information to be furnished when an agreement is being entered into (in this case in 1998), and in any event confers a discretion on the Courts to decide that, even where certain requirements are not complied with, an agreement is enforceable.

In relation to this complaint, this Office is not in a position to investigate conduct from 1998, and the substance of the complaint relates to information provided either during the currency of the agreement (2011) or after the agreement was terminated by the Provider in December 2012, but not at the time of entering into the agreement. In light of the foregoing, section 38 is not applicable to the circumstances of this complaint.

"43. (1) Subject to this section, a creditor or an owner shall during the currency of the agreement provide, within 10 days of a receipt of a written request by a consumer who is party to the agreement of it that consumer requires any person specified by him in the request, a copy of the written agreement or a statement of–

(a) the amount paid;
(b) the amount, if any, due but unpaid, and the date and amount of each instalment that remains unpaid, and
(c) the total amount outstanding and the date and amount of each outstanding instalment,

under the agreement.

(2) A creditor or owner shall not, without reasonable cause, fail to comply within 10 days with a request under subsection (1).

(3) If the default described in subsection (2) continues for a further period of 14 days, then while the default so continues, the creditor or the owner, as the case may be, shall not be entitled to enforce the agreement…" [emphasis added]

"49. (1) A person shall not make a demand for payment or assert a present or prospective right to payment in respect of an agreement which is unenforceable under this Act.

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> *(2) A person shall not, with a view to obtaining payment in respect of a debt which is unenforceable under this Act–*
>
> *(a) threaten to bring any legal proceedings,*
> *(b) place or cause to be placed the name of any person on a list of defaulters or creditors or threaten to do so, or*
> *(c) invoke or cause to be invoked any other collection procedure or threaten to do so."*

Sections 43 and 49 deal with the information to be furnished during the course of the agreement. I consider them to be applicable to the events of 2011 when the Complainant sought a copy of his credit agreement but the Provider could not furnish it.

Section 43 requires the written agreement **or** a statement containing the information set out in subsections (a), (b), and (c). I am satisfied that the monthly statements furnished to the Complainant during 2011 are sufficient to constitute compliance with this section in its strict terms, containing as they did any payments made, the minimum payments due, and the total amount outstanding.

Section 54 of the CCA 1995 deals with information to be furnished after an agreement has been terminated. It does not specify the credit agreement itself, but instead requires that a provider furnish *"details of the agreement sufficient to identify it".*

In light of the foregoing sections, it is by no means clear cut that the mere failure to furnish a credit agreement makes it strictly "unenforceable" within the terms of the CCA 1995. The Provider has nevertheless accepted that the agreement is unenforceable until such time as it can produce the credit agreement (9 August 2011). If the Provider were to attempt to pursue the debt through the Courts at this stage, this would clearly be of significance.

While the account was opened in 1998 and a final demand issued in 2011, I will take into consideration the Consumer Protection Codes of 2006, 2012 and 2015 which place an obligation on a Provider to maintain records of an agreement for a period of 6 years after the Provider ceased to provide the product. In other words, the Provider under those codes would have been required to keep a copy of the original credit agreement for a period of 6 years after the agreement had been terminated, as opposed to 6 years after the form being submitted.

In my Preliminary Decision, I stated that "*this must be considered the appropriate course of action even prior to the coming into force of the 2006 CPC".*

The Provider, in a post Preliminary Decision submission dated 14 October, states:

> *"it securely destroyed the credit agreement in question 6 years from the date of the agreement, in 2004, which was in compliance with [the Providers] internal retention policy at the time and some 3 years prior to the commencement of CPC on the 1st July 2007".*

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The Provider puts forward that *"at the point in time this action was taken the* [Provider] *was perfectly within its rights to make this decision and it was not contrary to any code or regulation then in being".*

The Provider goes on to state:

> *"We* [the Provider] *do not agree with your assessment that an action, which was legitimately taken at a point in time prior to the commencement of CPC, can now render* [the Provider] *in technical breach of CPC…"*

The Provider is of the view that my "*position does not allow for any mitigation on the* [Provider's] *part whatsoever"* and that in my Preliminary Decision I was *"in effect applying the CPC in retrospective manner which is overly burdensome on the* [Provider] *and we submit that this is neither fair nor in keeping with the sensible application of CPC".*

The Provider draws my attention to a guidance note issued by the Central Bank of Ireland regarding the Consumer Protection Code 2012 which states that *"all obligations under the 2012 code apply prospectively from 1 January 2012".*

In its post Preliminary Decision submission dated 14 October 2019 the Provider also states:

> *"that it is "of the respectful opinion that no reasonable decision-maker could reasonably infer that a legitimate decision taken by the [Provider] in 1998 could be retrospectively deemed a breach of CPC 2006/2012 as neither iteration of the Code explicitly applied retrospectively, as compliance with same would be overly burdensome on a regulated entity".*

In response to the Provider's post Preliminary Decision submission, the Complainant has made an additional submission dated 16 October 2019.

The Complainant's submission of 16 October 2019 included a copy of two correspondences the Provider had issued to him regarding his request for the Credit agreement.

The Complainant then states*: "How can they be so certain therefore in their most recent correspondence with you of the assertion that they have securely destroyed the credit agreement in 2004, when in 2011 they were convinced of its existence and had merely mislaid it?"*

The Complainant also states *"while not wishing to labour the point but* [the Provider] *either lied to me in 2011 or are somewhat disingenuous to you in there absolute assertion that the Consumer Credit Agreement was destroyed in line with the* [Provider's] *guidelines of the time in 2004*".

The Provider has stated that in my Preliminary Decision I had retrospectively applied the obligations under the Consumer Protection Code 2006/2012 to the complaint and in doing so I have made an Error of Law.

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The Provider further states *"We* [the Provider] *do not agree with your assessment that an action, which was legitimately taken at a point in time prior to the commencement of CPC, can now render* [the Provider] *in technical breach of CPC…"*

I do not accept these assertions made by the Provider. In coming to my decision I did not retrospectively apply the obligations under the Consumer Protection Code 2006/2012 to this complaint, nor did I indicate any intention in my Preliminary Decision to do so.

I did not, in coming to my decision, state that the Provider was in breach of the Consumer Protection Code 2006/2012, either in my Preliminary Decision or this Decision.

What I did during my adjudication of the complaint, was take into consideration *"the consumer Protection codes of 2006, 2012 and 2015 which place an obligation on a Provider to maintain records of an agreement for a period of 6 years after the Provider ceased to provide the product".*

I did this as the Consumer Protection Code can be considered to reflect what should be the best practice. In each version of the CPC it places the obligation on Providers to keep a copy of the original policy agreement documentation until 6 years after the termination of the agreement.

What I stated in my Preliminary Decision was that *"the Provider under those codes [2006, 2012, and 2015] would have been required to keep a copy of the original credit agreement for a period of 6 years after the agreement had been terminated, as opposed to 6 years after the form being submitted".*

I did not state, as suggested by the Provider in my Preliminary Decision, that this puts the Provider in breach of the Codes, but what I did state very clearly was that this *"must be considered the appropriate course of action even prior to the coming into force of the 2006 CPC."*

Prior to the Consumer Protection Code 2006 the Provider states that its retention policy was that the credit agreement was securely disposed of "*6 years from the date of the agreement".* I do not believe this retention policy would have been fully appropriate as complaints or disputes may have arisen prior to the ending of the agreement and this would result in documentation that may be required to resolve such disputes or complaints already being destroyed.

I cannot see how it is appropriate to destroy the very basis on which a contract or agreement exists during the lifetime of that agreement.

I remain firmly of the view that the failure to furnish the Complainant with a copy of his credit agreement by reason of having destroyed it prior to the account being terminated was not appropriate. Not because of the CPC obligations that are now in force but due to the retention policy which the Provider applied at the time not being appropriate.

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I also remain of the view that the Provider's inability to furnish a copy of the credit agreement constitutes a failure to act with due skill, care and diligence. This is the standard a provider should operate to, irrespective of the CPC or any other requirement.

The practice of destroying documentation 6 years after the date of the agreement does not show diligence on the part of the Provider. It is not unreasonable to expect that complaints or disputes may arise before the termination of the contract and the inability of a Complainant or Provider to rely on documentation which may have been destroyed before the termination of the policy is not appropriate.

My Preliminary Decision, and also this my Legally Binding Decision, was not reached by applying the Consumer Protection Codes retrospectively. Instead it was reached by my application of my Powers as set out in the ***Financial Services and Pensions Ombudsman Act 2017.***

Section 60 (2) (g) of the *Financial Services and Pensions Ombudsman Act 2017* is the basis of my decision which states:

"(g) the conduct complained of was otherwise improper"

I considered the Consumer Protection Codes of 2006 and 2012 as they reflect the best practice in regards to consumer protection, but I am not applying obligations under the Codes retrospectively.

The practice of destroying the credit agreement 6 years after the date of the agreement is, in my view, improper.

The failure of the Provider to produce a copy of the original credit agreement does not, in and of itself, prohibit the Provider seeking payment of the balance.

Whether or not the claim would be statute barred can only arise if it is raised as a defence to court proceedings. However, I do not accept the Provider's contention that simply corresponding, in the absence of an admission of liability, serves to extend the relevant limitation period beyond December 2018 (at the very latest).

In relation to the foregoing matters raised by the Complainant as a basis for claiming that the debt is "void" or unenforceable, and due to the discretion conferred by statute on the Courts for deciding these matters, I make no determination on the merits of this, but I note that if the Provider was to bring proceedings now to enforce this debt, the Complainant would be entitled to raise them as defences to the claim.

The Provider's agents repeatedly furnished incorrect information in their letters of demand, using Euro (€) and Sterling (£) signs interchangeably (19 May 2011 and 12 August 2011); and cited UK legislation (12 August 2011). These letters issued in 2011, and thus fall outside the 6 year period of conduct within which this Office can consider under section 51(1) of the Financial Services and Pensions Ombudsman Act, 2017, as amended.

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Since the introduction of the Central Credit Register, the Provider has been under an obligation to report this account to it. It would not be appropriate therefore, for me to direct that it be removed from the register. In addition, whether or not a claim is statute barred does not affect a provider's obligation to report it.

While I note the Complainant has stated details of the debit were reported to the Irish Credit Bureau, I have been provided with no evidence that the account was ever reported to the Irish Credit Bureau, and in any event, it is not disputed that there is no record of it with the Irish Credit Bureau now.

The failure to furnish a copy of a credit agreement does not, as the Complainant contends, automatically mean that such an agreement cannot ever be enforced. The Complainant does not claim that he never had any such credit card or that he never received monies on foot of the account. The Provider could well experience difficulty proving the debt in Court, both evidentially and upon consideration of the CCA, 1995 and the Statute of Limitations, however this is not a matter I can decide.

Nevertheless, there is no doubt that the Provider's inability to furnish a copy of the credit agreement constitutes a failure to act with due skill, care and diligence.

The Provider's insistence that, even if it cannot enforce the debt through the courts it can continue to seek repayment of the debt nearly 7 years after the account was closed is, in my view, an impractical and somewhat artificial position to adopt.

That said, I am conscious that the Complainant did indeed have the facility of a credit card from the Provider and did incur a debt with the Provider.

Accordingly, in consideration of the particular circumstances of this complaint I substantially uphold this complaint and direct that the Provider amend its records such that the balance of the Complainant's credit card account 534 **** **** 2651 be set to €2,000, and the appropriate steps be taken to notify the CCR and the Complainant of this.

It will be a matter for the Complainant to pay this balance if he wishes to cease having the debt reported to the CCR.

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Conclusion

My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is substantially upheld, on the grounds prescribed in ***Section 60(2) (g).***

Pursuant to ***Section 60(4) and Section 60 (6)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct the Respondent Provider to rectify the conduct complained of by amending its records such that the balance of the Complainant's credit card account 534 **** **** 2651 be set to €2,000, and the appropriate steps be taken to notify the CCR and the Complainant of this.

The Provider is also required to comply with ***Section 60(8)(b)*** of the ***Financial Services and Pensions Ombudsman Act 2017.***

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

10 December 2019

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.