



<b><u>Decision Ref:</u></b>	2022-0284
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Hire Purchase
<b><u>Conduct(s) complained of:</u></b>	Misrepresentation (at point of sale or after) Dissatisfaction with customer service Failure to process instructions in a timely manner
<b><u>Outcome:</u></b>	Partially upheld

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

This complaint arises from a new vehicle acquired by the First Complainant from a named car dealership (the “**Dealership**”) in **July 2017**. The vehicle was financed by way of a Hire Purchase agreement dated **26 July 2017**, with a named Bank. The term of the Hire Purchase agreement was 24 months and was scheduled to conclude in or around **July 2019**.

The purchase price of the vehicle was €72,000, of which €20,000 was financed by the hire purchase agreement and the remaining balance of €52,000 by deposit/part exchange.

The Provider is a member of company group which manufactures cars. One of the members of this group of companies will be referred to below as the “**Car Company**”.

Ownership of the hire purchase agreement was subsequently, in 2020, transferred from the Bank to the Provider. The Provider confirmed to this Office in an email dated 26 March 2020, that it would honour all contracts entered into with the Bank, and all associated obligations past, present and future. Consequently, this complaint is maintained against the Provider, as successor in title to the Bank.

References in the below Decision to the actions or position of the Provider, should be taken to include the actions or position of the Provider’s predecessor, the named Bank, as appropriate.

### **The Complainants' Case**

The Complainants state that within 3 days of acquiring the vehicle, they noticed a loud rattle emanating from the passenger side dash of the vehicle. The Complainants state that they returned the vehicle to the Dealership the following week, and that the Dealership advised them that it had dismantled the car dash, to investigate the issue and that the rattle had been caused by an air conditioning pipe.

The Complainants submit that following this repair work, they began to have issues with the radio, in so far as there was *“static and interference, and the quality of the reception had deteriorated greatly”*.

The Complainants state that they believe the issues with the radio were caused by the repairs carried out by the Dealership, because the Head Unit and all of the cables associated with the car audio are located behind the passenger side dash. The Complainants state that the Dealership investigated but said that it could not find any issue with the radio.

Subsequently, on foot of advice the Complainants received from an audio specialist, the Complainants requested the Dealership to change the head unit. The Dealership replaced the head unit in **February 2018**, however, the Complainants state that this repair did not improve the radio issues they were experiencing.

The Complainants state that the Car Company's customer care subsequently informed them that the part that had been fitted was different from the part the Dealership had advised them had been fitted, and that they *“now have concerns about whether or not this was actually done”*.

The Complainants submit that in **December 2017**, the vehicle's brakes began to squeal loudly, and that the vehicle was returned to the Dealership four times, on 22 December 2017, 10 January 2018, 25 January 2018 and 14 February 2018 respectively, for repairs but that

*“[o]n both occasions after repair, the noise has returned after a day or so and each time become progressively worse. The dealership basically advised that this is normal and due to weather, humidity, temperature etc. however we don't believe that a new vehicle should make a consistent noise and it is not dependant on weather, etc as it happens all day & in all weather.”*

Finally, the Complainants submit that the vehicle's fuel gauge was unreliable, insofar as on filling the diesel tank, the fuel gauge rose disproportionately to the amount of diesel added. The Complainant state that as a result, the fuel gauge did not accurately indicate the number of kilometres they could drive before needing to refuel. The Complainants state that when the Dealership investigated this issue, no fault was conveyed on its diagnostic system.

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In support of their contention that the vehicle was faulty, the Complainants have submitted a report by a named automotive engineer (the “**Engineer**”) dated **29 March 2018**. The Complainant states that the Dealership and the Car Company refused to accept the Engineer’s report and requested an assessment by another assessor. The Complainants state that this assessment did not ultimately proceed.

The Complainants contend that the Provider has failed with respect to its contractual obligation, as the owner of the vehicle under the hire purchase agreement, to supply them with a vehicle of merchantable quality.

The Complainants also contend that the Provider refused to deal with their complaint regarding their vehicle which they made in **March 2018**, and instead passed their complaint to the Dealership and the Car Company. The Complainants state that this is evidenced by the Provider’s final response letter dated **15 March 2018**, which referred the Complainants back to the Dealership, stating that the sale of goods issue remains between the Complainants and the Dealership. The Complainants state that Provider

*“at no point engaged with us regarding the faults with our vehicle via telephone call or email and refused to discuss it directly with us, continuously referring us to [the car brand’s] customer care and the Dealership”.*

### **The Provider’s Case**

The Provider states that it ensures that vehicles let under a hire-purchase agreement are of merchantable quality, by adopting a “*common-sense approach*” where it depends on its business partners to supply the technical support to resolve merchantability issues on a vehicle.

The Provider states that it has a contract with the Car Company and individual dealerships within which they agree to assume the responsibility for the resolution of merchantability issues. The Provider states that its contract with the Dealership stipulates that the Dealership must keep all vehicles in full repair and working order and to make good any defect or repair at the Dealership’s own expense.

The Provider states that in its agreement with the Car Company with respect to the purchase of vehicles, under covenant and acknowledgements, the Car Company confirms that each new vehicle is of merchantable quality. The Provider also states that the Car Company indemnifies it for any sums to be paid because of defective vehicles, which the Provider states acts as a deterrent to the Car Company providing defective vehicles.

The Provider states that

*“[a]ccepting this does not divest [the Provider] of its contractual obligations to a customer it does reflect the optimum approach and our legal basis for resolving*

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*merchantability issues as quickly, efficiently and professionally as possible through our Business Partners”*

The Provider states that checks carried out by the Dealership during the presale process did not reveal any of the issues raised by the Complainants, which emerged shortly after purchase. The Provider acknowledges that there was an initial rattle in the passenger side of the Complainants’ vehicle which was reported by the Complainants to the Dealership in **August 2017**, but it submits that this issue was fully repaired by the Dealership on **21 August 2017**. The Provider relies on the Dealership’s technical report of the same date, in support of this position.

The Provider does not agree with the Complainants’ contention that the dashboard was pulled apart to identify the cause of the initial rattle in the passenger side of the vehicle. The Provider submits that it made enquiries with the Dealership, which confirmed that only the glove compartment was removed, to investigate the rattle issue and that the Dealership confirmed that it was highly unlikely this had caused the radio issues identified by the Complainants.

The Provider states that in **August 2017**, the Complainants reported a fault with the radio, to the Dealership. The Provider submits that notwithstanding that the fault did not arise during the Dealership’s inspection of the vehicle, the head unit was subsequently replaced under warranty in **February 2018**, at the Complainants’ request.

The Provider states that the Complainants also reported to the Dealership in **February 2018** that there was excessive noise when braking, and there were issues with the reliability of the fuel gauge. The Provider submits that:

*“[t]his alleged fault of brake noise did arise during an inspection during February 18 with action taken by the dealer to fix it. A vehicle health check on the 09/10/18 shows brakes are ok. A noise was detected on the 23/02/19 and work was carried out to address it. While noise was detected, no safety issue was ever identified and the brakes were deemed to be fully functioning.”*

The Provider contends that no issues were detected with the reliability of the fuel gauge during the Dealership’s diagnostic check.

The Provider disputes that the vehicle is defective to the extent to which the Complainants contend, or that a replacement vehicle is warranted, stating that “[t]he vehicle has been roadworthy throughout the period and no material issues were substantiated”. In this regard, the Provider contends that the issues the Complainants experienced did not impact on the driving performance of the vehicle, which the Provider states is evidenced by the fact that the Complainants continued to drive the vehicle during the term of the hire purchase agreement.

The Provider states that extensive efforts were made to resolve the issues raised by the Complainants, at no cost to the Complainants, and that the Dealership also agreed to conduct a free service which the Complainants only availed of in January 2019. The Provider also states that general wear and tear safety repairs were recommended, “which

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*the customer opted not to avail of through the Dealership which they are fully entitled to do”.*

The Provider states that while the Dealership and the customer agreed to have a second independent assessment of the vehicle carried out, ultimately this assessment did not proceed.

In relation to the manner in which the Provider responded to the Complainants’ complaint, the Provider states that when it issued its final response letter, it referred the Complainants to the Dealership in accordance with the Provider’s agreement with the car company group and Dealership whereby “they take responsibility for resolving technical/merchantability issues relating to the condition of the vehicle”.

However, the Provider submits that, in such circumstances, it continued to have regular contact with the Dealership to oversee progress with a view to resolving the merchantability issues. The Provider submits that while:

*“[i]t does appear from our final response letter that [the Provider] became completely removed from trying to resolve the matter but the evidence provided of our interactions with the dealer and through the FSPO that it was not the case”*

The Provider accepts that it was premature in issuing a final response letter when the complaint was unresolved and in circumstances where it continued to endeavour to resolve the complaint in conjunction with the Dealership, after the final response letter was issued.

### **The Complaint for Adjudication**

The complaint is that the Provider:

1. failed to comply with its obligation to ensure that the hire-purchase vehicle supplied to the Complainant in **July 2017**, was of merchantable quality; and
2. failed to adequately investigate or respond to the Complainants’ complaint which they made in **March 2018**, about the vehicle supplied to the Complainants under the hire-purchase agreement.

### **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.

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

A Preliminary Decision was issued to the parties on **22 September 2021**, outlining the preliminary determination of this Office 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 consideration of additional submissions from the parties, the final determination of this Office is set out below.

### **1. Merchantable Quality**

The first aspect of the Complainants' complaint relates to the suggested failure of the Provider to comply with its obligation to ensure that the vehicle was of merchantable quality, when it was let to the First Complainant by the Provider in **July 2017**.

The obligation that goods let under a hire-purchase agreement must be of merchantable quality, is set out in **section 76(2)** of the **Consumer Credit Act 1995**, which states that

***“[w]here the owner lets goods under a hire-purchase agreement in the course of a business, there is an implied condition that the goods are of merchantable quality within the meaning of section 14 (3) of the Sale of Goods Act, 1893, except that there shall be no such condition –***

- a) as regards defects specifically drawn to the hirer's attention before the agreement is made, or*
- b) if the hirer examines the goods before the agreement is made, as regards defects which that examination ought to have revealed”*

[my emphasis]

**Section 14(3)** of the **Sale of Goods Act, 1893** (as amended) provides a statutory definition of the concept of merchantable quality. The section states:

*“Goods are of merchantable quality if they are as fit for the purpose or purposes for which goods of that kind are commonly bought and as durable as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances, and any reference in this Act to unmerchantable goods shall be construed accordingly.”*

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In *James Elliott Construction v Irish Asphalt Ltd* [2014] IESC 74, the Supreme Court quoted with approval the approach taken in the UK case of *Rogers v. Parish (Scarborough) Ltd*. [1987] Q.B. 933 (the “**Rogers Case**”), to the statutory interpretation of merchantable quality, stating that:

*“... in that case ... The plaintiffs purchased a Range Rover which was sold as new but proved to be defective and another Range Rover was substituted for it. On delivery, however, the engine, gear box and bodywork of the replacement were substantially defective, and oil seals at vital junctions were unsound, causing significant quantities of oil to escape. There were a number of unsuccessful attempts made by the garage to rectify the defects. At the end of a six month period, the engine was still misfiring, excessive noise was being emitted from the gear box, substantial defects remained in the body work, and the plaintiffs rejected the vehicle ...*

*[the Court in the Rogers Case] pointed out that the purpose for which goods of that kind, i.e. a new motor vehicle, were bought included not just travelling from one place to another, but doing so with the appropriate degree of comfort, ease of handling, reliability and indeed pride in the vehicle’s outward and interior appearance. Accordingly, [the Court] had no difficulty in concluding that the Range Rover was not as fit for the purposes the buyer could reasonably expect ....”*

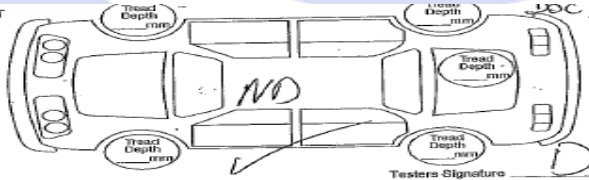
The documentation on file includes a number of mechanical and technical reports detailing the condition of the car. These reports date from before the car was let the Complainants and also from afterwards, when the suggested faults arose. I have set out the contents of these reports in greater detail below.

Pre- Hiring

Prior to the date on which the car was let by the Provider to the First Complainant on **26 July 2017**, the car was inspected by the Dealership for defects. The documentation on file includes a Job Card dated **24 July 2017**, described as “*new vehicle preparation*”, and a Technician’s Report dated **25 July 2017** which set out as follows:

BODYWORK REPORT

FAULT SYMBOLS (PANEL & PAINT)  
D DENT  
S SCRATCH  
C CHIP  
R RUST  
B BROKEN



ND

Testers Signature

TECHNICIANS WRITE-UP REPORT

PDI  
Ad-blue  
Boolliner  
Accessories Pack  
MMI cable  
Door lights.

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While this Report is not particularly detailed it does indicate that the vehicle was inspected by the Dealership on **25 July 2017**, and that certain items were added to the car such as a boot-liner and an accessory pack.

The documentation on file also includes a Maintenance List dated **25 July 2017** which sets out the various checks performed on the vehicle. An extract from this list details as follows:

Vehicle before the lifting platform	OK / completed	Not OK	Rectified
Stock vehicles and vehicles in storage: Carry out measures according to maintenance table "Stock vehicles and vehicles in storage", "Before delivering vehicle to customer"	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Vehicle exterior: remove protective foil if fitted	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Vehicle doors: remove edge protection	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Paintwork, decorative parts, windows, wiper blades: check for cleanliness	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Accessories: attach	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Display instruments: set time and date	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Front passenger airbag: Check key switch and On/Off function and set to On	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Luggage compartment: Remove protective foil and felt	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Vehicle interior: remove seat protective covers and protective foils	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Vehicle interior: check for cleanliness, clean if necessary	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Display protective foils: remove (if fitted)	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Vehicle on the lifting platform	OK / completed	Not OK	Rectified
Brake fluid: Check fluid level	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Coolant level: check - the specified value is the uppermost marking on the expansion tank. Coolant levels above the upper marking are permissible, but not below.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Engine oil: check oil level and correct as necessary	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Wheel bolts: tighten to specified torque	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Tyres on front axle: check tyre pressure and adjust as necessary	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Tyres on rear axle: check tyre pressure and adjust as necessary	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Vehicle from below: check for damage	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Final checks	OK / completed	Not OK	Rectified
Event memory: Read	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Service interval display: reset the service event	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Transportation mode: Deactivate	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Battery: interrogate condition	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Tyre pressure control display: store revised tyre pressures	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Check that vehicle literature is complete	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Owner's manual: Apply vehicle data sticker	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Vehicle key: check function, enter number of keys handed over	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Carry out road test	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Dash panel insert: reset driver information system	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Complete vehicle diagnosis and send diagnosis protocol	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Datasheet on Radio Equipment Directive: print off and place in glove compartment.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

● = Additional task invoiced separately

⊕ = Visual Inspection

OK / completed = OK    Not OK = Not OK, please observe service instructions.    Rectified = The error has been rectified

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The First Complainant and the Dealership signed a Customer Handover Checklist dated **27 July 2017**, which includes a list of items such as “*radio/CD Player/CD Changer/Bluetooth Operation*” beside which, I note that a tick was present, which appears to indicate that each item was present and correct.

It is clear that the Provider itself did not inspect the vehicle in or around the time it was let to the First Complainant on **26 July 2017**. Instead, the Provider states that in order to ensure the merchantability of the car, it relies on its contract with the Car Company, in which the Car Company confirms to it that each new vehicle is of merchantable quality. The provider says that its contract with the Dealership states that:

*“[t]he Dealer agrees at its own expense to keep all vehicles which are delivered under this Agreement...in full repair and working order and make good any defect or want or repair...”*

The Provider had not explained whether, in 2017, it had any processes or systems in place to verify that checks were carried out (whether by the Dealership or by the Car Company) on vehicles it intended to let under hire-purchase agreement, to ensure that such cars were of merchantable quality. However, I am satisfied that in this instance, the Technician’s Report and Maintenance List dated **25 July 2017**, demonstrate that the vehicle which was the subject of the hire purchase agreement with the Complainant, was inspected by the Dealership and checked for defects before it was let by the Provider to the Complainant.

Notwithstanding that the vehicle passed the maintenance checks carried out on it on **25 July 2017**, the Complainants contend that the following faults arose in respect of their vehicle, after they acquired it on **26 July 2017**:

1. a loud rattle emanating from the passenger side dash of the vehicle;
2. issues with the radio including static, interference and reduced sound quality;
3. excessive noise/squealing when braking; and
4. an unreliable fuel gauge that rises disproportionately in relation to the amount of diesel added.

#### *Rattle from the Passenger Dash*

The Provider acknowledges that a rattle from the passenger side dash of the vehicle did indeed arise shortly after the vehicle was let, but it contends that this fault was fully fixed by the Dealership on **21 August 2017**. The Provider has submitted a Job Car Report dated **21 August 2017**, which states

*“...Car road tested with customer, intermittently vibration noise heard coming from dash area.... Fault found with refrigerant line with internal heat exchanger vibrating against inner valance causing noise to be heard from dash area. See attached. All contact points on valance ground down and cavity spray applied... Road tested ok. Faults erased OK”*

## Radio

The Complainants first reported an issue with the radio to the Dealership, a month after acquiring the car, by email dated **28 August 2017**, in which they stated that the volume control and channel select had stopped working two days beforehand but had started working again the following morning.

As set out in the '**Summary of Related Action Carried out by [the Dealership]**' document supplied to this Office by the Provider, the Complainants complained about static and hissing noises on the radio from **September 2017** onwards. The Complainants believe that the fault in the radio was caused by the repairs carried out by the Provider on **21 August 2017**, to fix the rattle from the passenger side dash of the vehicle.

Both parties accept that the Dealership inspected the car and found no issues with the radio, although the Provider did replace the head unit at the Complainants' request in **February 2018**. However, the Provider has not supplied any reports relating to these inspections, nor is it clear on what precise dates these inspections occurred. However, according to the Provider's summary of dealership actions document, between **September 2017** and **January 2018**, the following actions were undertaken by the Dealership to investigate the suggested radio fault:

*"Sept 17-Jan 18      Customer complains of static and hissing noises on radio reception  
[The Dealership] unable to find or confirm a fault  
[The Dealership] engaged with [car brand redacted] and drove the [car model redacted] to test. No faults found  
After numerous communications [the Dealership] get Brand to agree to a new Head Unit  
Customer requests that [car brand redacted] Specialist she has spoken to Fit the New Head Unit- [the Dealership] unable to agree  
Customer visited [the Dealership] to have Sound checked  
Numerous extended test drives with Master Tech, Serv Manager, General Manager no faults found....."*

An email from the Car Company's customer service to the Second Complainant dated **15 March 2018**, states in relation to the suggested radio fault:

*"...We also discussed your concerns with the radio and [the Dealership] are satisfied that the radio is working as per manufacturer's specification. They have also engaged the services of the [Car Company] Technical Department who have also concurred that the car radio was operating correctly. In relation to dismantling of the dash they can confirm that the dash was not dismantled by [the Dealership] and they mentioned that they had clarified this to you a number of times.*

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*The head unit is accessed through the glove compartment. They also mentioned that during an email correspondence with you on Monday the 18th of December, they were happy to accommodate you visiting an Audio Specialist in regards to your radio, however they have yet to be furnished with any report...*

*The fuel gauge on any car is an approximate range and there are many external factors that affect this .... Again, they are happy to do a fuel test in order to eliminate any concerns that you may have."*

However, the Complainant commissioned an Engineer's Report on **29 March 2018** which states:

*".....*

#### **Electrics**

*The electrical system operated satisfactorily. All controls and switches functioned normally and the lights were operational. The horn was working normally. The radio functioned normally. The vehicle had 1 key provided which operated normally. We noted that there was interference from the audio system when the radio was selected. The interference was in the form of a low pitch crackling noise and a diminution in audio quality.....*

#### **Audio System**

*We found the sound quality from the audio system was below that of what we would expect for a vehicle of this calibre. On several occasions on the road test we noted a crackling noise coming through the speakers and the sound quality was poor. The sound quality was not necessarily muffled, rather, it was not as crisp and sharp as we would expect. The sound quality was clear when an auxiliary source was used which would suggest that the issue with the audio system is specific to the radio and relates to poor radio or RF signal.*

*We understand that previous work was carried out to the audio system by way of replacement of a component located behind the glove box. We have no direct information from the vendor as to what part was actually replaced. This is of concern as it clearly suggests that some degree of stripping has occurred with the audio system which may, by means of removing and refitting component's, have contributed to the fault with the radio element of the audio system. Clarification is required as to what part was replaced with the audio system.*

*Therefore, taking the foregoing information into consideration, it is our opinion that the vehicle should be returned to the vendor to have the necessary rectification works completed under the terms of the manufacturer's warranty."*

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## Brakes

There is some disagreement between the parties as to when the Complainants first reported the brake noise/squealing, to the Dealership. The Complainants submit that the vehicle was returned to the Dealership on **22 December 2017, 10 January 2018, 25 January 2018** and **14 February 2018**, for repairs due to the brakes. However, the Provider states that this issue with the brakes was first reported by the Complainants to the Dealership in **February 2018**.

In the Preliminary Decision I noted that:

*"The Complainants have not supplied this office with any documentation relating to four inspections of the car which they state were carried out in December 2017 and January 2018. Furthermore, in an email from the Second Complainant to the Dealership dated **12 March 2018**, the Second Complainant refers to two repair attempts, rather than four:*

*"...the issues with our brakes is still very much present ...**The car has been returned on 2 occasions now for repair** and this still hasn't been rectified. The radio issues are also still very much present"*

*[my Emphasis]*

*Consequently, I am satisfied that there was at most two repair attempts of the brake noise issue prior to **March 2018**."*

In the Complainants' post Preliminary Decision submissions the Complainants supplied various extracts from emails which the Complainants state were exchanged with the Dealership, demonstrating that the brake noises were reported to the Dealership on **15 December 2017** and that the vehicle was sent to the Dealership on **22 December 2017, 9 January 2018, 14 February 2018, 17 May 2018 and 14 January 2019** for repairs required to the brakes. One of the extracts which the Complainants state is from an email dated 15 December 2017, from the Complainants to the Dealership states:

*"We are now also experiencing a loud screeching noise emanating from the front brakes of this car, which also needs to be dealt with going forward.... "*

This tends to support the Complainants' position that the brake noise was reported to the Dealership in **December 2017**.

In any event, the Provider has acknowledged that there were brake noises during an inspection of the car in February 2018, although the Provider states that this issue was fixed at that time.

The Provider refers to an email from the Dealership to the Second Complainant dated **15 February 2018**, in this regard which states

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*“Just to let you know the work carried out for your information. Front brake pads were removed and cleaned and excessive brake dust removed. Ceramic grease compound was applied to the back of the pads. The vehicle was test driven from both cold and warm and all OK with brakes, Brake noise may occur in certain situations depending on speed, braking force and ambient conditions such as temperature and humidity”*

The Provider also refers to a Vehicle Health Check Report dated **9 October 2018**, detailing no issues with the brakes.

An extract from this report, states:

ENGINE + DRIVETRAIN	State	REPORT & RECOMMENDATIONS	PRICE (Inc. VAT)	STATUS
Check Clutch	<input checked="" type="checkbox"/>		0.00	
Check Plenum Chamber	<input checked="" type="checkbox"/>		0.00	
Leaks	<input checked="" type="checkbox"/>		0.00	
TYRES	State	REPORT & RECOMMENDATIONS	PRICE (Inc. VAT)	STATUS
DSF Tyre	<input type="checkbox"/>	*FAULTY* 285/45/20 3.1/3.2/1.	242.80	Declined work
DSR Tyre	<input type="checkbox"/>	4.4/3.6/3.4	242.80	Declined work
PSR Tyre	<input type="checkbox"/>	4.3/3.5/3.6	242.80	Declined work
PSF Tyre	<input type="checkbox"/>	*FAULTY* 2.6/2.5/1.1	242.80	Declined work
Spare Inflation Space?	<input checked="" type="checkbox"/>		0.00	
BRAKES	State	REPORT & RECOMMENDATIONS	PRICE (Inc. VAT)	STATUS
Check Front Pads	<input checked="" type="checkbox"/>		0.00	
Check Front Discs	<input checked="" type="checkbox"/>		0.00	
Check Rear Pads	<input checked="" type="checkbox"/>		0.00	
Check Rear Discs	<input checked="" type="checkbox"/>		0.00	
Flexi Brake Hose Condition	<input checked="" type="checkbox"/>		0.00	
SUSPENSION + EXHAUST	State	REPORT & RECOMMENDATIONS	PRICE (Inc. VAT)	STATUS
Check Front Suspension	<input checked="" type="checkbox"/>		0.00	
Check Rear Suspension	<input checked="" type="checkbox"/>		0.00	
Check Steering	<input checked="" type="checkbox"/>		0.00	
Check Exhaust	<input checked="" type="checkbox"/>		0.00	

NOTE: This report is the result of a visual examination only of those items listed. Further checks may be necessary to determine full extent of requirements.

Legend

- Requires urgent attention - Due for replacement immediately, is unsafe or may not last beyond 3 months\*
- Advisory - Does not require immediate attention i.e. Does not require replacement within 3 months but may not last to next service\*
- Visually OK - Estimated to make it to next service but advised to be checked between service intervals\*

Based on current conditions and visual inspection\*

**THIS IS NOT AN INVOICE**  
(Prices are VAT inclusive and valid for 30days)

The Complainants' Engineer's Report dated **29 March 2018** states:

“.....

**Brakes**

*The operation of the braking system was satisfactory. The vehicle stopped in a straight line under emergency braking. There was no feedback noted through the brake pedal. The handbrake operated satisfactorily.*

/Cont'd...



*The brake discs front and rear were serviceable and the brake linings were adequate. However, when coming to a gradual stop at velocities below 40 k/m p/h, where the brake pedal was lightly applied, a high pitch squeal was noted from the front and the rear of the vehicle....*

.....

*The high pitched squeal from the brakes is only evident at low velocities, when coming to a gradual stop, with the brake pedal lightly applied. This noise was quite apparent on our road test where we had both wet and dry conditions.... The noise from the braking system on this vehicle falls drastically short of what we would expect from a vehicle of this calibre."*

The Provider acknowledges that a brake noise was also detected in **February 2019**, and that work was carried out to address it by the Dealership. The documentation on file includes an internal invoice from the Dealership dated **23 February 2019**, which states:

*"[c]arry out diagnostic on brake noise from front of vehicle under light braking. Noise from DSF wheel. Brakes cleaned down. New brake pads and springs fitted. Lithium grease applied to contact points. Test drive. All ok."*

#### Fuel Gauge

The Provider states that an issue with the fuel gauge was first reported by the customer to the Dealership in **February 2018**. In an email from the Complainants to the Provider dated **12 March 2018**, the Complainants describe an issue with the unreliability of the fuel gauge and state that:

*"I did mention this to the dealership also but apparently no fault conveyed on their diagnostic system! This has happened again since."*

It is not clear on what date this diagnostic test occurred, nor has this Office been supplied any documentation relating to the diagnostic test. However, both parties have confirmed that this test was carried out and that no issue was identified by the Dealership.

#### Analysis

The FSPO is not a mechanical expert and the function of this Office is not to adjudicate on conflicting opinions as to mechanics. Rather, the role of the FSPO is to assess whether or not the Provider acted reasonably, properly and lawfully in determining that the car in question, was of merchantable quality, at the time when it was let to the Complainants.

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While the independence or competence of engineering professionals is not a matter for this Office and I make no comment in that respect, it is appropriate for this Office to consider the evidence which was available to the Provider, on the basis of which it determined that the car was of merchantable quality, when it was let to the Complainants in July 2019.

I note that the Provider has submitted that the first suggested fault, the rattle in the passenger dash, was repaired by the Dealership and it has submitted a Job Card Report dated **21 August 2017** as evidence of the repairs carried out at that time. The Complainants in their submissions to this Office have not disputed that this particular fault was resolved. I also note that the Complainants' Engineer's Report dated **29 March 2018**, does not refer to any such fault. Consequently, I am satisfied that the first fault (the rattle in the passenger dash) was fully repaired by the Dealership on **21 August 2017**, very shortly after the Complainants took possession of the vehicle, and that the Provider has no further case to answer in respect of this fault.

In relation to the suggested fault with the fuel gauge, limited documentary evidence has been supplied this Office. Notwithstanding this, it is clear that it is the Provider's position that no such fault arose when the Dealership carried out a diagnostic test. I also note that the Complainant's Engineer's Report does not detail any issue or fault with the fuel gauge. In light of the lack of evidence of this suggested fault, I am satisfied that it was reasonable for the Provider to conclude that there was no issue with the vehicle's fuel gauge.

Turning now to the issues with the radio and brakes raised by the Complainants, I note that the Provider stated that no issues with the radio were identified by the Dealership when it inspected the vehicle at some point in late 2017 / early 2018 although it acknowledged that a squeal from the brakes was identified when the vehicle was inspected by the Dealership in **February 2018** and again in **February 2019**.

While no issues were identified with the radio during the Dealership's inspections of the car, the Complainants' Engineer's Report describes a "*a low pitch crackling noise and a diminution in audio quality*" coming from the radio. Although the Provider stated that the Car Company's technical department concurred with the Dealership in late **2017 or early 2018**, that the car radio was operating correctly, the Provider has not supplied this Office with any technical or mechanical reports detailing the Dealership's or the Car Company's technical department's investigation of this issue and/or the outcome of such investigations. This suggests that such reports were not supplied to the Provider, such that the Provider could not have been aware of the type and extent of the investigations carried out on the radio by the Dealership and/or Car Company.

It is regrettable that the Provider did not take action to secure more details on these inspections which occurred in late 2017 or early 2018, before reaching a conclusion on merchantability. It is important for the Provider to seek all relevant or potentially relevant engineering records, before reaching a decision on merchantability, although I accept that the Provider was made aware of the outcome of these inspections, i.e., that no issue with the radio was identified.

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The Complainants believe that the issue of radio static was caused when the car's dash was dismantled in August 2018, to repair the rattle in passenger side, although I note that the Complainants' Engineer's Report dated **29 March 2018** is not conclusive as to the cause of the radio static:

*"[w]e understand that previous work was carried out to the audio system by way of replacement of a component located behind the glove box. We have no direct information from the vendor as to what part was actually replaced. This is of concern as it clearly suggests that some degree of stripping has occurred with the audio system, which may, by means of removing and refitting components' have contributed to the fault with the radio element of the audio system."*

It must be pointed out that in the event that the fault in the radio was caused by "stripping" carried out by the Dealership, rather than by an inherent fault in the car, then the issue with the radio could not be said to be one of merchantability (i.e. whether the car was fit for purposes when it was let).

Rather the issue in such circumstances, would stem from the work carried out by the Dealership on behalf of the Provider, on **21 August 2017**, approximately a month after the car was sold. However, the Provider denies that the dash was dismantled by the Dealership when carrying out initial repairs in **August 2017**. Furthermore, there is no suggestion that the Provider's determination that the car was of merchantable quality, was based in any part on the suggestion that any issue with the radio was the fault of the Dealership. It is also clear that while the vehicle did pass inspections by the Dealership before it was let to the Complainants, the Provider has not suggested that the issues with the car were caused by wear and tear, as opposed to the inherent merchantability of the car. Consequently, it is not necessary for this Office to make any finding on these points.

The crux of the Provider's position is that the car was of merchantable quality because the "vehicle has been roadworthy throughout the period and no material issues were substantiated". In essence, the Provider contends that, in so far as issues with the radio or brakes arose, these issues were minor faults, which do not "represent grounds for a replacement vehicle". The Provider states in relation to the Complainant's Engineer's Report, that "[t]he results were somewhat subjective and nothing substantive or of any materiality was identified".

The Complainants acknowledge that they continued to drive the vehicle, after they acquired it. The Complainants' Engineer's Report dated **29 March 2018**, (8 months after the vehicle was first let to the Complainants) records the odometer reading as 15,711 k/m. It is clear that the faults which the Complainants describe with the radio or brakes did not in any way affect the roadworthiness of the vehicle in terms of the mechanical ability of the car to travel from one destination to another. Rather the issues relate to the quality of the driving experience for the Complainants. In that regard, relying on the Court's views in the **Rogers Case**, I do not accept that the fact the Complainants were able to drive the vehicle from one location to another, is adequate in itself, to conclude that the car was of merchantable quality.

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In order for a car to be of merchantable quality, it must be *“fit for the purpose or purposes for which goods of that kind are commonly bought ...”*. It is clear that a car should be of reasonable, acceptable quality given the age, cost and history of the car. Deficiencies which might be acceptable in a second-hand vehicle are not to be expected in a new car. However, notwithstanding the fact that in this instance, the car was a new luxury vehicle costing €72,000, the Provider’s position is that the issues identified in the Complainants’ Engineer’s Report were not material or substantive enough to justify a replacement vehicle.

In considering whether the Provider’s position is a reasonable one, ie that the faults with the radio and brakes identified in the Complainants’ Engineer’s Report dated **29 March 2018** were not material to the merchantability of the car, I must consider the entirety of the content of the Report, as well as all of the other evidence that was available to the Provider in reaching this conclusion.

The Complainants’ Engineer’s Report examined the vehicle’s engine, engine bay, transmission, steering, brakes, suspension, wheels, tyres, electrics, and bodywork. With the exception of the radio static and brake noise, no other issues were identified, and the Report indicates that the vehicle was in good condition apart from these issues. The Report outlines that *“the radio functioned normally”*, but that when the radio was selected the sound quality was poor. The report indicated that *“[t]he sound quality was not necessarily muffled, rather, it was not as crisp and sharp as we would expect. The sound quality was clear when an auxiliary source was used which would suggest that the issue with the audio system is specific to the radio and relates to poor radio or RF signal”*.

It is clear from the fact that no issues were identified with the radio during the Dealership’s inspections of the vehicle, that the issue was intermittent. Indeed, that the radio issue was intermittent has been acknowledged by the Complainants in a submission to this Office which states:

*“...a fault became evident with the Audio system in the form of static interference to some of the speakers. Due to the intermittent nature of the faults, they were difficult to replicate for the dealership. In which case the dealership refused to acknowledge them or carry out repairs..”*

In these circumstances I am satisfied that evidence indicates that the radio static occurred intermittently, though the radio itself was functional, and that the issue of static impacted only the radio and not the audio system.

It is also clear from the Complainants’ Engineer’s Report, that while the Engineer found a noise emanating from the brakes, this was noted only *“at low velocities, when coming to a gradual stop, with the brake pedal lightly applied”* and that *“[t]he operation of the braking system was satisfactory”*. This finding tends to concur with the findings of the Dealership in so far as an internal invoice from the Dealership dated **23 February 2019**, detailed

*“... brake noise from front of vehicle under light braking....”*

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Neither do I consider it appropriate to overlook the fact that during the first 5 months after the vehicle was acquired by the Complainants (i.e. from July 2017 to November 2017) no issue arose with brake noises.

I acknowledge that the Engineer's Report indicates that "[t]he noise from the braking system on this vehicle falls drastically short of what we would expect from a vehicle of this calibre". Certainly it is clear that this noise was a source of ongoing annoyance to the Complainants.

In my Preliminary Decision I stated:

*"However, it is notable that there is no evidence to indicate any problems with the functioning of the brakes, or that the noise from the brakes occurred on every occasion when braking. Rather the evidence suggests that the brake squeal occurred only in very particular circumstances, i.e. when braking gradually at low speeds.*

*Consequently, and based on the evidence before me, I believe that it was reasonable for the Provider to arrive at the decision it did that the car is of merchantable quality in so far as any issues identified with the brakes and radio were not "material".*

*While I acknowledge that the vehicle is a luxury vehicle, I am satisfied that the Provider's decision was reflective of the evidence before it. The Complainants' Engineers Report and the inspections carried out by the Dealership indicate that the radio static and brakes noises were not constant issues, the brakes and radio functioned normally, and the car was roadworthy, and in generally good condition. Consequently, I am satisfied that it was reasonable for the Provider to conclude that the car was of merchantable quality."*

The Complainants in their submissions, since the Preliminary Decision was issued, state that:

*"[t]he legal precedent of the Roger's case states that whether the defect determines the roadworthiness of the vehicle is irrelevant, what is relevant is that there is a defect. This defect causes us frustration every time we sit into the vehicle. The fact that the Dealership and the Hiree state that the faults are only of a minor nature & may not affect the roadworthiness of the vehicle, are not relevant, as it is still a defect and deemed unacceptable under this previous case law. Therefore, the preliminary decision is unfair in light of this also"*

I am satisfied that the Rogers Case, concerned a vehicle with substantial defects in the engine, gear box and bodywork, and with unsound oil seals which caused significant quantities of oil to escape. After unsuccessful repair attempts, "the engine was still misfiring, excessive noise was being emitted from the gear box, and substantial defects remained in the body work".

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The Court in that instance found that the car was not fit for purpose, which included travelling with the appropriate degree of comfort, ease of handling, reliability, and pride in the vehicle's outward and interior appearance. However, in this instance I am satisfied that the evidence indicates that no such substantial defects existed in the Complainants' vehicle. While I accept that there was intermittent radio static and brake noises which occurred when breaking gradually at low speeds, having regard to the overall good condition of the vehicle described in the Complainants' Engineer's Report, and the fact that these noise issues occur only occasionally when driving the car, I remain of the view that it was reasonable for the Provider to conclude that the car was of merchantable quality, having regard to its fitness for purpose, durability, price and other relevant circumstances.

The Complainants also state in their post Preliminary Decision submissions that:

*"The brake defect resurfaced a couple of weeks after that Jan 2019 return...it is very frustrating that the Ombudsman states in her preliminary decision that she had decided, based on communications from the provider relating to this final repair attempt in Jan 2019, that the fault had been resolved, when clearly it was not"*

It should be noted that I have not made any finding that the brake noise issue was resolved. Rather I am of the view, as outlined above, that it was reasonable for the Provider to conclude that the brake noise, which the evidence suggest occurs only when breaking gradually at low speed, did not render the car of unmerchantable quality or unfit for purpose. I accept the Provider's position that this is a minor fault, and that as outlined in the Complainants' Engineer's Report, the *"operation of the braking system was satisfactory"*.

In a submission following the Preliminary Decision dated **30 March 2022**, the Complainants further stated that:

*"[u]nfortunately there has been quite a significant development in relation to the vehicle subject to this dispute. The vehicle was collected by a recovery company yesterday and taken to [the Car Brand] dealership due to a very serious engine problem. We were advised not to drive the vehicle under any circumstances via a warning on the vehicle's computer system, an independent mechanic and [the Car Brand] dealership. Apparently this is a known fault in this [Car Brand] model."*

The Complainants submitted a Car Brand invoice dated 5 April 2022 for €1,682.52 which states *"[t]ech diagnosed that the Shut off valve is leaking and requires replacement"*. In a subsequent submission dated **10 May 2022**, the Complainants stated that after the engine issue arose, they emailed the Road Safety Authority on 29 March 2022 and the Car Brand Customer Care on 30 March 2022, to enquire if there were any known faults or recalls for their model of vehicle. The Complainants state that the Car Company responded on 31 March 2022 and advised that there was no recall for the vehicle.

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However, the Complainants state that the Road Safety Authority advised them in an email dated 31 March 2022, that there was a recall in place for their car since 2018, as an update was required. This was because there was an issue in relation to the vehicle's production process, affecting the quality of the recordings of the vehicle's outputs, as opposed to any of the issues which the Complainants had raised with the Provider.

The Complainants state in this regard that:

*"..... as a result of the much publicized reports from consumers about negative effects of the recall update on their vehicles, we made a recent informed decision that we would NOT have this undertaken on ours ... we paid the repair costs to the [the Car Brand] dealership and collected our vehicle, believing that this was the end of it, determined to move on from all of this recent stress. Unfortunately following the return of the vehicle we noticed that the vehicle was labouring when driving at low speeds and when changing speeds ... That same day, I contacted the Dealership querying this, who after numerous calls from me, unfortunately verified that this [recall] update had been carried out on our vehicle .... The service manager responded, admitting that this should not have been undertaken without our consent, but it was not possible to reverse it. He then suggested we return the vehicle to have it checked in relation to the changes in its performance that we had experienced. We agreed to this, but as anticipated, they did not find any change to the vehicle's performance! ... [The Car Brand] also claims that the... recall has nothing to do with the recent serious engine fault with our vehicle, and claims that the recent fault is due to wear and tear. They failed to offer any form of redress for this recent fault. Unfortunately we have to accept this, as we cannot prove otherwise...."*

The Complainants also state that they should have been informed of the vehicle recall in 2018 and that *"we believe that the vehicle was mis-sold"*.

The Provider states in its submissions, since the Preliminary Decision was issued, that

*"while the complainants have raised a number of issues, some of which are quite recent, having considered them, they appear well beyond the scope of the original complaint...therefore we do not believe the contents necessitate...any further observations.."*

It is clear that the Complainants' submission since the Preliminary Decision issued have made reference to a new problem with the car (i.e. an engine leak in March 2022) which post-dates the matters the subject of this complaint. As this is an entirely separate and new issue with the car, which did not form part of this investigation by this Office, this issue falls outside the scope of this decision and no finding is made in relation to this matter. The Complainants have also raised the issue of a recent recall update performed on their car, due to an issue with the quality of the recordings of the vehicle's outputs, which they believe have led to the vehicle labouring when driven at low speeds, and which they state demonstrate that the car was mis-sold. Similarly, these issues fall outside the scope of this complaint investigation and are not matters in respect of which this Office makes any findings.

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## 2. Complaints Handling

The Complainants' second complaint is that the Provider failed to adequately investigate or respond to the Complainants' complaint about the merchantability of the vehicle under the hire-purchase agreement.

The Complainants state that when they contacted the Provider, "[the Provider] *just forwarded our complaint to [the Car Company] Customer Care who refused to assist us, advising us that our contract is with the dealership and nothing to do with them or [the Provider]*".

At the outset it should be noted that the Provider is not subject to the provisions of the **Consumer Protection Code 2012 ("CPC 2012")** regarding complaints handling, because the CPC 2012 does not apply to hire purchase and consumer hire agreements.

However, it is the role of this Office to consider whether the Provider acted wrongfully within the meaning of **section 60(2) of the Financial Services and Pensions Ombudsman Act 2017 (the "FSPO Act")**.

The Complainants first complained to the Provider on **12 March 2018**. In an email from the Provider to the Dealership dated **14 March 2018**, the Provider states:

*"[w]e have been made aware of an ongoing complaint in relation to the merchantability of this customer's vehicle. As the issue is in relation to the vehicle itself and not the finance agreement, we have advised the customer to make contact with the dealership directly to resolve this"*

I note that the Provider issued what it refers to as a final response letter, to the Complainants, on **15 March 2018**, stating

*"...as per our previous response we wish to advise that your complaint is in relation to technical vehicle issues. We have made our Brand Partner [the Car Company's] Customer Care department aware of this matter. They have advised that the sale of goods remains between yourself and [the Dealership] from who you purchased the vehicle..."*

The Provider acknowledges that the Complainants "*would have had the impression that [the Provider] was not fulfilling its obligations*" given that it referred the Complainants to the Dealership in its final response letter.

However, the Provider contends that it did in fact continue to have regular contact with the Dealership, to oversee matters with a view to resolving the merchantability issues, and that it also tried to resolve matters "*through the FSPO*". The Provider also states that it has since updated its complaints handling policy to reflect its practice of referring merchantability complaints to the Car Company for action:

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*“[w]hile our process at the time of the complaint (version 2.5) states that we will continue to keep customers updated should matters become prolonged, which transpired within this complaint, the practice for merchantability complaints was to pass them to [the Car Company] for action. This practice was formally updated and you will note at the top of page 5 of our current complaints policy (version 3) that the process has been updated to reflect the reality. On reflection, given our obligations within our HP contracts to comply with Section 76(2) of the Consumer Credit Act 1995, we were premature in issuing a final response letter when the complaint was un-resolved and we continued to endeavour to resolve it in conjunction with [the Dealership]. As a result of this we are reviewing our controls and approach in adhering to the process as documented”.*

I am satisfied that it was entirely unreasonable for the Provider to issue a final response letter to the Complainants which wrongly advised them that because the complaint related to technical vehicle issues, the sale of the vehicle *“remains between yourself and [the Dealership]”*. This information was clearly incorrect, as **section 76(2)** of the **Consumer Credit Act 1995** provides that where an owner lets goods under a hire-purchase agreement in the course of a business, there is an implied condition that the goods are of merchantable quality.

The fact that the Provider supplied such incorrect information, was compounded by the fact that the Provider failed to take the opportunity to correct this mistake, despite the Complainants specifically referring to the Provider’s obligation (to ensure that goods let under a hire purchase agreement are of merchantable quality) within an email to the Provider dated 20 March 2018. Indeed, I note that the Provider failed to respond to this email and an earlier email from the Complainants dated 16 March 2018, demonstrating very poor communication on the part of the Provider.

Although the Provider states that it continued to engage with the Dealership following the final response letter, in order to resolve the Complainants’ complaint regarding merchantability issues, the Provider has not supplied any evidence of this. The Second Complainant emailed the Provider on **20 March 2018**, stating that *“if goods hired under a hire purchase agreement are or become faulty, both the retailer and the owner (finance company) are responsible”*. While it is clear from the documentation on file that the Provider sought legal advice on *“the general merchantability issue and our potential liability”* in or around **21 March 2018**, the Provider has not supplied this Office with a copy of any correspondence it issued to the Dealership or the Car Company in or around that time with respect to the Complainants’ complaint regarding the merchantability of the car.

While I acknowledge that the Provider states that full evidence is not available of the interactions between it and the Dealership *“as the many calls or texts between the Provider and the Dealership were not recorded”*, it is not possible for this Office to conclude that such communications occurred, in the absence of any evidence of them. Furthermore, the Provider’s own complaint log states that the complaint was closed on **15 March 2018**, the day when the final response letter was issued, which contradicts the Provider’s assertion that it continued to endeavour to resolve the complaint in conjunction with the Dealership.

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While the Provider engaged with this Office in respect of the Complainants' complaint after the Complainants made a complaint to the FSPO on **24 April 2018**, it is not satisfactory that the Provider failed to do so prior to this point. Furthermore, I do not consider it acceptable or appropriate that the Provider did not make adequate efforts to determine whether it had complied with its obligation to let a vehicle of merchantable quality, and to communicate its reasons for concluding that the car was of merchantable quality, until a complaint had been made to this Office. This clearly contravened the Provider's own 2017 complaints handling policy's purpose of ensuring that "*all customer feedback and complaints are recorded, investigated and resolved in an efficient, transparent and timely manner*".

Consequently, I am satisfied that the evidence indicates the Provider, in its final response letter dated **15 March 2018**, wrongly referred the Complainants to the Dealership to address their complaint, and that it failed to oversee or involve itself in any meaningful way in the efforts of the Dealership and Car Company to resolve the Complainants' complaint on behalf of the Provider, until a complaint was made to this Office.

I am satisfied that it was unreasonable for the Provider to become entirely removed from the complaint handling process, in circumstances where the Provider's own 2017 complaints handling policy, states that "*all complaints will be handled and resolved by the Complaints Co-ordinator-Business Support Manager*". It is very disappointing that the Provider failed to comply with its own policy of handling and resolving complaints, and I have no doubt that the Provider's failure to engage with the Complainants, was a significant source of frustration and inconvenience for them.

Therefore, I am satisfied that the manner in which the Provider dealt with the Complainants' complaint was entirely unsatisfactory and fell far short of the customer service levels that the Complainants were entitled to expect. The Complainants' frustration and inconvenience regarding the Provider's failure to engage with their complaint is understandable, particularly as this failure arose against the background of an intermittent but recurrent noise with the brakes, that was acknowledged by Dealership when the vehicle was inspected in February 2018 and February 2019. Consequently, I am satisfied that the Provider's conduct in addressing the Complainants' complaint was unreasonable within the meaning of **section 60(2)(b)** of the **FSPO Act 2017**.

The Provider's failures in the manner in which this complaint was dealt with, seems to have stemmed from the Provider's failure to understand its obligations under **section 76(2)** of the **Consumer Credit Act 1995**.

It is disappointing that at the time the Complainants made a complaint in **March 2018**, the Provider, as evidenced by its final response letter, did not appear to be aware of its obligation to ensure that vehicles which it lets under a hire purchase agreement, are of merchantable quality, and that this was not, and is not, a matter solely for the Dealership.

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Indeed I note that after the Complainants pointed out the Provider's obligation to let a vehicle of merchantable quality in an email dated **20 March 2018**, the Provider in an internal email dated **21 March 2021**, stated that it was seeking legal advice on "*merchantability issues and our potential liability*" which "*could take a number of week to secure an probably will be of no use for this particular case but at least we will have a definitive position going forward*". I am satisfied that the Provider's failure to acknowledge its obligations under **section 76(2)** of the **Consumer Credit Act 1995** in its final response letter was a serious failing, which caused considerable (and entirely understandable) frustration and inconvenience to the Complainants.

It should be noted that in accordance with the hire purchase agreement which the Provider entered into with the Complainants, the Provider is the owner of the vehicle. The Provider, when letting the vehicle, must ensure that it is of merchantable quality. It is entirely a matter for the Provider as to how it ensures compliance with that obligation, (whether by entering into a contractual agreement with authorised dealers to supply technical services, or otherwise).

However, notwithstanding any arrangements the Provider has with Dealership or other parties, it remains the responsibility of the Provider to ensure that the vehicle is of merchantable quality, when it is let under a hire purchase agreement. This obligation is not as stated by the Provider "*[a] responsibility which only [the Car Company and the Dealership] can fulfil.*"

While the Provider may, in such circumstances, wish to engage the services of such parties to assist in the resolution of any merchantability issues, or to supply technical expertise, this does not divest the Provider of its responsibilities under **section 76(2)** of the **Consumer Credit Act 1995**.

I recognise the fact that the Provider has updated its complaint handling policy to reflect its complaint handling practice whereby "*[m]erchantability complaints received [by the Provider] are acknowledged by us and forwarded to [the Car Company] for action*". However, I recommend that the Provider further update its policies and practices to ensure that complaints regarding merchantability issues are escalated and dealt with in a timely manner by the Provider, and to recognise that it is the responsibility of the Provider to ensure that the vehicle concerned is of merchantability quality, when it is let under a hire purchase agreement.

In submissions following the Preliminary Decision, the Provider states that the FSPO relied on an erroneous interpretation of **section 76(2)** of the **Consumer Credit Act 1995** in reaching the decision regarding the complaints handling aspect of the complaint.

I note that, in particular, the Provider states that in proposing to uphold this complaint the FSPO relied on a finding that Provider failed to understand its obligations under **section 76(2)** of the **Consumer Credit Act 1995**, although there is nothing within this section placing any obligations on an owner under a hire-purchase agreement in relation to a complaint about the merchantable quality of the relevant goods.

The Provider further contends in its submissions since the Preliminary Decision was issued, that there is no lawful connection between the FSPO finding of 'unreasonable' or 'otherwise improper' conduct under **section 60(2)(b) and (g)** of the **FSPO Act** and the remedy imposed in the Preliminary Decision. In this regard the Provider states that compliance with the condition of merchantability, implied into contracts by **section 76(2)** of the **Consumer Credit Act 1995** should be the starting point for the FSPO's assessment of reasonableness and that:

*“there is nothing whatsoever in the relevant condition to support the FSPO's assertion that s. 76(2) gives rise to specified obligations on the part of [the Provider] in respect of complaints handling. In addition, in assessing the reasonableness of [the Provider's] conduct, the FSPO has also failed to give due regard to the published guidance issued by the Competition and Consumer Protection Commission which provides that customers who purchased vehicles on hire purchase should engage with the dealer in the first instance as regards any faults that may arise.*

*There is therefore no proper basis for the FSPO's finding that [the Provider's] conduct was unreasonable for the purposes of the FSPO Act. The High Court's ruling in the Utmost case makes clear that the starting point for considering whether the Provider's] conduct was reasonable should have been an assessment of s. 76(2) by the FSPO.”*

I note the Provider's position on the one hand, that **section 76(2)** of the **Consumer Credit Act 1995** does not impose any obligations on the Provider with respect to complaints handling, but on the other hand its position that the FSPO's starting point in assessing whether the manner in which the Provider handled the Complainants' complaint was reasonable, should be an assessment of **section 76(2)** of the **Consumer Credit Act 1995**.

I accept that **section 76(2)** of the **Consumer Credit Act 1995**, does not impose any complaints handling obligations on the Provider. I also accept that the Provider did not breach **section 76(2)** of the **Consumer Credit Act 1995**, by supplying a car of unmerchantable quality. However, this alone does not mean that the manner in which the Provider handled a complaint about the merchantability of a car, was not unreasonable within the meaning of **section 60(2)(b)** of the **FSPO Act**. In the context of the complaint made by the Complainants, I consider it appropriate to consider the overall reasonableness of the Provider's conduct with respect to the manner in which the complaint was handled, including the Provider's communications with the Complainants in this regard.

In assessing the reasonableness of the Provider's conduct, this Office has had due regard to applicable codes, and in particular any obligations within such codes that relate to complaint handling. As referenced above, the CPC 2012 does not apply to hire purchase and consumer hire agreements and consequently it has limited relevance to the assessment of the reasonableness of the Provider's conduct with respect to complaints handling.

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While the Provider refers to guidance issued by the Competition and Consumer Protection Commission which provides that customers who purchased vehicles on hire purchase should engage with the dealer in the first instance, it is clear from the evidence that the Complainants did in fact engage with the Dealership, before complaining to the Provider on 12 March 2018.

In upholding the complaint handling aspect of this complaint, and as clearly set out above, I am satisfied that the Provider's conduct was unreasonable within the meaning of **section 60(2)(b) of the FSPO Act** in circumstances where the Provider did not comply with its own complaints handling processes, it failed to adequately engage with the Complainants in respect of the complaint and it supplied information to the Complainants in its final response letter, that was incorrect (insofar as the final response letter stated that "*the sale of goods remains between yourself and [the Dealership] from who you purchased the vehicle*", without acknowledging the Provider's obligations under **section 76(2) of the Consumer Credit Act 1995**.)

The Provider states in its submissions since the Preliminary Decision was issued, that the body of the Preliminary Decision does not in any way address or consider whether the Provider's behaviour could be considered 'improper'. I accept that the body of the Preliminary Decision did not reference section **60(2)(g) of the FSPO Act**, and I am satisfied that this complaint should be partially upheld by reference only to **60(2)(b) of the FSPO Act**.

For the reasons outlined above I do not uphold the substantive complaint, because although there were some issues with the vehicle that had to be addressed, I do not accept that the Provider failed to comply with its obligation to ensure that the hire-purchase vehicle supplied to the Complainant in **July 2017**, was of merchantable quality.

I consider it appropriate however to partially uphold this complaint because of the poor manner in which the Provider dealt with and responded to the Complainants' complaint in or around March 2018, and because of the erroneous information sent to the Complainants at that time.

In my Preliminary Decision I indicated that I considered it appropriate to direct compensation of €3,000 in respect of the complaint handling element of this complaint.

The Provider states in its post Preliminary Decision submissions that compensation of €3,000 is excessive, as it amounts to 15% of the value of the amount financed under the hire purchase agreement, because there were goodwill gestures afforded to the Complainants throughout the complaints process and because the substantive complaint relating to merchantability was not upheld.

The Complainants state in their post Preliminary Decision submissions that the compensation should significantly exceed €3,000.

In this regard the Complainants point to the fact that the purchase price of the vehicle was €72,000 and that:

*"..despite our significant upfront financial contribution to the financial transaction, we were left feeling completely helpless when things went wrong....[the Complainants] made it very clear to the Hiree, that the Dealership was not providing a satisfactory long term repair of the fault and we pleaded with them to assist us, yet they refused to engage with us regarding those faults, instead referring us to ...Customer care and the Dealership. They failed to acknowledge our consumer rights & issued us with their final letter in March 2018, denying their liability... We would not want other consumers to experience the stress that we have encountered."*

In considering the appropriate level of compensation to be directed, this Office has had regard to the inconvenience suffered by the Complainants throughout the complaint handling process. As outlined above, this Office is satisfied that the Complainants suffered considerable inconvenience during the complaints handling process, in circumstances where the Provider supplied incorrect information to the Complainants in its final response letter, subsequently failed to correct this error by acknowledging its obligations under the **Consumer Credit Act 1995**, despite the Complainants' correspondence drawing the Provider's attention to these obligations, and ultimately became entirely removed from the complaint handling process, contrary to the Provider's own complaints handling policy.

Consequently, I accept the Complainants' submission that they were left feeling "completely helpless" because of the way their complaint was handled. For this reason, I do not accept the Provider's suggestion that compensation of €3,000 is excessive. Neither however, do I accept that compensation should significantly exceed €3,000 as suggested by the Complainants.


This is because the compensation directed by the Office below, is only to redress the inconvenience suffered by Complainants due to the Provider's complaint handling failures. No financial loss or expense suffered by the Complainants due to the complaint handling failures, has been identified. While I accept that the Complainants suffered significant inconvenience, I have not been furnished with evidence which demonstrates that the level of inconvenience suffered was so severe that compensation should significantly exceed €3,000.

Consequently, I remain of the view, that it is appropriate to direct the Provider to make a compensatory payment to the Complainants, in the sum of **€3,000**, as specified below, to reflect the inconvenience caused to the Complainants, as a result of the Provider's poor complaint handling.

## Conclusion

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is partially upheld, on the grounds prescribed in **Section 60(2)(b)** of the **FSPO Act**.
- Pursuant to **Section 60(4)(d) and Section 60(6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to make a compensatory payment to the Complainants in the sum of **€3,000 (three thousand euro)** to an account of the Complainants' choosing, within a period of 35 days of the nomination of account details by the Complainants to the Provider. I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said account, within that period.
- 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.



MARYROSE MCGOVERN  
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN (ACTING)

23 August 2022

## **PUBLICATION**

### **Complaints about the conduct of financial service providers**

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.

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**Complaints about the conduct of pension providers**

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will **publish case studies** in relation to complaints concerning pension 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.

