

## **Complaint**

Mr S complains that Retail Money Market Ltd (trading as “Ratesetter”) overcharged him when he settled a Non-commercial peer-to-peer loan in July 2019.

## **Background and my provisional decision of 24 February 2022**

Mr S was provided with a Non-commercial peer-to-peer loan for £25,000.00 in May 2019. This loan had a loan fee of £1,192.50 and interest of £3,184.70 and the total amount payable of £29,377.20 was due to be repaid in 60 monthly instalments of £489.62.

In July 2019, Mr S contacted Ratesetter to settle this loan early and was told he needed to pay £26,402.49 in order to do so. Although unhappy with the settlement figure quoted, as he thought that this was around £900 higher than he thought it should be, Mr S repaid his loan and then complained to Ratesetter.

Ratesetter didn't uphold Mr S' complaint. It said that its terms and conditions meant that Mr S was required to pay the remaining balance of the amount advanced, the full amount of the loan fee and any accrued interest and fees up until the settlement date, when settling a loan early. And, in its view, this meant that Mr S was asked to pay the correct amount to settle his loan.

Mr S disagreed and said that the loan fee was a cost of the credit and included in the Annual Percentage Rate (“APR”). Mr S argued that this meant that he should have received a proportionate refund of the loan fee - notwithstanding it having been paid upfront - and Ratesetter failing to do this meant that he was charged an APR of around 40% rather than the 6.7% quoted on the loan agreement. As Ratesetter didn't change its position Mr S referred his complaint to our service.

One of our investigators looked at Mr S' complaint and thought that Ratesetter hadn't done anything wrong or treated Mr S unfairly. In her view, the loan fee was part of the advance rather than a cost of the credit and therefore Mr S wasn't entitled to a rebate. Mr S disagreed and asked for an ombudsman to consider his complaint.

On 24 February 2022, I issued a provisional decision setting out my initial findings on Mr S' complaint. I won't copy that decision in full, but I will instead provide a summary of my findings.

I started by setting out what I thought were the key regulatory provisions when Ratesetter arranged this loan for Mr S.

Ratesetter arranged this loan for Mr S while it was regulated by the Financial Conduct Authority (“FCA”). The FCA's Principles for Business set out the overarching requirements which all authorised firms are required to comply with.

PRIN 1.1.1G, says

*The Principles apply in whole or in part to every firm.*

The Principles themselves are set out in PRIN 2.1.1R. And the most relevant principles here are PRIN 2.1.1 R (2) which says:

*A firm must conduct its business with due skill, care and diligence.*

PRIN 2.1.1 R (6) which says:

*A firm must pay due regard to the interests of its customers and treat them fairly.*

And PRIN 2.1.1 R (7) which says:

*A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.*

The Consumer Credit Sourcebook (CONC) sets out the rules which apply to operators of an electronic system in relation to lending like Ratesetter. Bearing in mind the complaint before me, I think the most relevant section of CONC here is CONC 4.3 which sets out the Pre-contractual requirements and adequate explanations for P2P agreements.

In May 2019, when Ratesetter brought about this loan for Mr S, CONC 4.3.4R said:

*“Adequate explanations*

*(1) Before a P2P agreement is made, the firm must:*

- (a) provide the prospective borrower with an adequate explanation of the matters referred to in (2) in order to place the customer in a position to assess whether the agreement is adapted to the customer's needs and financial situation;*
- (b) where the P2P agreement is not a non-commercial agreement, advise the prospective borrower:*
  - (i) to consider the information which is required to be disclosed under section 55 of the CCA; and*
  - (ii) where the information is disclosed in person, that the borrower is able to take it away;*
- (c) provide the prospective borrower with an opportunity to ask questions about the agreement; and*
- (d) advise the prospective borrower how to ask the firm for further information and explanation.*

*(2) The matters referred to in (1)(a) are:*

- (a) the features of the agreement which may make the credit to be provided*

*under the agreement unsuitable for particular types of use;*

- (b) how much the borrower will have to pay periodically and, where the amount can be determined, in total under the agreement;*
  - (c) **the features of the agreement which may operate in a manner which would have a significant adverse effect on the borrower in a way which the prospective borrower is unlikely to foresee;** [my emphasis]”*
  - (d) the principal consequences for the borrower arising from a failure to make payments under the agreement at the times required by the agreement including legal proceedings and where this is possible, repossession of the borrower’s home;*
  - (e) the effect of the exercise of any right to withdraw from the agreement and how and when this right may be exercised.*
- (3) Except where (4) applies, the adequate explanation and advice in (1) may be given orally or in writing.*
- (4) Where the matters in (2)(a), (b) or (e) are given orally or to the prospective borrower in person, the explanation of the matters in (2)(c) and (d) and the advice required in (1)(b) must be given orally to the borrower.*

CONC 4.3.5R says

*Where CONC 4.3.4 R applies to a firm, the firm must comply with the rules, and observe the guidance, in CONC 4.2 to the same extent as if it were the lender under an agreement to which those rules apply.*

Having carefully considered everything provided, it seemed to me that there had been a lot of back and forth between the parties over whether Ratesetter calculated Mr S’ settlement figure in line with how the Consumer Credit (Early Settlement) Regulations 2004 (“the regs”) set out how a creditor should do so. I said that I was somewhat persuaded by Mr S’ argument that the loan fee was a cost of the credit, as it wasn’t possible to have the loan without paying the fee and this is why it was included in the APR of 6.7%.

I also pointed out that it was also arguable that the regs do require a reduction in the total cost of the credit in the event of the early settlement of a loan. And this was a position which appeared to be advocated by the European Court of Justice in Case C 383/18 , which considered the right of a consumer to a reduction in the total cost of the credit, consisting of the interest and the costs for the remaining duration of the contract under Directive 2008/48/EC — Article 16(1).

But even if the regs themselves didn’t provide an automatic right to a reduction, or rebate, on all of the charges which made up the total charge for credit in the event of early settlement, I thought that the regs merely set out a formula for working out the maximum a P2P operator could charge in the event that a consumer wished to settle an agreement early. I made it clear that I didn’t consider it to be an absolute standard. I explained that what I was required to do was decide what was fair and reasonable in the circumstances of Mr S’ case not just whether Ratesetter had acted in accordance with the regs.

In deciding whether Ratesetter acted fairly and reasonably towards Mr S, I was mindful that CONC 4.3.4R requires a P2P operator to provide an adequate explanation of an agreement

in order to place the prospective borrower in a position to assess whether the agreement is right for their needs and financial situation. The matters to take into account included the features of the agreement which may make it unsuitable for a particular type of use and the features of the agreement which would have a significant adverse effect on the customer in a way which they were unlikely to foresee. CONC 4.3.5R also refers back to the guidance which lenders must comply with and confirms an operator of an electronic system in relation to lending should comply with these provisions as if it were a lender.

CONC 4.2.7G lists the factors a lender should take into account when deciding the level and extent of an explanation. These factors, amongst other things, include the type of credit, the amount and duration and the actual and potential costs. I thought that in this case, even taking Ratesetter at its best, adding a loan fee to the amount borrowed and including the cost of it in the APR meant it was structuring Mr S' loan in a way that differed from the way that most lenders did. It is not entirely clear to me why it did this – although I had my suspicions as to why. Nonetheless, Ratesetter argued that it structuring the loan in this way meant that Mr S was only ever entitled to a refund of a portion of the interest of £3,184.70 which would have been paid if the loan ran to term, in the event of early settlement, rather than a portion of the £4,377.20 total charge for the credit.

I explained that as these early settlement provisions differed considerably from most lenders' provisions, I would have expected Ratesetter to have adequately explained this to Mr S in a clear, fair and non-misleading way.

As I understood it, Ratesetter said that Mr S was made aware of early settlement provisions in the terms and conditions of the agreement he agreed to. It relied on this information as evidence of it having met its obligations to adequately explain in a clear fair and not misleading way the terms and conditions in relation to early settlement.

I went on to consider what Ratesetter said.

I started this section of my provisional decision by saying that whether the information Ratesetter had referred to ought reasonably to have led Mr S to understand he may still have had to pay a substantial amount of interest even if repaying his loan early, depended not only on the content of the information, but when it was provided and its prominence within the overall documentation given to him.

Ratesetter relied on the loan agreement Mr S signed but this would have been provided after it had been signed. And it hadn't provided all of the information Mr S was presented at the time. So I didn't know how prominent the information Ratesetter referred to and was now seeking to rely on, was within the plethora of documentation put before Mr S. And I didn't know whether Mr S actually had to read this information before confirming acceptance to being bound to them either. This was especially the case bearing in mind the speed at which this whole process is likely to have taken place.

In any event, I thought that even if I were to put to one side my concerns about whether the information in the terms and conditions were prominent enough, I didn't consider that the loan agreement set out the position as clearly as Ratesetter believed either.

On the right to repay early the agreement states:

*"You have the right to repay your indebtedness under the Agreement(s) early, in whole or in part. You can do so through your online account or by telephoning us on 020 3142 6226. To settle in full you must pay the Amount of Credit and Loan Fee still outstanding on all the Agreement(s) plus any unpaid interest and fees accrued up to and including the date of Settlement."*

The section entitled 'Loan fee' states:

*"£1,192.50*

*The Loan Fee is an upfront fee due and payable to RateSetter on the date the Agreement(s) are made. Payment of the Loan Fee and interest thereon at the Borrower Rate is included in your monthly payments but if you settle your Agreement(s) early, it will become immediately due and payable."*

The section entitled 'Borrower rate' states:

*"4.61% per annum fixed.*

*The Borrower Rate is a blended rate which combines the interest payable on all your Agreement(s) to the RateSetter Lenders and the Service Fee payable to us. The Borrower Rate is fixed for the duration of your Agreement(s) and is calculated and charged daily on the Amount of Credit and Loan Fee outstanding."*

The section 'APR' states:

*"6.7%*

*The APR is calculated on the assumption that the Agreement(s) will continue for their full duration and that you will perform your contractual obligations when required to do so under the terms of the Agreement(s)."*

And finally, the section entitled 'Your right of withdrawal' states:

*"You are entitled to withdraw from the Agreement(s) without having to give any reason within 14 days beginning with the day after the date of the Agreement(s). If you would like to withdraw, you must do so from all the Agreement(s) simultaneously.*

*If you intend to withdraw from the Agreement(s), you must notify us in writing or orally. You can do so by telephoning us on 020 3142 6226, by writing to 6th Floor, 55 Bishopsgate, London, EC2N 3AS or by sending an email to [contactus@ratesetter.com](mailto:contactus@ratesetter.com). If you withdraw from the Agreement(s) you must repay, without delay and no later than 30 calendar days beginning with the day after the day you gave us notice of withdrawal, the credit together with interest and fees at the Borrower Rate from the date the credit was provided until the date of repayment. Interest and fees accrue at £3.16 per day. You can make payment to RateSetter by bank transfer or debit card."*

I thought that the most striking thing about the information set out was that the total amount of interest to be paid (and the only amount Ratesetter says Mr S was entitled to a proportionate rebate of in the event of early settlement), was nowhere to be seen in it, or anywhere else, for that matter, on the agreement. The closest the agreement came to indicating how much interest could accrue in the event of early settlement was the daily interest amount set out in the right of withdrawal section. I assumed Ratesetter's expectation was that Mr S would work out the amount of interest due under the agreement from the rest of the information provided.

Secondly, and most importantly of all it wasn't clearly and explicitly set out that Mr S wasn't entitled to a refund of any part of the loan fee in the event of cancellation. Indeed, the loan fee wasn't mentioned at all in the section regarding Mr S' right of withdrawal. Ratesetter may have argued that by saying the loan fee would become immediately due and payable in the event of Mr S' agreement being settled early, it met this obligation. But given what I had already said about a typical loan from most lenders not being structured in this way, I set out that I would have expected this section to make it clear that the loan fee was non-refundable in the event of cancellation.

I also thought it was worth noting that this fee was included in the APR arrived at. And as an APR was generally considered the best way to compare the cost of credit and the significant impact of the loan fee being non-refundable, the loan fee would clearly have a more significant impact on those prospective borrowers unlikely to repay their loan over a full term.

So, in my view, it was arguable that Ratesetter ought to have provided a prospective borrower with an adequate explanation that a loan structured in this way may not have been suitable for them if they intended to settle it early. After all most borrowers were unlikely to have had experience of agreements of this type (unless they'd entered into P2P agreements previously) and Ratesetter relied on these terms operating in a way which differed from the early settlement terms typically included in loan agreements. And I couldn't see any evidence of such a warning having been provided to Mr S.

Of course, it was possible Ratesetter provided such information elsewhere through the sales process. But I didn't think that it was fair and reasonable to expect a consumer to go rooting through various segments of an application process, or a number of documents to piece together their obligations under an agreement. Especially as it was the operator of an electronic platform in relation to lending's responsibility to provide an adequate explanation of these matters.

So while I thought about what Ratesetter had said and what it had provided, I was minded to find that Ratesetter failed to adequately explain the early settlement terms and conditions and specifically that Mr S wouldn't be entitled to a rebate of the loan fee in the event the loan was settled early, in a clear fair and not misleading way.

Even though I was minded to conclude that Ratesetter didn't adequately explain the early settlement terms to Mr S, in a clear, fair and not misleading way, it didn't automatically follow that Mr S' complaint should be upheld. That was because I still needed to consider whether Mr S lost out as a result of Ratesetter's failure to provide adequate information to him. In other words, I needed to consider whether Mr S would have acted differently if Ratesetter had met its obligations to him.

I've carefully considered what I thought would more likely than not have happened – if Ratesetter had met its obligations to Mr S.

In deciding this matter, I referred to what Mr S had said his reasons for applying for this loan were. Ratesetter hadn't provided any of the documentation relating to Mr S' application. So I didn't know what if any purpose was recorded for this loan at the time Mr S' made his application. Nonetheless, Mr S said that he took out this loan because he had short-term liquidity issues as a result of an unexpectedly delay to an investment proposal.

Given Mr S settled the loan in full less than two months later and what Mr S had described about his financial position, I had no reason to disbelieve or doubt what he said on this matter. And, in these circumstances, it seemed to me that the early settlement terms and the fact that no part of the loan fee was refundable in the event of early repayment were likely to have been important to Mr S.

Bearing in mind all the circumstances, I was minded to find that Mr S would more likely than not have decided against taking this loan and instead sought a loan elsewhere had he received an adequate explanation of the early settlement terms and these been properly explained to him. In reaching this conclusion, I was mindful that Ratesetter could have avoided any ambiguity over the status of the loan fee and ensured that Mr S was treated fairly and reasonably by simply setting out the total interest on the loan agreement and making it clear that this was the only charge Mr S was entitled to a rebate of.

It was my view that some might argue that it suited Ratesetter to set out the agreement in the way it did as borrowers intending to settle early would be less likely to realise the implications at the outset and enter into a contract they wouldn't have done, had the terms been set out more clearly. Although that was not a finding I was making.

Instead what I did find was that as the regulated firm Ratesetter was the expert in this matter. And instead of doing what was fair and reasonable in the circumstances and clearly setting out that the loan fee was non-refundable, Ratesetter instead chose to present this information in a more-opaque manner. It was then choosing to rely on this opaque explanation, which I considered to be inadequate bearing in mind it wasn't clearly highlighted, and potentially a gamut of pre-contract information, which may or may not have had to be read before being accepted. I didn't think this was fair and reasonable and this left me minded to find that Ratesetter's actions led to Mr S entering into a loan agreement that he wouldn't have entered into had he received an adequate explanation of the early settlement terms.

So overall and having considered everything, I did think that there was a reasonable argument for saying that Mr S was entitled to a proportionate refund of the loan fee because it was part of the total charge of the credit and upon early settlement of the agreement all elements of the total charge of the credit are eligible for a rebate. But I made it clear that I wasn't making that finding as reaching such a finding wasn't critical to my provisional determination of whether Ratesetter acted fairly and reasonably towards Mr S.

This was because the non-refundable nature of the loan fee meant that this loan was structured in a way which meant the early settlement terms were different from most typical loans available on the market. And this left me minded to find that this was significant information Ratesetter ought to have provided Mr S with an adequate explanation on. Mr S' circumstances and his reasons for taking out this loan in the first place also left me minded to find that he would not have taken this loan had the early settlement terms been adequately explained to him.

So I concluded that Mr S entered into a loan agreement that he wouldn't have, had Ratesetter provided him with an adequate explanation. And as I thought he would have instead taken a loan with typical early settlement terms with a different provider, I was minded to find that Mr S lost out because Ratesetter didn't act fairly and reasonably towards him. I then went on to set out a method of putting things right in a way I considered to be fair and reasonable.

### **Mr S' response to my provisional decision**

Despite being provided with an additional copy of my provisional decision, Mr S didn't respond or provide anything further for me to consider.

### **Ratesetter's response to my provisional decision**

Ratesetter responded disagreeing with my provisional decision. In summary it said:

- It is confident that it complied with the FCA Principles and CONC provisions that I quoted in my provisional decision.
- In relation to CONC 4.3.4R there was a number of references to the loan fee being added to the loan and it being immediately due and payable in the event the loan was settled early, in the documentation provided to Mr S.

- In its view, it isn't reasonable to characterize the process, or its communication to Mr S, as giving rise to "an APR of around 40% rather than the 6.7% quoted on the loan agreement", nor unusual, opaque, inadequately explained or misleading.
- It does not agree that the early settlement terms were different from most typical loans available on the market and asked for this claim to be substantiated.
- That the legal advice I appeared to give is at best controversial and it would like clarification. If the practice of not providing a rebate of any part of the loan fee in the event of early settlement is illegal then this would be the end of the matter.

## My findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I thank Ratesetter for its further comments. I can confirm that I've read and considered everything it has said and provided.

Before I go any further, I do think that it would be useful for me to correct a couple of misunderstandings that Ratesetter appear to have taken from my provisional decision.

Firstly, I did not provide any legal advice in my provisional decision. I merely pointed out that it could be argued that Mr S' position – namely that a proportion of the of the loan fee should be refunded in the event a loan was settled early as it was part of the cost of the credit – appears to have been shared by the European Court of Justice in the case I mentioned. I did not and do not find that Ratesetter acted illegally as this isn't what I'm required to determine here.

What I was and still am required to determine here is whether Ratesetter acted fairly and reasonably in its dealings with Mr S. I didn't consider it necessary to make a formal finding on whether Ratesetter breached the Consumer Credit (Early Settlement) Regulations 2004, in order to determine these matters. And I remain satisfied that this is the case here.

Secondly, I'd also like to make it clear that I did not make a finding that Mr S' loan had an effective APR of 40% - that is the argument Mr S made. And I've not attempted to work out whether Mr S was correct in his assertion or what the APR for Mr S' loan would have been had it originally been structured in the way that it ended up being repaid.

I now turn to Ratesetter's comments regarding the documentation it says was provided to Mr S as part of the process of arranging this loan. In truth, Ratesetter has merely referred to information that was quoted in my provisional decision and which I was aware of at the time. And I'm still not persuaded that the documentation Ratesetter is referring to, makes the position as clear as it thinks it does.

For example, the following is one of the extracts Ratesetter has referred to:

*The Loan Fee is an upfront fee due and payable to RateSetter on the date the Agreement(s) are made. Payment of the Loan Fee and interest thereon at the Borrower Rate is included in your monthly payments but if you settle your Agreement(s) early, it will become immediately due and payable."*

The extract says the loan fee is due and payable on the date of the agreement. It then says that the fee (which is already due and payable on the date of the agreement), will become

immediately due and payable in the event the loan is settled early. It isn't particularly clear to me how a fee which is already due and payable can then again become due and payable.

Furthermore, the next extract focuses on the total amount including the loan fee being payable in the event Mr S were to make all his payments to the end of the term of the loan. But it isn't in dispute that Mr S knew he'd have to pay the loan fee if the loan ran to its scheduled end date. The question here isn't whether Mr S knew there was a loan fee, it is were the early settlement terms - and in particular the fact that there wouldn't be any rebate of the loan fee in the event that loan was settled early - adequately explained in a clear, fair and not misleading way to Mr S.

I accept that some of what Ratesetter has quoted in terms of other information provided throughout the journey, may more strongly *hint* that no part of the loan fee would be returned if the loan was paid early. But, in my view, there isn't anything which specifically and explicitly sets out that this is the case.

And as said in my provisional decision, as the drafter of the agreement and the expert in this matter, Ratesetter had the opportunity to remove any ambiguity by clearly and explicitly stating, or including a warning saying, that early settlement wouldn't reduce the amount owed (over and above the capital advanced) and would simply result in not having to pay any further and as yet unaccrued interest. As it chose not to include such wording in the contract and bearing in mind why I think such information is of importance in this particular case, I don't think that it would be fair and reasonable for the benefit of any ambiguity to go in its favour in this particular instance.

Finally, I've seen that Ratesetter disagrees the early settlement terms on Mr S' loan were different from those on most loans typically available on the market and it asked for me to substantiate this claim. I have to say that I'm somewhat surprised by this. But to be clear the reason I believe Mr S' loan to differ from most personal loans typically on the market is because most loans don't contain loan fees which are added to the borrowing.

The total amount to be repaid for the overwhelming majority of personal loans typically available on the market merely consists of the principal capital amount advanced and interest. And as this is the case, the total amount repaid in the event of early settlement would be the capital amount advanced plus interest covering the period the borrower owed the lender money for.

I am satisfied that adding such a significant (in comparison to the amount advanced), loan fee to the amount advanced and then not providing any sort of proportionate refund should the loan not run to its scheduled end date, isn't the way the overwhelming majority of personal loans typically available on the market operate. So I remain satisfied that the features of this loan, in relation to early settlement, operated differently from those a borrower might typically expect. And it was a feature of Mr S' agreement which may have operated in a manner which would have a significant adverse effect on him in a way which he was unlikely to have foreseen.

As this is the case and I've already explained why I think Mr S wouldn't have proceeded with this loan had this been adequately explained to him, I remain satisfied that Ratesetter failed to act fairly and reasonably towards Mr S and that he lost out as a result. So Ratesetter needs to put things right.

### **Fair compensation – what Ratesetter needs to do to put things right for Mr S**

I've already explained why I found that Mr S wouldn't have entered into this agreement and would more likely than not have instead entered one with an alternative provider with more

typical charges for credit and early settlement terms, in the event Ratesetter met its obligations. Clearly, I can't just simply recreate the terms Mr S would more likely than not have obtained with an alternative lender, some three years after the event. So I need to find another way of directing Ratesetter to put things right for Mr S in a fair and reasonable way.

Having given careful thought to the matter, I think that the most simple way for Ratesetter to put things right for Mr S this far down the line would be for it to simply work out what Mr S would have repaid to settle his loan when he did, if the loan fee had been part of the interest added, rather than a fee added to the loan, and then deduct this from the amount Mr S did pay to settle his loan. The extra Mr S paid, plus interest 8% simple per year\* from the date Mr S repaid his loan to the date Ratesetter settles this complaint, should then be refunded to Mr S.

\*HM Revenue & Customs requires Ratesetter to take off tax from this interest. Ratesetter must give Mr S a certificate showing how much tax it has taken off if he asks for one.

### **My final decision**

For the reasons I've explained above and in my provisional decision of 24 February 2022, I'm upholding Mr S' complaint. Retail Money Market Ltd should put things right in the way I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 22 April 2022.

Jeshen Narayanan  
**Ombudsman**