An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2020-0485
Sector:	Banking
Product / Service:	Car Finance
Conduct(s) complained of:	Mis-selling Complaint handling (Consumer Protection Code) Errors in calculations
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint concerns a consumer hire purchase agreement entered into by the Complainants.

The Complainants' Case

The Complainants entered into a consumer hire finance agreement with the Provider for the purchase of a vehicle on or about 26 March 2011. The agreement was entered into at the motor dealership where the vehicle was sold. The complaint relates to the information provided to the Complainants about finance for the vehicle and, in particular, the early repayment therefor. It also relates to the Provider's handling of the Complainants' complaint.

The Complainants state that when they were considering the finance agreement they were told that only the motor dealership could talk to the Provider. They asked the salesperson at the dealership to confirm that there were no early repayment penalties and that there would be no up-front interest payable. The Complainants state the sales person left the room in order to check with the Provider by means of a phone call and that when he returned, he confirmed that neither of the aforementioned charges would apply, and that only a "documentation charge" would be taken with the last payment.

The Complainants state that in August 2013 they requested to pay off the loan, and were given a settlement figure in excess of what they had expected, due to the application of up front interest and a penalty for early repayment. The Complainants state that this was not mentioned in the conditions of their finance agreement.

The Complainants contend that the Provider failed to comply with the Consumer Protection Code in respect of the Complainants' finance agreement in that it failed to:

- record its conversation with the motor dealership with regard to potential charges for early repayment as queried by the Complainants;
- ensure that the motor dealership recorded the Complainants' instructions in relation to the agreement;
- ensure that the Complainants were informed of applicable fees and charges;
- ensure that the penalties and charges associated with early repayment were highlighted to the Complainants;
- ensure that the motor dealership selling the finance agreement was adequately trained as to communicate the correct information requested.

In a further letter dated 15 July 2014 the Complainants highlighted issues surrounding the advertisement of the APR and the application of charges at the commencement and the end of the finance agreement. They consider that the Provider is overcharging customers as the APR does not include these charges.

The Complainants also complain about the manner in which the Provider has dealt with their complaint. In their Complaint Form the Complainants state that the Provider has *"sent us a final response letter but at no point dealt with the actual complaint"*. They complain that dealing with their complaint has been very time consuming and that the Provider *"was outside the legislated response times on almost every occasion resulting in more letters or calls"*.

The Complaint for Adjudication

The complaint is that the Provider failed to ensure the provision of correct and adequate information about the finance agreement for the purchase of the Complainants' vehicle in or around March 2011. The complaint is also that the Provider failed to ensure the recording of communication at the time of entry into force of the Complainant's finance agreement to purchase their vehicle. Further, the complaint is that the Provider has not dealt with the Complainants' complaint in a proper manner.

The Complainants want the Provider to calculate interest using a reducing balance method which they feel is in accordance with the agreement made at the dealership.

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The Provider's Case

The Provider notes, in its letter dated 9 April 2014 that the Complainants did not receive a copy of the approved fees and charges and set out that it would *"provide feedback to our dealership network that customers must be made aware of* [the Provider's] *fees and charges before entering into a finance agreement"*.

The Provider also advises that it cannot confirm the content of any phone conversation between the dealership and the Provider at the time of sale as it does not record phone calls between the dealership network and itself. It goes on to state that *"the dealership in question is a registered credit intermediary with the National Consumer Agency and is a regulated entity in its own right".*

The Provider accepts the Complainants' contention that they were told by the dealership that they could not speak directly to the Provider but sets out that this was not:

"*practice or procedure in place. Since inception [the Provider] has had a customer care team with dedicated phone lines. The details of the customer care phone line were clearly outlined on the last line of the welcome letter issued to the [Complainants] on 8th April 2011".*

In the Provider's letter dated 7 July 2014 it notes that its dealers are *"independent of* [it]*"* and it does not accept responsibility for advices given at point of sale. It sets out that it *"does not accept responsibility for incorrect information that was provided to the Complainants by the dealer"*.

The Provider further states that its fees and charges have been approved by the Central Bank of Ireland since 2008 including early settlement fees. It offered the Complainants €250 *"in acknowledgement of the incorrect information that they were given with regard to* [the Provider's] *approved fees and charges, as well as the inconvenience caused by the delays in dealing with the [Complainants'] complaint caused by* [the Provider]*"*.

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.

A Preliminary Decision was issued to the parties on 9 January 2020, 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 further submissions as follows:

1. Letter from the Complainants to this Office dated 10 January 2020.
2. E-mail from the Provider to this Office dated 16 January 2020.
3. Letter from the Provider to this Office dated 27 January 2020.
4. Letter from the Complainants to this Office dated 1 February 2020.

Copies of these additional 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 Complainants cite the Provider's advertisements for finance which were published in or about the time they entered into the agreement with the Provider which they state are misleading in that they quote an APR of 4.9% for a finance agreement of this type. The Complainants' agreement was subject to an APR of 5.1%.

This copy advertisement submitted by the Provider in fact cites 4.9% as "APR Typical", and provides examples whereby the 4.9% APR would be applicable, and includes reference to the acceptance and completion fees of €75 each. The advertisement cannot be taken as a guarantee that the Complainants would enjoy an APR of 4.9%.

I accept that the advertisement content complies with the requirements of section 21 of the Consumer Credit Act, 1995 (as amended) which sets out that:

"*[a] advertisement in which a person offers to provide or arrange the provision of credit shall, if mentioning a rate of interest or making any claim in relation to the cost of credit,*

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contain a clear and prominent statement of the APR, using a representative example if no other means is practicable, provided it is indicated that this is only a representative example, and no other rate of interest shall be included in the advertisement".
[my emphasis]

In their submission, received after the Preliminary Decision, the Complainants assert that I made an "*Error of law*" in:

"*making reference to section 21 of the 1995 consumer credit act but the directive below gives the actual accuracy required by law dated 2008.*

The advertised rate of 4.9% excluded the loan arrangement. When it is included the rate went to 5.1% which does not comply with the EU directive.

As this process is standardised [the Complainants] *believe* [the Provider] *excluded the loan arrangement fees from the APR advertised for all loans issued in Ireland.*

It is out by 2 decimal places exactly. Calculations are provided in previous submission.

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"*Annex 1:Page 19*

Under section: remarks

(d) The result of the calculation shall be expressed with an accuracy of at least one decimal place. If the figure at the following decimal place is greater than or equal to 5, the figure at that particular decimal place shall be increased by one".

Directive 2008/48/EC , the Consumer Credit Directive, was transposed into law in Ireland by the European Communities (Consumer Credit Agreements) Regulations, 2010 (the "CCD Regulations"). The provision to which the Complainants refer to above is found in "*Schedule 1, Part 1 Basic equation expressing equivalence of drawdowns with repayments and charges*" of the CCD Regulations.

The CCD Regulations at Regulation 3(6) "*Scope of these Regulations*", set out that:

"*Parts 2 to 7 of these Regulations do not apply –*
….

(d) subject to paragraph (7), to a hiring or leasing agreement where an obligation to purchase the object of the agreement is not laid down either by the agreement itself or by a separate agreement,…"

The Complainants' agreement suggests at clause 2 of "*Rights of Hirer to Terminate Agreement*" that there is an option to purchase the car. Further at clause 7 "*Termination*" it outlines that "*if the Hirer shall exercise the right to purchase the Goods*…" again

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indicating an option rather than an obligation to purchase the car which would mean that the agreement falls outside the scope of the CCD Regulations and so the provision to which the Complainants refer would not apply. Clause 1.2 of "*Hiring*" does set out that "[o]*nce the rental payments have been discharged the Hirer shall purchase the Goods by payment*". This is only one clause in the agreement which everywhere else makes it clear that the Hirer has an option to purchase the vehicle if he so wishes. On the basis of the entire agreement I am not satisfied that the CCD Regulations do apply to it and, therefore, the provision to which the Complainants refer is not applicable to consumer hire finance agreements like theirs. However, even if the CCD Regulations did apply, I do not accept that this affects the APR applicable to the Complainants' agreement. As set out above the rate on the advertisement was a representative example and not the actual rate which applied their agreement. The Provider does not dispute that the APR applicable to the Complainants' agreement was not outlined to them. Therefore, even if the Complainants are correct, that the rate advertised by the Provider did not comply with the requirements of the CCD regulations, the APR advertised was not the rate applicable to the Complainants' agreement with the Provider.

[The Complainants] *therefore conclude that [the Provider] should repay the loan arrangement fees to every loan effected. If it is deemed that they only need look at this case*".

The Complainants went on to query in a further submission if:

"*any car loan by* [the Provider] *include the loan arrangement fees in the APR quoted around this period?*"

It is important that the Complainants understand that each complaint made to the Financial Services and Pensions Ombudsman is dealt with on its own merits and this Decision relates only to that individual complaint. As I do not consider that the CCD Regulations were applicable to the Complainant's agreement, there is nothing in evidence before me which leads to the conclusion that I should refer this matter to the Central Bank of Ireland.

By contract dated 25 March 2011 the Complainants entered into a consumer hire purchase agreement with the Provider. The agreement signed by the Complainants contains information about, amongst other things, the total interest to be charged (€1,922), a documentation and completion/purchase instalment (€75 each), the monthly repayment schedule, and the total repayable (€17,772).

However, the Complainants state (and it is not disputed) that they were told by staff in the dealership that there would be no penalty for early repayment; and that interest was not charged on an "up front" (or flat interest) basis. In other words, they were led to believe that interest would be charged on a reducing balance basis.

Ultimately, having made monthly repayments as per the repayment schedule for roughly two and a half years (of the five year term) the Complainants sought to clear the balance

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due under the agreement. They were given a settlement figure which included three months of future interest.

The Complainants regard this as a penalty for early repayment. Furthermore, the Complainants state that they have been charged interest on a flat interest basis. Both of these aspects of their account run contrary to what they say they were told by the dealership in response to specific questions when they were entering into the agreement.

While the agreement allows (albeit somewhat obliquely, by referring simply to the provisions of the Consumer Credit Act, 1995 (as amended) for three months future interest to be paid upon early settlement, it is silent on both APR and the "up front" basis of the interest calculation. A key document was the copy of the approved fees and charges which should have accompanied this agreement when the documentation was furnished to the Complainants. The Provider advises that "*[a]t the time the charges were listed on the reverse of the Terms of Business page"*. The Complainants state that this schedule of fees and charges was not received by them, and the Provider is not in a position to contradict this.

The Complainants' agreement refers at clause 7 "*Termination*" to s52 and 53 of the Consumer Credit Act 1995 (as amended). S52 sets out that:

"*(1) A consumer is entitled to discharge the consumer's obligations under an agreement at any time before the time fixed by the agreement for its termination.*
….

(3) Where the consumer exercises the entitlement, the creditor or owner shall allow a reduction in the total cost of credit under the agreement.

(4) Except where subsection (6) applies, the reduction is to be calculated in accordance with a method or formula approved for that purpose by the [Central Bank of Ireland].

(5) The [Central Bank of Ireland] *may approve different methods or formulas for the purpose of subsection (4).*

…."

S89 of the Consumer Credit Act 1995 (as amended), though not referred to in the Complainants' agreement, sets out that:

"(1) A hirer shall, at any time, be entitled to determine a consumer-hire agreement by giving notice of termination to the owner or any person entitled to receive the sums payable under the agreement.

(2) Where a notice is given under subsection (1) the agreement shall be determined after the expiration of the period of 3 months (or such lesser period as may be specified in the agreement) from the date of receipt of the notice."

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The Provider outlines that it had sought and received permission from the Central Bank of Ireland to apply the early termination charge of three months interest. It submitted a copy of this authorisation dated 12 September 2008 which sets out as follows:

"[t]*he Early Termination charge in respect of the calculation of early redemption of fixed rate loans is approved at 3 months interest and the Financial Regulator notes the use of the Rule of 78*".

However, while the agreement allowed for the three months future interest and the Provider maintains that the copy of the approved fees and charges would have confirmed this, and the Central Bank of Ireland noted "*the use of the Rule of 78",* I cannot find any reference to the APR therein or the Rule of 78 or the effect of it where early repayment takes place.

This was clearly not a satisfactory level of information to provide to the Complainants, and is exacerbated by the fact that the Complainants were given information at the time of entering into the agreement that was, quite simply, incorrect.

Extensive calculations were provided by both parties. However, given that the settlement took place in or around the midpoint of the loan term, I am satisfied that the difference between three months' interest on an "up front" basis and three months' interest on a reducing balance basis is not significant.

Despite other shortcomings, the agreement did clearly state the total amount of interest that was payable, as well as the schedule of monthly repayments, so the total cost of the loan to the Complainants had it run its term, would not have been at issue.

The issue is the levying of the three months' future interest. The amount actually charged as three months' interest on the final settlement figure was less than €100.

The incorrect information was provided to the Complainants by a staff member in a motor dealership. However, I do not accept that this serves to exonerate the Provider from any responsibility whatsoever. Section 88 of the Consumer Credit Act 1995 (as amended) sets out that s75 to 83 of that Act apply to Consumer-Hire Agreements such as is at issue here. S80 sets out that:

"[w]*here goods are let under a hire-purchase agreement to a hirer, the person, if any, by whom the antecedent negotiations were conducted shall be deemed to be a party to the agreement and that person and the owner shall, jointly and severally, be answerable to the hirer for breach of the agreement and for any misrepresentations made by that person with respect to the goods in the course of the antecedent negotiations*".

When asked to respond to the contention that s80 applied to the agreement between the parties, the Provider set out that it:

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"*does not accept responsibility for incorrect information that was provided to the complainant by the dealer. The dealer was answerable to the complainant. Dealers are independent intermediaries for* [the Provider] *but are individually regulated and authorised by the Central Bank of Ireland and / or the CCPC* [the Competition and Consumer Protection Commission] *depending on the products they offer. They are subject to the rules and regulations attached to their authorisations, independent of* [the Provider]*. However,* [the Provider] *is looking to resolve the issue with the complainant and have participated in this complaints process from the outset*"

While I note the Provider's argument, s80 is clear that the Provider and the motor dealer were jointly and severally answerable to the Complainants for any misrepresentations made by the dealer. The Provider must ensure that correct and clear information is given to its customers. This did not occur in this instance.

The Provider failed to ensure that the Complainants received clear and correct information in relation to its product. However, the financial loss suffered by the Complainants was, relatively speaking, minimal.

The Complainants also complained of the Provider's handling of their complaint. The Complainants submitted their complaint to the Provider in November 2013. In April 2014 the Provider issued a final response letter and the Complainants submitted a complaint to this Office. There followed some delay while it was established which was the appropriate body to deal with a complaint against the Provider. While the delay between November 2013 and April 2014 is regrettable, there were a number of interactions during this time. When the Complainants submitted a complaint to this Office they were, in good faith, referred to a supervisory authority in another EU member state. Therefore, the time lapse between when the complaint was submitted to this Office and when confirmation of the appropriate body to investigate the Complainants' complaint does not lie at the door of the Provider.

Further, consumer-hire agreements are not subject to the Consumer Protection Code 2012(as amended) so the timelines set out therein are not applicable albeit that the Provider confirms that since 2015 it has "*adopted the regulatory timelines as best practice*".

By letter dated 7 July 2014 the Provider wrote to the Complainants offering to pass on their feedback to the dealer network together with €250 by way of compensation.

The First Complainant has repeatedly referred to the rate he charges per hour as a yardstick for the level of compensation that would be appropriate. This is not an appropriate manner in which to measure compensation – if it were it would result in wide discrepancies between compensation directed to different consumers who have experienced identical issues, and between consumers who have devoted differing levels of their own time when dealing with identical issues.

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In my view, the €250 in July 2014 constituted a reasonable offer of settlement at that point in time. I note from the Provider's response to the Schedule of Questions in the Summary of Complaint at Question 19, it confirms that "*the offer of €250 is still open to the customers".*

On the basis that this offer was received prior to the matter proceeding for adjudication by this Office, and remains available to the Complainants, 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

13 March 2020

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.