



MATTER DECIDED BY THE TRIBUNAL

Tribunal meeting number, case number and date	Case ref	Network operator	Level 1 provider	Level 2 provider	Service title and type	Case type	Procedure
171 Case 1 31/07/15	63304	Vodafone Group plc	N/A	Cash Finance Direct (Holdings) Limited (UK)	Fixed line loan brokerage service	Level 2 provider	Track 2

Between 22 December 2013 and 6 May 2015, PhonepayPlus received 119 complaints from consumers in relation to a fixed line loan brokerage service (the “Service”) operated by Cash Finance Direct (Holdings) Limited (registered company no: 04106575) (the “Level 2 provider”). The Service was operated on Vodafone Group plc’s fixed line ranges: 0906 191 0800-0899, 0906 193 1090-1279, 0906 199 7800-7999 and 0906 400 1800-1999. Vodafone Group plc was the Service Network operator. Consumers engaging with the Service made up to two premium rate calls for the purposes of applying and finding out if they were eligible for a loan. The Service was promoted by SMS marketing, third party lead generation and online re-directs.

The Level 2 provider commenced operation of the Service on or shortly after the time of its registration with PhonepayPlus on 31 July 2013, however the Executive was aware that the Service was previously operated by a separate company since around 1994. The Executive was also aware that the Level 2 provider had ceased trading and that liquidators had been appointed on 10 April 2015.

Concerns regarding the Service were raised following the ongoing receipt of complaints which suggested that undue delay may be an issue. Complainants also routinely stated that they felt that calls were lengthy and drawn out, that they received misleading promotions and/or that when they applied for refunds they were not received.

The Executive raised the following potential breaches of the PhonepayPlus Code of Practice (12<sup>th</sup> Edition) (the “Code”):

- Rule 2.3.2 – Misleading
- Rule 2.3.4 – Undue delay
- Rule 2.6.4 – Complaint handling - Provision of refunds
- Rule 2.3.1 – Fair and equitable treatment

The Tribunal upheld all the breaches of the Code raised. The Level 2 provider’s revenue in relation the Service was Band 1 (£1,000,000+). The Tribunal considered the case to be **serious** and imposed a fine of £100,000 and a requirement that the Level 2 provider must refund all consumers who claim a refund, for the full amount spent by them on the Service, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to PhonepayPlus that such refunds have been made.

Administrative charge recommendation:

100%



Tribunal meeting number 171 / Case 1

**Case reference:** 63304  
**Level 2 provider:** Cash Finance Direct (Holdings) Limited (UK)  
**Type of service:** Fixed line loan brokerage service  
**Level 1 provider:** N/A  
**Network operator:** Vodafone Group Plc

### THIS CASE WAS BROUGHT AGAINST THE LEVEL 2 PROVIDER UNDER PARAGRAPH 4.4 OF THE CODE

#### BACKGROUND

Between 22 December 2013 and 6 May 2015, PhonepayPlus received 119 complaints from consumers in relation to a fixed line loan brokerage service (the “**Service**”) operated by Cash Finance Direct (Holdings) Limited (registered company no: 04106575) (the “**Level 2 provider**”). The Service was operated on Vodafone Group plc’s fixed line ranges: 0906 191 0800-0899, 0906 193 1090-1279, 0906 199 7800-7999 and 0906 400 1800-1999. Vodafone Group plc was the Service Network operator. Consumers engaging with the Service made up to two premium rate calls for the purposes of applying and finding out if they were eligible for a loan. The Service was promoted by SMS marketing, third party lead generation and online re-directs.

To respond to any of the three promotional methods above, the consumer would contact a freephone or local rate number provided in the promotional material in order to check their eligibility for a loan (the “**Preliminary Call**”). During this call, details were taken from the consumer which included the purpose of the loan, their name, address, marital status, current salary and employment status. The Level 2 provider stated that the purpose of the Preliminary Call was to ascertain that the consumer initially met the criteria of the Level 2 provider and the lenders on the underwriting panel for a loan. During the Preliminary Call consumers were given a reference number to complete their application and were advised that there was a:

“...guaranteed refund upon request so that it doesn’t cost you a single penny”.

During the Preliminary Call consumers were also instructed to contact one of the Level 2 provider’s premium rate numbers.

Consumers who called the premium rate number were asked questions regarding the type and purpose of their loan, along with personal information, including information already obtained in the Preliminary Call. This information would then be passed on to potential lenders. The call (“**Call 1**”) was charged at £1.53 per minute and lasted no longer than 15 minutes.

Towards the end of Call 1, consumers were given another premium rate number to contact if they wished to be notified of the potential lenders they had been initially matched with, although consumers were informed that making this second call (“**Call 2**”) did not speed up the process or increase the likelihood of a successful application. Call 2 was also charged at £1.53 per minute and lasted no longer than 10 minutes. The Executive noted that the script provided by the Level 2 provider indicated that the advisors on Call 2 asked consumers to confirm their personal details including information already obtained in Call 1. The adviser would then proceed to discuss potential lenders which might be interested in their application.



Towards the end of Call 2, consumers were given a freephone number to contact in the event that they had any further questions or queries, or wished to find out how to obtain a refund of the costs of the premium rate calls. The Executive noted that consumers were directed to send a copy of their bill to 'Freepost CFD' and were advised that after six weeks they would receive a refund via cheque.

The Level 2 provider commenced operation of the Service on or around the time of its registration with PhonepayPlus on 31 July 2013, however the Executive was aware that the Service was previously operated by a separate company since around 1994. The Executive was also aware that the Level 2 provider had ceased trading and that liquidators had been appointed on 10 April 2015.

Concerns regarding the Service were raised following ongoing receipt of complaints which suggested that undue delay might be an issue.

#### The investigation

During the investigation the Level 2 provider responded to a direction for information from the Executive dated 25 February 2015. A follow-up direction for information was submitted to the Level 2 provider on 19 March 2015 but the Executive did not receive a response. On 29 April 2015 the Executive was advised by the Level 2 provider's liquidators (the "**Liquidator(s)**") that the Level 2 provider had entered into creditors' voluntary liquidation and as such the direction for information could not be complied with.

The Executive conducted this matter as a Track 2 investigation in accordance with paragraph 4.4 of the PhonepayPlus Code of Practice (12<sup>th</sup> Edition) (the "**Code**").

The Executive sent a breach letter to the Level 2 provider and the Liquidator on 22 May 2015. Within the breach letter the Executive raised the following breaches of the Code:

- Rule 2.3.2 – Misleading.
- Rule 2.3.4 – Undue delay.
- Rule 2.6.4 – Refunds.
- Rule 2.3.1 – Fair and equitable treatment.

#### Adjournment of the Tribunal hearing on 25 June 2015

The Level 2 provider responded on 29 May 2015 via the Liquidator acting on its behalf, however the Liquidator was not in a position to provide any substantive responses to the alleged breaches of the Code which had occurred before their appointment, and while the Level 2 provider was still trading. The Liquidator did however sanction a named director of the Level 2 provider (the "**Director**"), and/or a representative to attend the Tribunal to make representations relating to the period when the Director was in control of the Level 2 provider, and when the alleged breaches occurred. The sanction was also given on the basis that the Director and/or his representative would not be acting on behalf of the Liquidator or the Level 2 provider, and the Liquidator was not responsible for the statements made by the Director and/or his representative. On 1 June 2015 the Liquidator provided the Executive with a response to the breach letter from the Director, however the letter did not specifically address the alleged breaches of the Code that had been raised by the Executive.

On 25 June 2015, the Tribunal considered correspondence between Phonepayplus, the Liquidator, the Director, and his solicitor (the "**Solicitor**"), for the period from 22 May 2015 to 23 June 2015, which included an application by the Director, through his Solicitor, for an adjournment of the hearing to enable him to make representations and/or attend the Tribunal hearing.



The Tribunal considered as a preliminary issue whether to adjourn the hearing on the Director's application. The Tribunal determined that, notwithstanding the fact that the relevant party is the company in liquidation acting through the Liquidator, it was in the interests of justice in the specific circumstances of the case to grant an adjournment to allow the Director time to make representations and/or attend the hearing.

On 25 June 2015 the Tribunal, having considered a representation (by telephone) from the Solicitor, made the following directions (the "**Directions**"):

1. "By 4pm on Friday 10 July 2015, [the Director] must serve on the Executive and the [Liquidator] any further written response to the breach letter dated 22 May 2015.
2. By 4pm on Friday 24 July 2015, the Executive must serve on [the Director] and the [Liquidator] any response to [the Director's] written response.
3. By 4pm on Friday 24 July 2015, the [Liquidator] must serve on [the Director] and the Executive any response to [the Director's] written response.
4. Any responses which a party chooses to serve in accordance with the Directions will be placed before the Tribunal.
5. In addition to the rights of the [Liquidator] to make informal representations at the hearing should they wish, [the Director] may attend the hearing to make an informal representation, limited to 30 minutes, for the sole purposes of clarifying or emphasising the written response that he has submitted, and responding to questions from the Tribunal panel.
6. The Tribunal is adjourned to 31 July 2015 at 10am at PhonepayPlus, Clove Building, 4 Maguire Street, London SE1 2NQ".

The Directions were submitted to the Director, the Solicitor and the Liquidator on 26 June 2015.

On 8 July 2015 the Executive provided the Liquidator, the Director and the Solicitor with a copy of the Tribunal's written decision to adjourn the Tribunal hearing. The written decision was published on the PhonepayPlus website on 9 July 2015.

Notwithstanding item 1 of the Directions, no further written submissions were made by the Director in response to the breach letter by the deadline of 4pm on Friday 10 July 2015.

On 14 July 2015 the Tribunal determined that, as the Director had not complied with the Directions, the Tribunal hearing would proceed on 31 July 2015 on the basis of the papers originally presented to the Tribunal on 25 June 2015. All parties were notified of the Tribunal's decision.

On 27 July 2015 the Executive emailed the Director, via his Solicitor, to ascertain whether there was a desire to make informal representations at the hearing on 31 July 2015. A colleague of the Solicitor responded on 29 July 2015 with a request for a second adjournment and stated that, owing to a misunderstanding of the documentation, it was understood that the Director was not to attend the hearing and as such had made no representations.

The request was forwarded to the Tribunal on the same day and was refused. The Tribunal gave the following reasons:



“On one view, it is clear that by the very latest, on 22nd June 2015 or soon thereafter, [the Director] was aware that he was permitted to respond to the breach letter in writing and attend the Tribunal to make informal representations.

The matter was listed before us on 25th June 2015 when having considered the case, we felt that [the Director] should be given an opportunity to make representations. Before adjourning the matter, we asked [our clerk] to call [the Solicitor] to discuss a timeline for responses in the event of an adjournment. We gave clear directions for compliance with any written or oral representation, in particular item 5 [of the Directions], as to the making of informal representations. None of those have been complied with to date, nor have we been provided with a coherent or credible explanation for such failure. Further, I have considered the correspondence between the parties since the making of those directions and summarise that as follows:

- 26 June 2015- Email to [the Director and his Solicitor] containing Track 2 hearing directions.
- 30 June 2015- A brief telephone conversation with [the Solicitor] whereby the Executive was advised he was in a meeting and would call back.
- 10 July 2015- Email requesting [the Solicitor] to contact the Executive should he have any further queries.
- 14 July 2015- All parties (including the liquidator) receive a notification from the Executive that, as no response to the breach letter was submitted by [the Director] by the deadline of 10 July 2015, the Tribunal would proceed on 31 July 2015 on the basis of the papers originally presented on 25 June 2015.
- 27 July 2015- Email sent to [the Solicitor] copying in [the Director] asking them to confirm if they would be attending the tribunal and making informal representations.

With this background it is difficult to understand the assertion in the letter requesting the adjournment that there was a "misunderstanding" of some kind.

I have a discretion and have very much at the forefront of my mind fairness and the interests of justice to both parties. The efficient, speedy and timely disposal of cases is an overriding objective of the Tribunal. I am satisfied that [the Director] and his legal representatives have been given ample opportunity since 22.6.15 and without a shadow of a doubt, since 26.6.15, to make written representations and to confirm whether they intended to attend the Tribunal hearing to make informal representations and have chosen not to do so. This Tribunal was especially convened for the consideration and disposal of the matter with the original composition. There is nothing in the procedural history of this case which gives us any hope that a further adjournment is warranted and even if granted, would achieve anything. For these reasons, I refuse the application and the Tribunal will proceed as listed”.

On 30 July 2015 a colleague of the Solicitor responded to the above decision by informing the Tribunal that their client was intending to make informal representations. The Tribunal granted discretionary permission for the Director to make informal representations. On the same day the Solicitor sent an email to the Executive which set out a number of general points that he wished to address during his informal representations. Within this email the Solicitor confirmed that he alone would make informal representations as no members of the Level 2 provider’s senior management were available.



### The Tribunal hearing on 31 July 2015

The Solicitor attended the Tribunal hearing on 31 July 2015 and confirmed that he was making informal representations on behalf of the management team of the Level 2 provider, which included the Director. The Tribunal reached a decision on the breaches raised by the Executive.

The Tribunal considered the following evidence in full:

- The complainants' accounts.
- Correspondence between the Executive and the Level 2 provider (including directions for information and the Level 2 provider's responses, including supporting documentation).
- Call recordings and accompanying screenshots and transcripts.
- Correspondence between the Executive and the Liquidators.
- The PhonepayPlus Service-Specific Guidance on "Consumer Credit".
- The breach letter of 22 May 2015, the Liquidator's response of 29 May 2015 and the Director's response of 1 June 2015.
- The informal representations made by the Solicitor together with his supporting email of 30 July 2015 and further documentary evidence presented to the Tribunal on the date of the hearing by the Solicitor.

### Complaints

The Executive had received 119 complaints concerning the Service since 22 December 2013. The main complaint period was January 2014 to April 2015. Most complainants stated that they felt that calls were lengthy and drawn out, that they received misleading promotions and/or that when they applied for refunds they were not received.

Extracts from a sample of complainants' accounts included:

"I am so upset and angry, I was looking for a loan and came across this company who said I had been approved and accepted for £400 online and to phone a 0161 number to go through my details with an agent, I then got told on the phone I need to phone a premium rate number which is approvals then I will get paid, so I said ok but that's a bit strange. A total of 15 minutes!! I was getting no where, the person on the other end was just rumbling on, going through everything again, it's as if they were trying to make me pay more and more for the call as it's around £1.60 a minute! I'm so annoyed at this, it's a scam. I don't see how they can get a way with it. I hope something can be done! I really can't afford to pay £24.00 for this stupid scam!"

"I am complaining because I was cold called by this company, who assured me I had qualified for a loan from one of their lenders. I had to remain on the phone for 15 minutes, and also call back another number I [sic] order to complete the process. I was not really given an option to refuse as I was constantly kept talking, I was advised that I could refund the cost of these calls, however, I was not told that this could take up to 45 days! This is not very helpful when my bill is due every month. I have since sent In Two [sic] copies of my of mobile phone bill, one of which the company claims to have not received, and they received one on the 12th July. I am still waiting for my refund, and they have ignored emails I have sent them in the meantime about this matter. I am incurring late fees on my mobile account because of non payment whilst I wait for this refund. Not happy!"

"Cash Finance Direct Limited text me claiming they could help me get a loan. They told me the cost of the call was £1.53 per minute, and the call would not exceed £15. This was on the number 09061931238. They told me about the costs but assured me I would be entitled a full refund of the total amount billed, whether I continued with the service or not. After the first phone call they asked



me to call them back on another number which is listed above (09061997805), to confirm my loan application, but once again was told I would be charged £1.53 per minute, not to exceed £15, and am entitled to a refund no matter what. They charged me on the 05 of September 2014 for the amount of £12.36, and also for the amount of £32.92 (which exceeded the original promised charge). I phoned them when my bill came through and they said I had to send them a copy of my bill with the charges on it, which I did. It has now been almost 2 months and I've heard nothing back from them, I would continue to phone them and complain but I've read some forums with people with history with this company and they all have had no luck."

"This is the first message i got in a text "Hello Ms Hodges, Its Emma. Please ring me at 01143032442 asap. I have good news regarding your credit application. Im with CFD. Text stop 2 end" I then phoned the number got asked loads of questions then was kept on phone for a while (total of about 14min) then was told to ring this number 09064001855 to complete my application."

"I received a text saying that I had been approved for a loan. I called the number in the text and was then asked to call another number, they stated that it was a premium rate phone call and that I would be charged £1.53 per minute but that I was allowed to get a refund for the price of the phonecall if i called customer services afterwards. I was under the impression that I was speaking with the loan company the whole while. He kept me on the phone for around 20 minutes and took all of my details including bank details and payment dates all the while repeating that I had been approved to receive the loan. He then told me that I needed to call another premium rate number to finalise the loan payment and that this would also be refunded. This time he kept me on the phone telling me all the time that I had been accepted to receive the loan for about 15 minutes. After the phonecall I called the customer services number that I had been given for the refund to be cut off everytime."

## SUBMISSIONS AND CONCLUSIONS

### ALLEGED BREACH 1

#### Rule 2.3.2

"Premium rate services must not mislead or be likely to mislead in any way."

1. The Executive asserted that the Level 2 provider had breached rule 2.3.2 of the Code because SMS messages sent by the Level 2 provider to promote the Service were misleading or were likely to mislead consumers as they implied that they had been pre-approved for credit, when that was not the case.

The Executive relied on the content of the PhonepayPlus Service-Specific Guidance on "Consumer Credit" (issued 18 December 2014) (the "**Guidance**"). The Guidance states:

"Personalisation of promotional material

Paragraph 2.20

When personalising promotional material, the impact of such a method of advertising must be properly considered to ensure consumers are not misled. By sending a letter to a named individual at a personal or specified address, the recipient may be given the impression that some assessment of their eligibility for a loan has already been undertaken."

The Executive submitted that some of the SMS message promotions sent by the Level 2 provider gave the misleading impression that a consumer had been pre-approved for a loan, thereby encouraging them to contact the number which invited them to interact with the



Service. The Executive referred to the following samples of SMS promotional messages as supplied by the Level 2 provider:

“Hello #FirstName#, It's Emma. I have good news regarding your £#amount# loan. Please ring me on [number] ASAP. I'm with CFDH. [insert opt-out]”

“Hello #Title# #LastName# It's Emma. I have good news regarding your £#amount# loan. Please ring me on [number] ASAP. I'm with CFDH. [insert opt-out]”

The Executive noted that the messages mentioned a loan for a specific amount, implying to a consumer that they had a specific amount of money ready for them and used phrases such as ‘good news’, and asked for a consumer to ‘ring ASAP’. The Executive submitted that this gave a sense of urgency to the message which was likely to have encouraged consumers to interact with the Service rather than risk losing a potential loan.

The Executive asserted that some SMS messages also misled consumers into believing that the messages were from an actual advisor, as opposed to being a generic promotional message. The Executive noted the sample promotional messages above which purported to be from ‘Emma’:

In addition to the accounts set out previously in the “Background” section, the Executive relied on the following consumer complaints:

“My daughter was encouraged to call this number by an SMS message giving false information. She was told that a loan had been taken out in her name. Transcript of Text: Please call this number to discuss your recent loan application. Summary of Complaint: Eliciting calls by giving misinformation is theft. £31.250 for a 15 minute call, most of which spent waiting for an answer. Then told to call another premium rate number for a refund!”

“Service Description: I rang this number believing it was to complete my application for a credit card that I had applied for over the internet, I spoke to a lady believed to be called Demi? for about 14 min and then I got cut off I then waited for them to call me back and when they didn't I called the same number explaining what had happened and I was asked loads of different questions by a different person a guy called josh (obviously to keep me on the line and inflict more costs to me) I was unaware of the cost from my landline, was made to believe it was £1.50 a minute from a mobile that's why I called it from my landline so my phone company have informed me today it cost a total of £41 for these 2 calls I made, I'm so angry at this company as I cant afford to pay it as I'm a single parent and on a low income, I would be very happy if there's anything you can do to help me get my money back and stop them doing this to anyone else! Thanks”.

“Transcript of Text: This is the first message I got in a text "Hello Ms Hodges, Its Emma. Please ring me at 01143032442 asap. I have good news regarding your credit application. I'm with CFD. Text stop 2 end" I then phoned the number got asked loads of questions then was kept on phone for a while (total of about 14min) then was told to ring this number 09064001855 to complete my application”.

The Executive noted that the final complaint appeared to be from a consumer experiencing financial difficulty. The use of the consumer's actual name created a sense of personalisation thereby further encouraging a consumer to believe that they had been personally approved for credit, which the Executive considered was misleading. As a result, consumers contacted the





number promoted and subsequently interacted with the Service thereby incurring premium rate charges.

For the reasons set out above, the Executive asserted that promotional messages for the Service misled or were likely to mislead consumers into interacting with the Service in breach of rule 2.3.2 of the Code.

2. As a consequence of the Director's or his legal representative's failure to comply with the Directions or to provide a credible explanation for the failure, there were no specific written responses to the alleged breach of rule 2.3.2 of the Code. The Director did however provide a general response to the breach letter on 1 June 2015, and the Solicitor set out a response in an email to the Executive on 30 July 2015. In addition, detailed informal representations were made by the Solicitor during the Tribunal hearing.

The Solicitor confirmed during informal representations that he was appearing before the Tribunal on behalf of the Level 2 provider's management team which included the Director.

The Tribunal asked the Solicitor to address the Tribunal on why its Directions had not been complied with. The Solicitor confirmed that this had been as a result of a misunderstanding which he appreciated he could not explain satisfactorily. He further stated that, as a result of this misunderstanding, he thought the Director was not permitted to attend the Tribunal hearing and as such, there would have been no point in providing a response to the breach letter. The Solicitor further stated that he thought there was no hearing on 31 July 2015 and that the Directions had not come to his attention.

During a later part of his informal representations, the Solicitor stated that the lack of communication with PhonepayPlus since the adjournment of the hearing on 25 June 2015 was his error and not that of the Director. He also stated that he had no idea what the Liquidator had told PhonepayPlus, and it would have been better if the Director had been present to give informal representations. However, as the Director had lost his business and was experiencing other personal problems, he had not responded to this case as swiftly as he could have.

#### Procedural Concerns

During the course of his informal representations, and within his email to the Executive dated 30 July 2015, the Solicitor raised some general concerns regarding the Executive's case. He stated that he and the Director were upset about this process and that he did not know how these proceedings worked.

The Solicitor stated that he believed these proceedings were unfair as he had not seen the case bundle before the morning of the hearing. The Executive pointed out that the substantive documents within the bundle (the breach letter and accompanying annexures) had previously been presented to the Director, his Solicitor and the Liquidator on two occasions, the first being on 22 May 2015 when the breach letter was initially submitted to the Level 2 provider, and the second on 26 June 2015 when the Tribunal's Directions were issued to the parties. It also became clear to the Tribunal that the Solicitor had in his possession a detailed bundle of all of the relevant documents, as he referred the Tribunal to relevant extracts during his informal representations. He also produced other material from a separate case file which he had brought to the hearing.

The Solicitor further raised a concern with the Tribunal Chair's use of the word 'breaches' to describe the Executive's alleged breaches of the Code. He stated that he did not recognise



the process of the Code and further alleged that the Tribunal had already made a determination, which the Tribunal stated was not the case.

The Solicitor additionally asked the Tribunal to identify the considerations had been made for refusing the application for adjournment of the hearing which the Tribunal had received on 29 July 2015. The Solicitor was provided with a further copy of the email sent to him by the Executive on 29 July which contained the Tribunal's reasoned decision to refuse the adjournment application.

#### General Submissions

Generally, the Solicitor asserted that these proceedings were unfair as the full history of the Service had not been reflected in the Executive's case, and had not therefore been made clear to the Tribunal. The Solicitor stated that the Service had not commenced in 2013 as suggested by the Executive, but that a separate legal entity had been licensed by PhonepayPlus (then called the Independent Committee for the Supervision of Standards of the Telephone Information Services ("ICSTIS")) since around 1994. He further stated that ICSTIS had granted a prior permissions certificate to the prior legal entity in 1998. The prior legal entity then went into administration in 2012, and the Service was subsequently inherited by the Level 2 provider. The Solicitor further confirmed that his account of the Service history was based on first-hand knowledge as he was formerly the company secretary.

The Solicitor also stated that the providers of the business had a very open relationship with PhonepayPlus following a misunderstanding dating back to approximately 2007. He further stated that ICSTIS and the Level 2 provider had a relationship that functioned extremely well. Similar assertions were also made by the Director in his letter of 1 June 2015, in which he stated that:

"[The Level 2 provider] always had excellent internal compliance and relationships with [PhonepayPlus] and other governing bodies. We believe its complaints level to be the lowest in the industry especially considering the size of the company and large volumes of business conducted".

The Tribunal queried whether these points had been raised by him or the Director in the course of the investigation. The Solicitor responded by asserting that the only information the Executive had received regarding this case had come from the Liquidator and not the Director. The Tribunal drew the Solicitor's attention to the Level 2 provider's response to the Executive's request for information dated 25 February 2015, which was contained within the Tribunal case papers. The response contained a number of details on how the Service was operated. The Solicitor noted this document and acknowledged that it had been written by the Director.

The Solicitor commented that Horizon [the former trading name of both the Level 2 provider and the separate legal entity that operated the Service prior to 2013] charged £30 to make someone a loan application. The Solicitor later stated that when PhonepayPlus had moved onto an objectives based Code of Practice, the Level 2 provider had operated a business with 200 employees and it was clearly not a rogue that was seeking to hide away. He further stated that the Service was operated with 'real virtue' and before the widespread use of the internet, the Service model, whereby consumers could call a premium rate number to apply for a loan, was an especially successful one.

The Director stated that, in June 2014, Horizon had met with members of PhonepayPlus' Policy team during which time there had been some debate regarding the Service. The Solicitor



stated that there were a number of discussions about the operation of the Service, which included a 'no quibble refund policy'. The Solicitor handed to the Tribunal a written report which had been attached to an email dated 9 June 2014 from the Level 2 provider to PhonepayPlus. He said that PhonepayPlus' Policy team had endorsed and welcomed this document and he was concerned that it had not been included in the case bundle as PhonepayPlus had accepted the manner in which the Service was operated.

The Solicitor also spoke in detail throughout the course of his informal representations about the Level 2 provider's no quibble refund guarantee, whereby 100% of the cost of both premium rate calls made during the course of an application for a loan was entirely refundable to everyone who used the Service. He asserted that the overarching policy that catered to all potential consumer harm in this case was in fact the refunds policy. In support of this submission the Solicitor confirmed that there were no specific conditions or criteria (such as entry into a credit agreement) that were needed to be eligible for a refund. He also stated that the 100% refund policy was maintained despite the fact that Horizon would only receive 70% of the call costs after accounting for VAT, the Network operator's revenue share and other deductions. The Solicitor further confirmed that this policy was in place despite the position at law whereby credit brokers were entitled to retain up to £5 of the cost of applying for credit in the event that the consumer chose not to enter into a credit agreement. In his letter of 1 June 2015 the Director also commented in relation to the Level 2 provider's refunds policy that:

"The main reason for consistent low complaint levels is that we had a full no quibble refund policy for consumers so complaints were rare as they left satisfied. There was clearly no prospect of any consumer harm. Whether justified or not upon a simple request customers were refunded in full".

Further to the above, the Solicitor commented that in 20 years of trading, there had been no complaint that either the Level 2 provider or its predecessor had not honoured their refund obligations. The Solicitor accordingly believed the complaints regarding the Service were 99% attributable to the liquidation of the Level 2 provider which had prevented the Level 2 provider from being able to fully adhere to its refund policy. He further commented that, as a result of consumers not obtaining their expected refund, they had raised complaints with PhonepayPlus, and the Solicitor sympathised with the complainants on this issue. These views were additionally expressed by the Director in his letter of 1 June 2015.

The Solicitor further confirmed that the Level 2 provider's no quibble refund guarantee policy had been maintained since the start of operation of the Service in 1994 (by the company previously operating the Service) until December 2014, when the Level 2 provider began experiencing the financial difficulties that ultimately resulted in its liquidation. This also included the period when the prior legal entity went into administration in 2012 and survived. He stated that, in spite of this insolvency in 2012, the Level 2 provider took on the responsibility of honouring full refunds. He further commented that, by contrast, the Level 2 provider was now in liquidation and the business had in fact gone. The Solicitor surmised that if a company trading as Horizon were to come back to operate the Service, it would have to start again with PhonepayPlus and engage in a conversation about refunds that would probably include a need for capital to create a ring-fenced source of funds for the provision of refunds.

Having read the case papers the Solicitor submitted that he was aggrieved that the Executive's case did not appear to have taken into account the refunds policy. The Solicitor commented that this issue had been dealt with during the meeting between the Level 2 provider and members of PhonepayPlus' Policy team in June 2014, and he suggested both in his email of



30 July 2015 and during informal representations that the Tribunal invite those members to attend the Tribunal to enable the Solicitor to cross examine them.

The Solicitor further stressed the importance of the no quibble refund policy by stating that refunds were prioritised over the payment of rent to the landlord of the Level 2 provider's office premises. He further asserted that the Level 2 provider's last assets were used to pay refunds and not rent.

The Solicitor also stated that an error within a publicised statement by another regulator in December 2014 had caused the business of the Level 2 provider to go into liquidation. The Solicitor asserted that as a direct consequence of this error, loan companies ceased to work with the Level 2 provider and, notwithstanding the publication of a statement of retraction by the other regulator a few days later, the Level 2 provider was unable to recover from the financial detriment caused by the original statement, and was duly entered into liquidation.

The Solicitor said that he was appearing before the Tribunal at this hearing as his client was concerned that an adverse outcome of the investigation by PhonepayPlus would affect any claims against the other regulator.

The Solicitor further commented that he believed PhonepayPlus did not enjoy granting prior permission to consumer credit companies that dealt with consumers at the lower end of the market, but he asserted that prior permission was given by PhonepayPlus on the basis that there would not be a problem so long as there was entitlement to a refund of premium rate call charges.

In response to this point the Tribunal pointed out that the majority of complaints in this case had been made prior to December 2014 and as such, they predated the financial difficulties that prevented the Level 2 provider from paying refunds of premium rate call charges to consumers.

The Director's solicitor stated in response that this was extraordinary. He confirmed he had handed the Tribunal details of a discussion from June 2014 with members of PhonepayPlus' Policy team and noted that, despite these discussions, the Level 2 provider had received no notice of these early complaints. He admitted that he had overlooked the fact that many of the complaints were historic and confirmed that he would have liked to challenge this by cross examining those complainants, but was unable to do so as they were not in attendance at the hearing. He further considered that most complaints to PhonepayPlus made before December 2014 would have probably been refunded. He accordingly asserted that complainants who did not obtain a refund due to the liquidation of the Level 2 provider were justified while those who had raised complaints prior to the financial difficulties of the Level 2 provider were not. The Solicitor commented that, in his view, if many of the complainants in the latter group were questioned, their real complaint would be that they hadn't been offered a loan. He further commented that, if the historic complainants had not received a refund this would have amounted to a serious breach of Horizon's rules and accordingly he believed that the complainant's accounts were inaccurate, their evidence was unreliable but the evidence of non-payment after December 2014 was reliable.

#### Submissions directly in response to the alleged breach of rule 2.3.2 of the Code

The Solicitor addressed the allegations of misleading marketing raised by the Executive. In his email of 30 July 2015 he stated that he noted certain purported promotional material had been provided in the breach letter, but he had not established whether any of that material had been



used, and as far as he was aware, the Liquidator had made no approaches to the management team of the Level 2 provider concerning these matters.

During informal representations, the Solicitor commented that he had spoken to the Level 2 provider's management team who confirmed that (aside from a pilot) no outgoing marketing calls were made to consumers. He stated that the majority of promotions were created by external third parties and he accepted the Director's comment in his response to the Executive's request for information dated 25 February 2015, in which he stated that:

"A small proportion of the SMS marketing is carried out by Cash Finance Direct (Holdings) Limited directly".

During the course of his submissions the Solicitor referred to the promotions relied upon by the Executive and stated that the most offensively misleading SMS messages that had been sent to consumers were 'in low use'. He further commented that it would have been better if he had been given an opportunity to cross examine the complainants on this issue. He stated that the business did not guarantee people a loan. The Tribunal Chairman reminded the Solicitor that the Code does not facilitate cross examination of witnesses during informal representations in Track 2 procedures.

The Solicitor highlighted some of the "least offensive" SMS messages, and further confirmed that SMS messages were sent to a data list of people who were known to be looking for a loan. He asserted that these individuals would have previously been declined a loan application, and to that extent the sentiments in the SMS messages which referred to earlier loan applications were true.

The Solicitor also noted that the Director had been very candid in his response to the Executive's request for information and he recognised that the SMS messages could constitute aggressive marketing. He also noted that these SMS messages had been sent out to consumers. He further commented that, within his response to the request for information by the Executive, the Director was not shy about the information he gave and accordingly he was not seeking to hide anything. He asserted that this business model lay within the parameters of what was acceptable. He had also stated in his email of 30 July 2015 that there was ongoing and candid dialogue between the former legal entity and PhonepayPlus, in which the promotion of the Service and all telephone scripts were disclosed. Accordingly, the Solicitor asserted that the operations of the former legal entity were approved.

When asked by the Tribunal, the Solicitor stated that data lists of consumers were obtained from third parties. The Level 2 provider needed people who earned at least £400 pcm as this was one of their brokerage criteria. The Solicitor stated that the Level 2 provider marketed to people on the basis that it thought the Service could help them. He also confirmed that the Level 2 provider wanted business from people wanting the Service and not from those who would take the Level 2 provider to a Tribunal.

3. The Tribunal considered the Code, Guidance, relevant correspondence, the Solicitor's informal representations and all the evidence before it. The Tribunal noted that the Guidance was issued on 18 December 2014 and that this post-dated many of the complaints to PhonepayPlus, however the Tribunal considered that the application of the Guidance to its deliberations was not essential, as the determination of whether there had been a breach of rule 2.3.2 the Code was based on an assessment of the wording of the SMS marketing messages. The Tribunal also noted the Solicitor's general point that the Service had previously operated with prior permission, but further noted that these comments were in relation to a



separate legal entity and, notwithstanding this, the Service was nevertheless required to comply with all of the provisions of the Code.

The Tribunal noted the Solicitor's general assertion that the overarching policy that addressed all potential consumer harm was the refunds policy, and disagreed. The Tribunal accordingly determined that consumer access to a refund, while clearly relevant, was not in itself sufficient to justify a decision not to uphold a breach which had otherwise been made out. With regard to the Solicitor's direct submissions concerning the alleged breach of rule 2.3.2 of the Code, the Tribunal noted that the Solicitor had admitted that some of the SMS messages for the promotion of the Service could be described as aggressive advertising. The Tribunal also noted the Solicitor's comment that the majority of SMS messages were sent to consumers by third parties, however the Tribunal further noted that, notwithstanding this point, for the purposes of the Code the Level 2 provider was responsible for all promotions of its Services. The Tribunal further noted that, while many consumers who received a marketing message might well have previously been declined a loan and have been actively seeking credit, this did not detract from the finding that (i) the degree of personalisation used in the marketing messages was still capable of misleading consumers into believing that this was a specific and not a generic promotional message, and (ii) some marketing messages misled or were likely to have misled consumers into believing that they had already been approved for loans when in fact they had not.

Consequently, and having taken into account all of the above, the Tribunal concluded that consumers had been and/or were likely to have been misled by the Service. Accordingly, the Tribunal upheld a breach of rule 2.3.2 of the Code.

#### **Decision: UPHELD**

#### **ALLEGED BREACH 2**

##### **Rule 2.3.4**

"Premium rate services must be provided without undue delay after the consumer has done what is necessary to connect with the service and must not be unreasonably delayed."

1. The Executive asserted that the Level 2 provider had breached rule 2.3.4 of the Code in that several elements of Call 1 and Call 2 unduly delayed the provision of the Service. Whilst the Executive accepted that Call 1 and Call 2 were limited to a maximum of 15 and 10 minutes respectively, the Executive submitted that the Level 2 provider prolonged calls in order to ensure that calls reached or approached the maximum possible length even where this was not necessary. In particular, the Executive submitted that:

Reason 1 - Consumers were asked to repeat information obtained in the previous call(s).

Reason 2 - Advisors for the Service advertised various other products during the calls.

The Executive relied on the content of the Guidance. The Guidance states:

"Avoidance of undue delay

Paragraph 2.24.

Rule 2.3.4 of the Code states: "Premium rate services must be provided without undue delay after the consumer has done what is necessary to connect with the service and must not be unreasonably prolonged".



Paragraph 2.25.

Where the broker is simply gathering contact details on behalf of potential lenders and the lenders themselves will undertake a test for eligibility, only that information necessary for the referral must be taken. To take more information prior to a transfer of data in such circumstances may increase the consumer's expectations of success and will extend the length of the call unnecessarily.

Paragraph 2.26.

Where questions are added to the script to simply give an impression of professionalism or thoroughness, but do not contribute to the application process itself, such additions are likely to be considered unjustifiable and unfair for consumers who call the PRS line to make the application.”

#### **Reason 1 – Consumers were asked to repeat information obtained in the previous call(s)**

The Executive relied on the call script and sample telephone recordings provided by the Level 2 provider in relation to Call 1 and submitted that consumers were required to repeat information given in the Preliminary Call.

The script provided by the Level 2 provider, and as highlighted in screenshot 1 at Annex A, showed that advisors were instructed to begin a new enquiry with the consumer using the phrase “unfortunately the data protection act is preventing the person who referred you to us from transferring all of your details to me, so I will have to run through an enquiry with you now...”. The Executive submitted that this element of Call 1 suggested to the consumer that the Preliminary Call and brokerage elements of the Service were controlled by different parties, meaning that the Level 2 provider had to gather the information again. In reality the Level 2 provider was responsible for both the Preliminary Call and the Service and there was no reason to gather the information again and unduly delay the Service.

The Executive noted that advisors were instructed to obtain the following information from the consumer in Call 1 which duplicated information already requested in the Preliminary Call.

- Name
- Address
- Type of loan
- Purpose
- DOB
- Telephone number
- Home owner
- Employment

In the example of Call 1, the Executive noted that the advisor spent approximately nine minutes clarifying the above details with a consumer.



The Executive noted that the content of Call 2 as evidenced in the call recordings and scripts provided by the Level 2 provider demonstrated that during a large portion of Call 2 the advisor clarified information already taken in Call 1 and/or the Preliminary Call. The information that was duplicated in Call 2 included the following:

- Name
- DOB
- Address
- Telephone number
- Email address
- Credit commitments

In the example of Call 2 to which the Executive referred, the advisor spent approximately six minutes clarifying information with a consumer before providing details of any lenders.

Whilst gathering this information did not take the entire length of the call, the Executive submitted that this caused the consumer undue delay during the call thereby increasing the call duration and incurring further premium rate charges.

#### **Reason 2 – Advisors for the Service advertised various other products during the calls**

The Executive submitted, based on the call scripts provided by the Level 2 provider for Call 1, that advisors advertised other financial products to consumers, thereby keeping them on the phone and causing undue delay.

The call script provided by the Level 2 provider demonstrated that advisors were instructed to offer the consumer life insurance, the option of a loan secured against the value of a vehicle, a no credit check phone contract with a guaranteed upgrade to an iPhone 5s and a pay day loan.

The Executive noted that the call recordings supplied by the Level 2 provider showed that not every product included in the script was advertised on each occasion. The Executive however noted that the Level 2 provider did not provide, when requested, the most recent call recordings for complainants.

The Executive submitted that the Level 2 provider offered these other services to consumers who were calling specifically regarding a loan application in order to prolong the length of the call to close to the maximum permitted length.

In support of its submissions, the Executive referred to screenshot 2 at Annex B, taken from the call script for Call 1 provided by the Level 2 provider which stated that “as soon as you reach 14 minutes, click the “jump” button which will take you straight to the Processing screen.” The Executive submitted that this demonstrated that as an advisor reached 14 minutes they were required to jump to the end of the call so as not to exceed the maximum permitted call length of 15 minutes - however this implied that if a call was not at 14 minutes at this point, the advisor would continue to the subsequent slides. The Executive submitted that those slides showed additional questions which were valueless to the provision of the Service and were intended to keep the consumer on the phone for close to the maximum of 15 minutes.

In addition to the accounts set out previously in the “Background” section, the Executive relied on the following complaint:





“The call was lengthy and drawn out, I missed their call originally and called back. The call was dragged out to maximum time so they can charge £25 max then I was given another number from this company to call to complete the loan which was 09061931231 I thought I was getting, but never did. Which again ended up being another £18

Misleading. Keep you on the phone asking unnecessary questions and kept on hold for unnecessary length of time. Duration 15 minutes 14.04.2014 at 12.50 hrs.”

For the reasons set out above the Executive asserted that the Level 2 provider had acted in breach of rule 2.3.4 of the Code.

2. In addition to the above general submissions contained within the Solicitor’s submissions with respect to the alleged breach of rule 2.3.2 of the Code, the Solicitor made the following specific points concerning the alleged breach of rule 2.3.4 of the Code.

The Solicitor commented that the Level 2 provider had admitted to a short delay on calls, however he noted that the concerns raised by the Executive were inconsistent with the conversations that the Level 2 provider previously had with members of PhonepayPlus’ Policy team in June 2014. The Solicitor commented that he wanted to cross-examine members of the Policy team but noted that the Tribunal had denied him the right to do so.

The Solicitor commented that all calls to the Service by consumers were recorded to facilitate improvement to the Service. He further commented that promotional material and scripts were sent to PhonepayPlus and approved by its Policy team.

With regard to the second premium rate call, the Solicitor noted that consumers were asked to again provide their identity details but he asserted that the Service was approved by PhonepayPlus and it was inconsistent to raise the issue as part of an alleged breach of the Code. The Solicitor further commented that this case had been raised in a manner that suggested that PhonepayPlus was not aware of the business of the Level 2 provider. He commented that the business had been granted a prior permissions certificate in 1998 and that the call script and Service ‘method’ were approved by PhonepayPlus. He further commented that the script was thorough and, given its earlier approval by PhonepayPlus, it was not open for the Executive to now complain about it.

3. The Tribunal considered the Code, Guidance, relevant correspondence, the Solicitor’s informal representations and all the evidence before it. The Tribunal noted that the Guidance was issued on 18 December 2014 and that this post-dated many of the complaints to PhonepayPlus, however the Tribunal considered that the application of the Guidance to its deliberations was not essential, as the determination of whether there had been a breach of rule 2.3.4 of the Code was based on an assessment of the call scripts and recordings as against the wording of rule 2.3.4 of the Code. The Tribunal accordingly determined that, as the purpose of the Service was to enable consumers to apply for a loan, there should have been no undue delay to completing the application process once consumers had connected with the Service by dialing a premium rate number. The Tribunal also noted the Solicitor’s general point that the Service had previously operated with prior permission, but further noted that these comments were in relation to a separate legal entity and, notwithstanding this, the Service was nevertheless required to comply with all of the provisions of the Code. The Tribunal noted the Solicitor did not deny but had admitted to a short delay. The Tribunal further noted the Solicitor’s general comment that the Level 2 provider charged consumers £30 for a loan application. The Tribunal also noted that the method for levying those charges was achieved by encouraging consumers to make two premium rate calls. The Tribunal also noted the



Solicitor's submission that any consumer harm arising from this business model would be rectified by the Level 2 provider's no quibble refund guarantee policy. Having noted these points, and having read through the scripts and listened to sample recordings of both Call 1 and Call 2, the Tribunal determined that the £30 charge (consumers could in fact be charged as much as £38.25 plus standard network charges) via premium rate calls was unfairly levied as calls appeared to be deliberately unduly delayed to their maximum durations of 15 and 10 minutes respectively. The Tribunal considered that this failed to meet the requirement under rule 2.3.4 of the Code that premium rate services should not be unreasonably prolonged. In making this determination the Tribunal noted with respect to reason 1 the Executive's submission that much of the information provided in Call 2 was already provided in Call 1, and that Service operators were not truthful to consumers as they gave the impression that they needed to obtain personal information again that had already been collected during the Preliminary Call. With respect to reason 2, the Tribunal noted that the scripts were deliberately designed to prolong calls to the maximum call lengths by building in other promotions in the event that there was a surplus of time remaining on the call. Consequently, the Tribunal concluded that for both the reasons raised by the Executive, consumers experienced undue delay when using the Service. Accordingly, the Tribunal upheld a breach of rule 2.3.4 of the Code.

#### Decision: UPHELD

#### ALLEGED BREACH 3

##### Rule 2.6.4

"Where refunds are provided to consumers they must be provided promptly and in an easily accessible manner."

1. The Executive asserted that the Level 2 provider had breached rule 2.6.4 of the Code as refunds were not provided in a prompt or easily accessible manner.

Based on the information provided by the Level 2 provider, the refund process worked in the following way. At the end of Call 2 an advisor was instructed to tell a consumer that in order to obtain a refund they should call the aftercare team on a free phone number.

The Executive noted that, based on the call recordings provided by the Level 2 provider, when the consumer telephoned the free phone number to obtain a refund, they were told that they should then send in a copy of their itemised phone bill to Freepost CFD and they should receive a cheque within 6-9 weeks.

The Executive asserted that this two stage process of telephoning another number and then posting a copy of their phone bill was onerous for consumers and likely to dissuade them from applying for a refund. Further, several consumer complaints stated that they had difficulties in obtaining refunds and in some cases refunds had not been received at all. In addition to the complaints cited in the Background section above, the Executive relied on the complaints below.

"Consumer says that he received a call from the service confirming him that he got a loan. Consumer was told he had to call the service, consumer says when he called he had to start all the process of providing them with consumer's details. Consumer said that wanted to terminated the call. After that, consumer was told he had to call another 09xx and continue with the process. Consumer said he was not interested. Consumer says he was not told that the company was a broker company not a loan company as they pretended to be. Consumer says he was also told that the call would be refunded. Consumer says that provider informed



him that the process of be refunded will take up to two months. Consumer says he has to wait for the bill phone to come, provide them with a copy of the bill and after that when they will receive the call it will take them up 2 months.”

“Cash Finance Direct Limited text me claiming they could help me get a loan. They told me the cost of the call was £1.53 per minute, and the call would not exceed £15. This was on the number 09061931238. They told me about the costs but assured me I would be entitled a full refund of the total amount billed, whether I continued with the service or not. After the first phone call they asked me to call them back on another number which is listed above (09061997805), to confirm my loan application, but once again was told I would be charged £1.53 per minute, not to exceed £15, and am entitled to a refund no matter what. They charged me on the 05 of September 2014 for the amount of £12.36, and also for the amount of £32.92 (which exceeded the original promised charge). I phoned them when my bill came through and they said I had to send them a copy of my bill with the charges on it, which I did. It has now been almost 2 months and I've heard nothing back from them, I would continue to phone them and complain but I've read some forums with people with history with this company and they all have had no luck.”

“I received a text saying that I had been approved for a loan. I called the number in the text and was then asked to call another number, they stated that it was a premium rate phone call and that I would be charged £1.53 per minute but that I was allowed to get a refund for the price of the phonecall if i called customer services afterwards. I was under the impression that I was speaking with the loan company the whole while. He kept me on the phone for around 20 minutes and took all of my details including bank details and payment dates all the while repeating that I had been approved to receive the loan. He then told me that I needed to call another premium rate number to finalise the loan payment and that this would also be refunded. This time he kept me on the phone telling me all the time that I had been accepted to receive the loan for about 15 minutes. After the phonecall I called the customer services number that I had been given for the refund to be cut off everytime.”

The Executive noted that in a direction for information to the Level 2 provider dated 19 March 2015, the Level 2 provider was requested to provide the percentage of consumers that had received a full refund of their costs, however the Executive did not receive a response to this enquiry.

For the reasons set out above the Executive asserted that the Level 2 provider had acted in breach of rule 2.6.4 of the Code as it had not provided refunds promptly or in an easily accessible manner.

2. In addition to the above general submissions contained within the Solicitor's submissions with respect to the alleged breach of rule 2.3.2 of the Code, the Solicitor made the following specific points concerning the alleged breach of rule 2.6.4 of the Code.

The Tribunal queried the lead times advised to consumers for the provision of refunds and asked whether the Level 2 provider would have caught up on the refund applications made by complainants. The Solicitor commented that, as at December 2014 the timeframe for payment of refunds was running at 8 weeks after completion of Calls 1 and 2 as opposed to the 6 weeks communicated to consumers, and refunds at this time were accordingly for the costs of calls made in October 2014. He further blamed the Level 2 provider's liquidation for any failure to pay refunds beyond December 2014.



The Solicitor stated that, during the course of discussions in June 2014 with the Level 2 provider, a member of PhonepayPlus' Policy team had noted that only 5% or, as the Solicitor later stated, 8-9% of the Service customers appeared to seek a refund, which was low, and in light of this, he was asked whether consumers were clear on the refund policy. During a later part of the informal representations the Tribunal also asked why there was not a 100% request for refunds. In response the Solicitor suggested that this may have been because the majority of consumers had been satisfied with the outcome of their call, and had considered £30 a fair price to pay. He accordingly commented that some consumers may have considered that seeking a refund was a hassle and not worth it, but that equally there would be some consumers who would seek a refund.

The Tribunal queried the language of "a no quibble refund" as it suggested that there needed to be a reason for being eligible for the refund. Why was it not described as an absolute entitlement rather than 'no quibble', and why, if in fact there was an absolute entitlement, did such a low proportion of consumers claim it?

The Solicitor compared the situation to another common type of promise whereby consumers are sometimes offered a refund of the difference between two prices for the same product where the consumer locates a lower price. The Solicitor commented that most people did not follow through on that guarantee either. The Tribunal commented however that the Level 2 provider's refund policy was not the same as acting upon a "we'll refund the difference if you find it cheaper elsewhere" policy. That potentially required onerous research whereas a no quibble guaranteed refund required none.

The Solicitor also stated that loan uptake was increased by the availability of the type of service offered by loan companies that accepted all applications for loans pending nomination of a suitable guarantor. The Solicitor named one such company which he stated had been very interested in the Level 2 provider. The Solicitor went on to state that it could be said that inertia stopped people looking for a refund and people would not seek a refund if they felt that they had been treated fairly.

3. The Tribunal considered the Code, Guidance, relevant correspondence, the Solicitor's informal representations and all the evidence before it. The Tribunal noted the Solicitor's general point that the Service had previously operated with prior permission, but further noted that these comments were in relation to a separate legal entity and, notwithstanding this, the Service was nevertheless required to comply with all of the provisions of the Code. The Tribunal noted that, at the time of the Executive's follow-up direction for information to the Level 2 provider on 19 March 2015, the Liquidator had not yet been appointed and, as such, the Level 2 provider could have responded to the Executive's request to provide details of the percentage of consumers that sought a refund of the premium rate calls to the Service. In any case, notwithstanding the fact that the Liquidator had taken control of the Level 2 provider from 10 April 2015, the Tribunal considered that the Director or other officers of the Level 2 provider could have responded to the Executive's direction. The Tribunal considered that, it was clear that the process of obtaining a refund was unnecessarily protracted, and the Solicitor had accepted that the response time of 6 weeks was in fact nearer 8 weeks at a time before the Level 2 provider began to experience financial difficulties.

The Tribunal also noted that the Service script that described the refund process stated that refund cheques would be sent to consumers 6-9 weeks after submission of the phone bill. The Tribunal noted this suggested that refunds might take as long as 13 weeks to process if phone bills were sent to consumers one month after making the premium rate calls.



The Tribunal further noted that complainants who had requested a refund after December 2014 had not obtained one, and that this had been conceded by the Solicitor.

In addition, the Tribunal considered that the Solicitor's submission that the Level 2 provider's financial difficulties were the root cause for consumers not obtaining refunds did not stand up to scrutiny, as many of the complaints pre-dated the Level 2 provider's financial difficulties.

The Tribunal noted that the alleged breach was not concerned with whether or not there was a refund policy, but with whether refunds were provided promptly and in an easily accessible manner. The Tribunal noted that there were clear examples within a number of the complainant testimonies that demonstrated that, contrary to rule 2.6.4 of the Code, refunds were not provided promptly or in an easily accessible manner. The Tribunal further considered that the Director had been given ample opportunity to respond to this alleged breach by complying with the Directions, however no response was received. The Solicitor's wish to cross examine consumers was not communicated to PhonepayPlus until the day before the Tribunal hearing, and the Tribunal also noted that, in any case, a Track 2 procedure Tribunal hearing was not a type of hearing where cross examination was possible. Having taken this into account, the Tribunal duly dismissed the Solicitor's assertion that the complaints to PhonepayPlus regarding the refunds procedure were not bona fide. Consequently, the Tribunal concluded that Service refunds had not been provided promptly and in an easily accessible manner. Accordingly, the Tribunal upheld a breach of rule 2.6.4 of the Code.

#### **ALLEGED BREACH 4**

##### **Rule 2.3.1**

"Consumers of premium rate services must be treated fairly and equitably"

1. The Executive asserted that the Level 2 provider had breached rule 2.3.1 of the Code as Call 2 did not provide any value to the consumer.

The Executive relied on the Guidance. The Guidance states:

"Paragraph 1.7

With the above considerations in mind, PhonepayPlus takes the view that PRS calls can be used for the operation of credit broking services but only in limited circumstances where it meets a test of fairness.

Paragraph 1.8

A key factor in determining whether providers are treating consumers fairly is the question of how many premium rate calls, and the duration of those calls, consumers are required to make to access the service, or are encouraged to make, or are offered.

Paragraph 1.9

When considering compliance with the PhonepayPlus Code, especially rule 2.3.1, the test of fairness is unlikely to permit multiple calls to a PRS line to be necessary. We would expect the service to be capable of being provided to customers using one telephone call, with such a call not exceeding 15 minutes in order to apply for credit. We suggest that where 15 minutes is not considered sufficient time, then the provider should consider using a call service number that is charged at no more than 'basic rate' for the entire call.



#### Paragraph 1.10

If providers are unclear whether the call duration will always last under 15 minutes, it is strongly recommended that the call length is carefully monitored and where calls reach 15 minutes in length, or are likely to do so, the provider should offer to call the consumer back to continue the call or provide the consumer with a call service number that is charged at no more than 'basic rate' at that time for future engagement with the service.

#### Paragraph 1.11

Providers should take steps to manage the consumer's expectations in relation to what the service can offer, and the process by which the consumer may be introduced to relevant potential lenders. If this is done properly, consumers should not need to make repeat calls to the provider to check on the status of the application.

#### Paragraph 1.12

As such, we strongly recommend that providers give to consumers the details of timescales for potential lenders to make contact to further an application for credit, and they should avoid encouraging the consumer to call again unless there is a clear reason for the consumer to do so and it is in their interests to do so.

#### Paragraph 1.13

Where it is claimed that any second or further call to a PRS line is part of an "additional" service, providers must consider carefully what value is being added and ensure it is in the interests of the consumer for an additional fee to be paid. Consumers must be provided with a clear benefit that they fully understand before making a further call or calls.

#### Paragraph 1.14

Such a practice is unlikely to be considered by a Tribunal as treating consumers fairly and equitably unless the provider is confident that they have met the following conditions...

- The second call provides demonstrable added value to the consumer in progressing their loan application that is in line with the likely cost of the call (i.e. the added value of the service cannot only be marginal if the added cost of the call will be more than marginal);
- The added value could not reasonably have been provided in the first call; The consumer is clear about the benefit they will derive and the costs they will incur from any subsequent calls to a premium rate number once they have made their first call;
- The consumer is not encouraged into making a second or subsequent call; The call does not last more than 5 minutes; In addition, the call is as short as possible to deliver any added value (in line with rule 2.3.4 around undue delay), and does not for example request any information which was previously provided to the service in previous calls, and which does not need to be repeated. An example would be personal details which should not have to be given again if the consumer has been given a reference number for an operator to check their file on a provider's database.



#### Paragraph 1.17

Where the above guidance has not been followed, providers are likely to be in breach of rule 2.3.1 of the PhonepayPlus Code by failing to treat consumers “*fairly and equitably*”.

The Executive submitted that consumers were encouraged on Call 1 to make Call 2. The Executive submitted that the clear benefit of Call 2 was not made clear to consumers, that the added cost of Call 2 was more than marginal, and that Call 2 in fact appeared to have no substantive value. The Executive submitted, in addition, that Call 2 was not as short as possible to deliver the added value claimed, and lasted more than 5 minutes.

The Executive noted from the call recordings provided that the advisor did not mention anything about potential lenders until the very end of the call. Consumers had to repeat information to the advisor before potential lenders were even discussed.

The Level 2 provider stated in its Call 1 call script that the purpose of Call 2 was finding out which lenders a consumer had been initially matched with. The Executive noted that the script (a screenshot of which is located at Annex C) also instructed the advisor to state that:

“Although it won’t speed up the progress of your enquiry or influence the lenders decision, it is a much quicker call than this one and again this is fully refundable to you.”

The Executive submitted that, since the introduction to Call 2 in the script confirmed that making Call 2 would not speed up the lender’s decision, this evidenced that Call 2 had a less than marginal value to a consumer.

The Executive submitted that the promotion of Call 2 took advantage of consumers who the Level 2 provider would have been aware were vulnerable due to their financial difficulties.

The Executive asserted this based on:

- the aforementioned alleged breaches; and
- the fact that consumers were likely to be persuaded to call the Service (including Call 2) on the basis that the money for their calls would be fully refunded (when in fact this process was made unduly lengthy and onerous).

The Executive noted that screenshots from the call scripts for both the Preliminary Call and Call 1 showed that advisors were prompted to inform consumers of how the premium rate calls were fully refundable. The language used in the Preliminary Call script is that it won’t “cost you a single penny.”

The Executive referred to the below example of a consumer complaint demonstrating the issues faced as a consequence of using the Service:

“This company got in touch with me about a loan I was looking for and promised me a loan and a refund of all call charges, but I got nothing from them except 2 charges on my Sky phone account for £28.90(odds in pencil, not exact), so now I have charges of approximately £57/£58 that I cannot get back and my outgoing calls on my account have been restricted as I can't pay sky the charges ! I need urgent help as I am a disabled woman on my own with 4 children and I desperately need to have access to a phone. Transcript of Text: All calls to this number are free as you get all call charges free so you have nothing to worry about. Now they are not answering my calls to a number on their website, named CFD holdings and all



emails are just bouncing back to me. Summary of Complaint: I did not go on their site, I was transferred to it. They emailed and text me to say I had been guaranteed a loan but I had to call them 1st. I queried the call charges 3 times and they said the service was actually free as all call charges are refunded easily, and your loan is guaranteed. This was under the company CFD holdings. They guaranteed me a loan and also said if I couldn't get one I'd still be reimbursed, but they gave me nothing, no companies offering me a loan and now I know they are called cash finance direct and hide behind CFD holdings and I cannot get anything from them. I desperately need help or I'm going to lose my phone line and I desperately need it.”

The Executive submitted that as vulnerable consumers were encouraged to make a further premium rate call which had marginal or no value, the Level 2 provider had acted in breach of rule 2.3.1 of the Code.

2. In addition to the above general submissions contained within the Solicitor's submissions with respect to the alleged breach of rule 2.3.2 of the Code, the Solicitor made the following points concerning the alleged breach of rule 2.3.1. of the Code.

#### General Comments on Fairness

The Solicitor generally commented that the business was fair to consumers and gave some examples of fair conduct. He asserted that PhonepayPLUS understood that the Service dealt with the bottom 5% of the consumer credit market. He noted that, in the old days, people who called the Service could obtain a sub-prime mortgage and these products generated huge commissions. However by 2009 (following the financial crash), the Level 2 provider's predecessor experienced financial difficulties as the panel of lenders willing to lend in that market shrank. There were no more sub-prime mortgages and the brokerage business was left with only the payday loan end of the lending business. The Solicitor stated that Horizon made a decision at that time to stop dealing with payday loans as the business believed it was not fair to charge £30 to apply for a payday loan.

The Solicitor further stated that Horizon also had a policy not to accept applications from consumers who had called the Service within the previous eight weeks, and that this was designed to ensure that consumers were not left out of pocket and that, accordingly, as a result of this policy, no consumer should be owed more than £30. The Solicitor noted that, in the past, some consumers had spent £200 on calls, however with the above policy in place consumers were not incurring huge costs. The Solicitor further mentioned that less scrupulous websites did not have this policy.

The Solicitor additionally submitted that if the Tribunal felt that the Service was a rogue business, detailed and lengthy submissions would be required. The Solicitor confirmed he did not believe he was engaged in a rogue business.

Later during informal representations the Solicitor asserted that the overarching issue in this case was the protection of consumers. He later submitted that, as the Service had ceased, there was no longer a need to protect consumers. He commented that, if the Tribunal did however make a finding that the Service was unfair, the other regulator against whom the Level 2 provider intended to raise a claim might not feel obliged to pay compensation for its error in December 2014.

#### Specific Comments on Call 2





The Solicitor stated in his email of 30 July 2015 that it was a very long and established process of the Level 2 provider's predecessor to operate a two call process and it was approved and licensed by PhonepayPlus.

The Solicitor also referred to the written report that he had handed to the Tribunal during informal representations and commented that the meeting surrounding this report had included discussions concerning Call 2. Further, during the time of discussions of this matter in June 2014, scripts were given to PhonepayPlus which contained details of pricing, call durations of up to 15 minutes per call, and the right to a no quibble refund. He stated that PhonepayPlus was entitled to say that there was an issue with Call 2 at that time but instead PhonepayPlus had approved it. During a later part of his informal representations he further stated that the Level 2 provider had communicated to PhonepayPlus that it could move to a single call model. As previously stated in his email of 30 July 2015, the Solicitor accordingly asserted that it was not open to PhonepayPlus to now question Call 2 in the context of a complaint when it already had knowledge of Call 2 and had approved the process. The Solicitor also commented that the fairness of Call 2 was accordingly understood by PhonepayPlus and that the impact of the call was mitigated by refunds.

3. The Tribunal proceeded on the basis of the evidence, the Code, the Guidance and took account of the submissions made by the Solicitor. The Tribunal noted the Solicitor's general comments regarding the impact of this investigation on contemplated proceedings against another entity and considered that it could not be influenced by whether, and if so, to what extent any decision it made would have on any effect on those future proceedings. The Tribunal's function was to consider the evidence in isolation and decide whether any alleged breach of the Code had been proved or not. The Tribunal noted that the Guidance was issued on 18 December 2014 and that this post-dated many of the complaints to PhonepayPlus, however the Tribunal considered that the application of the Guidance to its deliberations was not essential, as the determination of whether there had been a breach of rule 2.3.1 of the Code was based on an assessment of whether Call 2 provided any value to consumers. The Tribunal also noted the Solicitor's general point that the Service had previously operated with prior permission, but further noted that these comments were in relation to a separate legal entity and, notwithstanding this, the Service was nevertheless required to comply with all of the provisions of the Code. The Tribunal noted that the Solicitor had made a number of submissions concerning the history of dialogue between the Level 2 provider and PhonepayPlus, and the Tribunal particularly noted the email dated 9 June 2014 that contained the report that the Solicitor had presented to the Tribunal during the course of informal representations. The Tribunal firstly observed that the document did not contain an agreed structure between PhonepayPlus and the Level 2 provider for operation of the Service, but was more in the nature of a proposal on the Level 2 provider's part. The Tribunal also noted that the description of Call 2 within the report contradicted the manner in which Call 2 was operated in practice. In one statement on page 4 of the report both premium rate calls were described as "absolutely essential if a full and satisfactory service is to be given to customers". However, this statement was inconsistent with the manner in which Call 2 was described to consumers during Call 1, whereby they were informed, "...it won't speed up the progress of your enquiry or influence the lender's decision..." On this basis the Tribunal considered that, for the purposes of achieving the objective of obtaining a loan, Call 2 was valueless to all consumers, and not only to those who were vulnerable as a result of financial difficulties.

Taking all of the above into consideration the Tribunal concluded that the Service had not been operated in a fair and equitable manner and, accordingly, the Tribunal upheld a breach of rule 2.3.1 of the Code.



Decision: UPHELD

#### SANCTIONS

##### Initial overall assessment

The Tribunal's initial assessment of the breaches of the Code was as follows:

##### Rule 2.3.2 – Misleading

The initial assessment of rule 2.3.2 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The Service promotion had a clear detrimental impact, directly on consumers.
- The Service generated substantial revenues through recklessly non-compliant promotions that misled consumers into thinking that they had already been accepted for a loan.

##### Rule 2.3.4 – Undue delay

The initial assessment of rule 2.3.4. of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Service had a clear detrimental impact, directly on consumers.

##### Rule 2.6.4 – Complaint handling – Provision of refunds

The initial assessment of rule 2.6.4. of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Service had a clear detrimental impact, directly on consumers.

##### Rule 2.3.1 – Fair and equitable treatment

The initial assessment of rule 2.3.1. of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The Service had a clear detrimental impact, directly on consumers.
- The Service had a charging mechanic that caused unnecessary and significant additional charges.
- The Service was purposely promoted on Call 1 in such a way as to impair the consumer's ability to make an informed transactional decision regarding Call 2.

The Tribunal's initial assessment was that, overall, the breaches were **serious**.

##### Final overall assessment

In determining the final overall assessment for the case, the Tribunal noted the Solicitor's admission that the Level 2 provider had not effectively engaged with PhonepayPlus during the course of this investigation, and particularly following the adjournment of the Tribunal hearing on 25 June 2015. In particular the Tribunal noted that, notwithstanding earlier indications given to the Executive, the Solicitor had appeared before the Tribunal alone and the Tribunal wished to emphasise that this had



not been the basis upon which the Tribunal had granted discretionary authorisation for informal representations to take place. The Tribunal further noted that the Solicitor had presented the Tribunal with documentation at the time of the hearing, which was highly irregular and unusual in a Track 2 procedure, particularly as the Director had been given ample opportunity, over and above the level provisioned in a usual Track 2 procedure, to provide documents in response to the breach letter. Notwithstanding these observations the Tribunal found that there were no aggravating factors.

The Tribunal noted the Solicitor's assertion that his clients' business had a very open relationship with PhonepayPlus and further acknowledged that he had referred to a long standing record of compliance with PhonepayPlus in a letter written by the Solicitor to the other regulator in February 2015. The Tribunal further noted that the Solicitor was able to give the Tribunal the history and development of the business from 1998, he had described the difficulties the business had when trying to cope with the other regulator and how it would attempt to cope in the future. Finally the Tribunal noted that the Solicitor had raised a number of concerns at the beginning of his informal representations regarding the fairness of the Track 2 procedure, such as disclosure and completeness of the bundle, and allegations that the Tribunal was biased. The Tribunal made it clear that these suggestions had no substance and the Solicitor duly apologised to the Tribunal. The Tribunal accepted the Solicitor's apology. Having considered these points, the Tribunal took into account the following mitigating factor:

- The Tribunal noted the letter from the Director to the Liquidator of 1 June 2015 and acknowledged that the Level 2 provider was unable to refund all consumers once it started to experience financial difficulties and was placed into liquidation.

The Level 2 provider's revenue in relation to the Service was in the range of Band 1 (£1,000,000+).

Having taken into account the circumstances of the case, the Tribunal concluded that the seriousness of the case should be regarded overall as **serious**.

#### Sanctions imposed

Having regard to all the circumstances of the case, the Tribunal decided to impose the following sanctions:

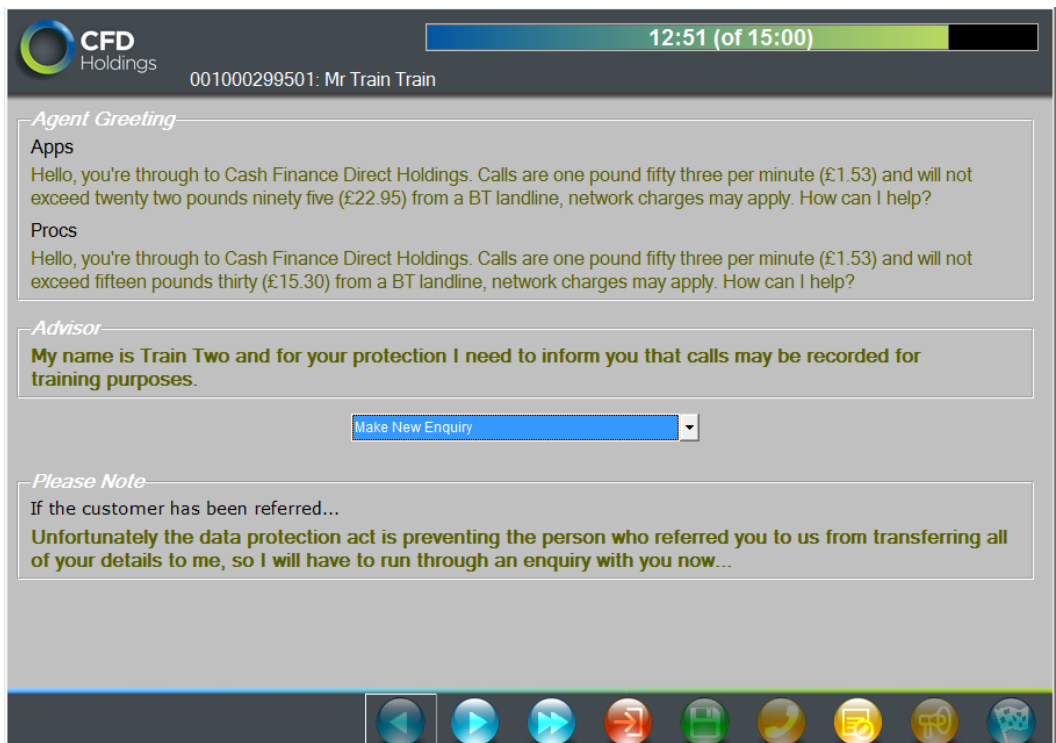
- a fine of £100,000; and
- a requirement that the Level 2 provider must refund all consumers who claim a refund, for the full amount spent by them on the Service, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to PhonepayPlus that such refunds have been made.

**Administrative charge recommendation:**

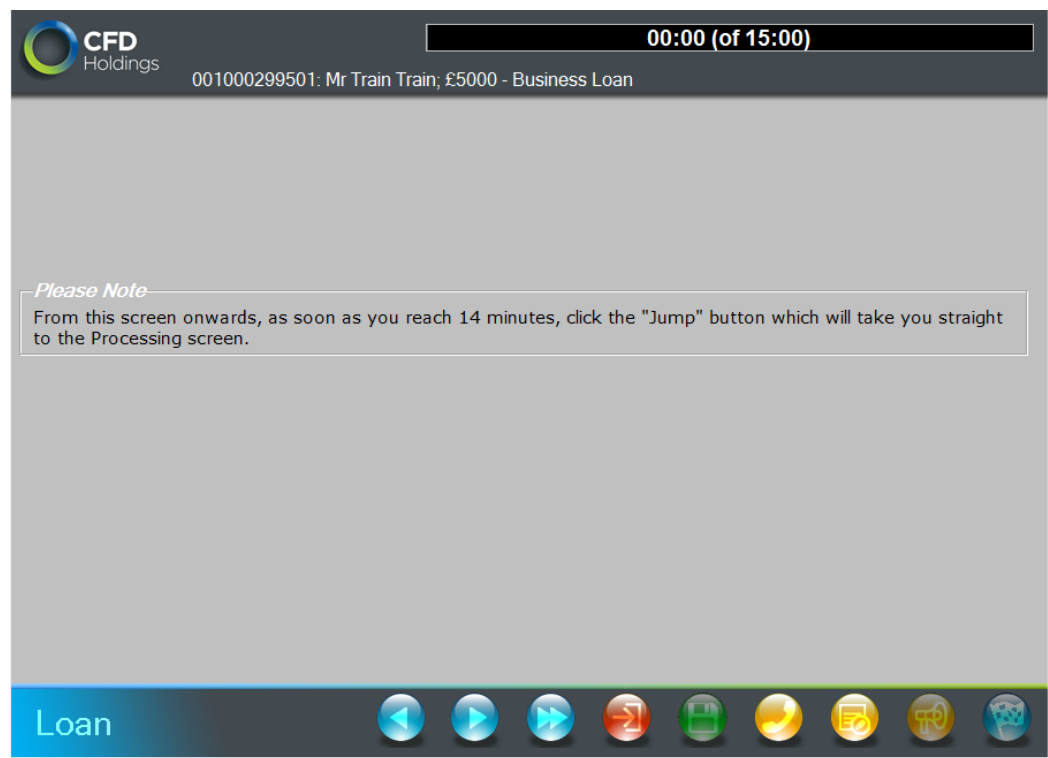
**100%**



Annex A – Screenshot 1



Annex B – Screenshot 2





Annex C – Screenshot 3

The screenshot shows a mobile application interface. At the top left is the "CFD Holdings" logo. A green progress bar at the top right shows "00:00 (of 15:00)". Below the header, the text "001000299501: Mr Train Train; £5000 - Business Loan" is visible. The main content area is titled "Advisor" and contains the following text:

Thank you for answering those questions for me. The great news is everything looks fine with your enquiry. Now everything does happen over the next 5-14 working days, (24 hours payday) this is from hearing from the lenders via phone, email or SMS and agreeing to an offer to money being transferred to you if you are happy with any offers.

However - there is a way we can provide information of the lenders to you sooner. Would you be interested in knowing which lenders we have sent you to today? (Wait for response...) If "Sooner":

Cash Finance Direct Holdings can provide a service to you in an hour advising you of which lenders you have initially been matched with and this can help you with knowing who may be contacting either by phone, SMS or email.

To do this you need to ring our processing department, have you got a pen and paper?

OK now I can have your enquiry processed for 17:08 today and to find out which lenders have come forward the number is:

0905 005 8902.

This number again is charged at one pound fifty three (£1.53) a minute and won't exceed fifteen pounds thirty (£15.30) from a BT landline, other networks may vary.

Although it won't speed up the progress of your enquiry or influence the lenders decision, it is a much quicker call than this one and again this is fully refundable to you.

Ok Mr Train, call us back at today at 17:08 and thank you for calling CFD Holdings today.

Bye.

At the bottom of the screen, there is a blue bar with the word "Loan" on the left and a row of seven circular navigation icons: a left arrow, a right arrow, a double right arrow, a red square with a white 'X', a green square with a white checkmark, a yellow circle with a white speech bubble, and a blue circle with a white globe.