DRN-3321957

The complaint

Mr R has complained about the quality of a car he acquired under a conditional sale agreement with Santander Consumer (UK) Plc trading as McLaren Financial Services (SCUK).

Both Mr R and SCUK have had representatives at times but, to keep things simple, I'll mainly refer to Mr R and SCUK.

What happened

Mr R acquired a new car under a three-year conditional sale agreement with SCUK in October 2019. The 'on the road price' was £120,000. But I think the following figures that I've been shown are also relevant:

Vehicle basic price	£ 130,833.33
Factory fitted options	£ 27,749.98
Discount	£ 60,141.67
Sub total	£ 98,441.64
VAT	£ 19,688.36
Road fund licence	£ 1,815.00
First registration fee	£ 55.00
On the road price	**£ 120,000.00**

Mr R has explained more about the discount he received. He tells us the supplying dealer, in partnership with SCUK, contributed to the discount. And that a deposit of around £23,000 Mr R had put towards a previous car also financed by SCUK was carried over and put towards the discount.

To give some background to this, Mr R tells us he acquired a car in July 2018 under a finance agreement with SCUK (car 1) and paid a deposit of around £23,000. He said it wasn't of satisfactory quality and over the course of the next few months repairs were attempted without success. Mr R tells us the manufacturer replaced car 1 with car 2, but he says car 2 wasn't of satisfactory quality either. Mr R also said he was unhappy finance agreements weren't dealt with properly by SCUK and that they were produced unsigned.

Mr R tells us he decided to acquire the current car (car 3) on the basis of his £23,000 deposit from car 1 being put towards it. Otherwise, he would have wanted to walk away by rejecting car 2 and receiving his deposit back. Mr R entered into a new agreement (agreement 2) with SCUK to acquire car 3.

Repayments towards the agreement for car 3 were £725 per month for three years followed by a final payment of around £105,000. Mr R also entered into a sales agency arrangement which meant he could sell the car back to SCUK at the end of the term for a guaranteed amount of the final payment, providing certain conditions were met. So he had the option of walking away after three years without having to make the final payment.

A manufacturer approved garage carried out a pre-delivery inspection on car 3 which checked the condition of the car and that it had the necessary accessories. This included a short road test. And a third-party firm also carried out a pre-delivery inspection on it that said *The paint finish itself was noted to be of a high standard, as expected for a hand painted vehicle, where all panels were uniform throughout.* But the inspection also pointed out what it referred to as *a number of very minor discrepancies:* a small scratch to an air intake; debris and/or polish on the inner surfaces of two air intake chambers as well as various seals; an incorrectly fitted seal; white mark on a side trim.

The inspection set out there was a certain expectation for a high-performance supercar, and that the car Mr R was acquiring had been finished to a high standard. But it also pointed out the car was hand built and painted so would always appear unique when compared to another model.

The supplying dealer rectified the issues highlighted above and a further inspection was carried out in October 2019 that said all cosmetic issues had been resolved.

Mr R, however, contacted SCUK about certain defects within a couple of weeks of the car being supplied, having covered less than 100 miles. He highlighted the following issues:

- White noise.
- Door strut failure.
- Door trim finish.
- Sill trim issues.
- Keyless entry.
- Passenger seat 'ghost'.
- Panel delamination.

Mr R set out in an email to SCUK dated 28 October 2019 that the Consumer Rights Act 2015 (CRA) has remedies available of a replacement, a price reduction or the right to reject.

SCUK responded to say the first step would be to allow the supplying dealer to inspect the car. But Mr R was unhappy with this. He would have preferred the manufacturer or another approved garage to inspect it. SCUK suggested the firm that carried out the pre-delivery inspection, but Mr R didn't think it was suitably independent. SCUK proposed another independent firm to carry out an inspection and said the report would be disclosed if it was going to rely on it. Mr R said he was happy for the independent firm to inspect the car at the same time as the manufacturer. But due to the car being a high-performance supercar using technologies not used anywhere else in the general automotive market he thought the manufacturer would need to give its opinion.

SCUK said it had been unable to persuade the manufacturer to get involved. It said Mr R should take the car to an approved garage to examine it for any warranty work required. It said it wouldn't be productive for an engineer instructed on its behalf to carry out the inspection without support from someone at the approved garage who's able to discuss what works can be carried out under warranty. SCUK said Mr R could *have the vehicle inspected... at the* [supplying] *dealership there with the support of their* [manufacturer] *trained technicians or to take the vehicle to another dealership.* [SCUK] *will still have their nominated expert present, but, we emphasise that the purpose of this is to report back… with a view on the defects about which* [Mr R] *complains.*

Mr R wasn't happy that the manufacturer wouldn't get involved. He'd mentioned that the bonding agent had failed in certain areas and so he thought a sample of the mastic would

need to be tested by the manufacturer. He said the manufacturer should have an expert that could attend. And he said if the inspection wasn't arranged soon, he wanted to reject the car.

SCUK said Mr R was outside of the time limit for the short term right to reject, so repair or replacement were the only options at that stage. It said the two options he had were to take the car to the supplying dealer for inspection and repair if needed, or to take the car to another approved garage and have the inspection carried out there. It also said it would not accept a rejection.

Mr R didn't respond to SCUK. And he decided to take the car to a different manufacturer approved garage. He says he still wanted to reject the goods although, from what I've seen, I've not been supplied further evidence he tried to do that via the other approved garage. The manufacturer approved garage inspected and offered to resolve certain issues.

The table below shows the faults investigated and the rectification comments. The repairs were carried out under warranty.

Date	Fault	Rectification comment
17-Dec-19	Wipers inoperative	Replace wiper motor
19-Dec-19	White noise	As expected
19-Dec-19	Panel bonding failing	Clean off adhesive and rebond
19-Dec-19	Panel not solid or bonded	Rebonded
19-Dec-19	Passenger seat belt sensor fault	Calibrate
19-Dec-19	Key not found issue	No fault found
19-Dec-19	Sill loose	Refit panel and secure
19-Dec-19	Parking sensor fault	No fault found
19-Dec-19	Door strut fault	No fault found
19-Dec-19	Comfort entry fault	No fault found - calibrate seat

From what I can see the mileage recorded on the 17 December 2019 job card when the car was handed in was 500 miles.

Mr R says a manufacturer approved garage gifted him titanium wheel bolts and an outdoor car cover free of charge at the end of January 2020. He says the bolts are worth around £600 and the cover around £200. The manufacturer also paid him £7,500 as a goodwill payment through an approved garage. The manufacturer has said these payments are normally made in recognition of repair delays or where cars have been off the road for a long time.

Further work was carried out to the car between 28 February 2020 and 3 March 2020 by the manufacturer approved garage because the door glass kept dropping. The door release switch was replaced under warranty. The mileage at this point was around 2,700 miles.

Mr R asked to reject the car in April 2020. He referred to previous problems he had with it. And said there were other issues present:

- Passenger seat belt warning alarm fault.
- Loud rattle when starting the car.
- White noise that Mr R says was not present on another car of the same model he'd driven.
- Paint bubbling / rust on door sill.

- ‘Key not found in the vehicle’ warning fault.

SCUK asked for evidence of the faults and Mr R told it the car was still with a manufacturer approved garage. Mr R thought SCUK had enough evidence of faults. He also highlighted courtesy cars he’d been given by the garage were not of the same class as the car he’d acquired on finance with SCUK.

SCUK wrote to Mr R in June 2020 to say it had not been able to inspect or repair the car – so it wanted to be given that opportunity. Alternatively, it asked if Mr R would like to contribute towards the cost of an independent inspection. It expected this to cost around £4,000 plus VAT. Around this time the car was taken to another approved garage for further repairs. Mr R thought it would make more sense to arrange the inspection after the repairs had been completed. And he was concerned the inspection would be carried out by the firm that completed the pre-delivery inspection as he didn’t think the inspection was carried out properly and was concerned that the pre-delivery inspector didn’t drive the car. If SCUK were to arrange an inspection itself, Mr R wanted to know who would carry it out, and he wanted to have sight of the report. He was also worried as some of the faults were intermittent and so might not have been picked up.

SCUK indicated it hadn’t decided on an expert at that point, but it thought it likely any expert would drive the car. It also said if Mr R were to contribute to the cost of the report, he’d receive it. But if he didn’t, the report would attract privilege and therefore would not be shared with him unless that privilege was waived.

Mr R wasn’t happy with the options he was given. He thought he’d indicated he wanted to reject the car in October 2019, and he highlighted multiple failed repair attempts. He was not happy he might not be allowed to see a copy of the report. He said he would arrange his own inspection if needed, but he thought he’d given enough evidence of the faults by way of video and picture evidence, as well as details of approved garages that had undertaken repairs.

SCUK didn’t agree. In summary, it said:

- Mr R didn’t reject the car in October 2019, and he’d lost his right to the short term right to reject.
- Any repairs Mr R had arranged had been carried out without SCUK’s permission and without it having inspected the car.

We’ve been supplied the following comments relating to work undertaken on the car in August 2020 when the mileage was around 3,500:

- Replaced occupant seat sensor.
- Brake component replaced under goodwill to stop squeak.
- Key Fault.
- Paintwork bubbling.

Mr R decided to arrange his own inspection later on that month as he still thought there were issues despite the car having just been repaired. He paid £2,500 for the report. And by this point the car had covered around 3,590 miles. The report concluded:

- *… the build quality and panel alignment is to a very poor standard taking into account the vehicle brand and the multiple attempts at repairs. The examiner is of the opinion from the findings of this report that the defects noted to build quality and panel alignment would have been present at the point of purchase.*

- *… the vehicle in its present condition has multiple defects present rendering the vehicle of unsatisfactory quality and unfair* [sic] *for purpose.*
- *The examiner is extremely concerned over the high pitched whine being emitted from the vehicle which not only is a major distraction to the driver of the vehicle but could result in a failure of the steering system and as such the vehicle should not be driven on the public highway in its present condition.*
- *The examiner is of the opinion from this limited inspection that the abnormal noise level may be related to the vehicle's power steering system which in its present condition is not acceptable and further investigation into this concern will be required. If, as it may be suggested, that the abnormal noise level is simply a design characteristic of the vehicles* [sic] *steering system this would not be considered acceptable for a vehicle of this type and brand.*
- *To conclude, It was the opinion of the examiner from the findings of this report that the vehicle would not have been of satisfactory quality or fit for purpose at the point of sale in terms of Section 9 of the Consumer Rights Act 2015 and would not have been of suitable quality or fit for purpose at the point of purchase in terms of Section 10 of the Consumer Rights Act 2015. Multiple attempts at repairs and a significant timeframe has elapsed with the Pursuer not having the vehicle and as such a rejection of the vehicle should be granted.*

Since the report was carried out Mr R had a service carried out in October 2020. And the windscreen was replaced due to a stress fracture around this time. At this point the mileage was around 4,400. I understand it was seen again in December 2020 because the heating, ventilation and air conditioning (HVAC) box was coming away.

Mr R said the car had another issue with the window not working in April 2021, and he says there was an issue with mould which he thought was as a result of a common fault with this type of car due to water ingress from the boot area. In November 2021, another service was carried out, and the mileage was around 8,800.

Towards the end of the term there was an issue with the suspension that was investigated. The mileage at that point was around 11,000. But afterwards, Mr R says the car still had the following issues:

- White noise.
- Interior panel loose.
- Rust on window trim.
- Front bumper loose.
- Keyless entry.
- Passenger seat 'ghost'.
- Intermittent radio issues.

Mr R has now handed the car back to SCUK having covered around 11,500 miles. A company inspected the car for damage in November 2022 when it was handed back. The inspection found:

- Front bumper dented with paint damage.
- Front bumper molding scratched (painted) over.
- Near side front wheel scratched up to 50mm.
- Near side rear quarter panel rusted over 5mm.
- Off-side rear quarter panel rusted over 5mm.

No charges were applied in relation to the damage.

In summary, the position between the parties prior to the complaint being referred to me for a provisional decision was as follows. Mr R thought the car was of unsatisfactory quality and that he should have been able to reject it. SCUK said it did not authorise the repairs that Mr R had carried out. As it wasn't given its own opportunity to inspect or repair the car it didn't accept rejection. It questioned why Mr R continued to use the car if he wanted to reject it. It said that Mr R's continued use of the car prohibits rejection. It also thought the complaint should be dismissed or rejected. It asserted that the complaint is frivolous because it thinks it was brought too early i.e., before SCUK was given the opportunity to inspect or repair the goods. It said considering the complaint might seriously impair the effective operation of the Financial Ombudsman Service because it thought deciding it may lead to other complainants exploiting the complaints process by denying traders their right to be given the opportunity to repair goods before rejection is made available to a consumer.

SCUK had also said any complaint about the deposit should not be considered as part of this complaint because the deposit relates to a separate, settled finance agreement. And it said a complaint relating to this has been brought out of time because it was referred more than six months after a previous final response.

I issued a provisional decision that said:

I want to acknowledge that whilst I've summarised the events of the complaint, I've reviewed everything on file. If I don't comment on something, it's not because I haven't thought about it. I'm focussing on what I consider are the key issues.

There are some key questions I need to ask myself to help me decide what, if anything, SCUK needs to do to put things right:

1. *Is the complaint in jurisdiction?*
2. *Should the complaint be dismissed?*
3. *Was the car of satisfactory quality?*
4. *If applicable, what remedies are available under the CRA?*
5. *Does SCUK need to take any action to put things right?*

Is the complaint in jurisdiction?

I've first thought about what the rules say about what complaints we can consider.

SCUK says our service should not be considering the complaint because it's been brought too early - as in prior to SCUK sending its final response letter and/or before it was given the opportunity to repair.

I think it's relevant to first consider what the rules say about our jurisdiction in relation to that. There are rules in the Financial Conduct Authority's (FCA) Dispute Resolution chapter of its handbook (also known as DISP or the DISP rules) that set out when the Ombudsman Service can consider complaints.

DISP 2.8.1R says our service can only consider a complaint if:

> *"(1) the respondent has already sent the complainant its final response or summary resolution communication; or*
>
> *(2) in relation to a complaint that is not an EMD complaint or a PSD complaint, eight weeks have elapsed since the respondent received the complaint;…*
> *…*

unless:

(4) the respondent consents and:

(a) the Ombudsman has informed the complainant that the respondent must deal with the complaint within eight weeks (or for EMD complaints and PSD complaints 15 business days or, in exceptional circumstances, 35 business days) and that it may resolve the complaint more quickly than the Ombudsman; and

(b) the complainant nevertheless wishes the Ombudsman to deal with the complaint."

So just because Mr R contacted our service before SCUK sent its final response letter and before it was given the opportunity to repair, the Ombudsman Service still had to wait for a final response or eight weeks to pass before we could start considering the complaint unless SCUK consented to the complaint being taken on by the Ombudsman Service before then and so long as the provisions under DISP 2.8.1R(4) were met. It's not unusual for potential complainants to come to our service before they've exhausted the firm's own complaint process. In this case, once the eight weeks passed the Ombudsman Service began its investigation of this complaint. Overall, I am satisfied that this complaint would not fall outside the Ombudsman Service's jurisdiction just because Mr R referred the complaint before the final response letter had been issued or the eight weeks had passed. Nor would the complaint be out of jurisdiction because Mr R referred the complaint to the Ombudsman Service before SCUK was given an opportunity to repair the vehicle.

I've next thought about our jurisdiction concerning the deposit. SCUK said it sent a final response letter concerning car 1 (and agreement 1) in March 2019. Mr R paid a deposit towards car 1. DISP 2.8.2R says that (unless the firm consents or there are exceptional circumstances):

"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

(1) more than six months after the date on which the respondent sent the complainant its final response, redress determination or summary resolution communication;…

However, it appears that the transfer of the deposit towards the discount may have been part of the negotiations relating to the finance agreement entered into for car 3. If I conclude that this is correct and also conclude that Mr R should be entitled to reject car 3 then I am satisfied that I can consider whether Mr R has suffered any loss concerning the deposit. I am satisfied that I would be able to do this in those circumstances as the deposit would have been included in the negotiations for the agreement for car 3 which is subject to this complaint.

Should the complaint be dismissed?

For complaints referred to the Financial Ombudsman Service on or after 9 July 2015 an ombudsman may dismiss complaints that are within our jurisdiction for the reasons set out at DISP 3.3.4AR and, where relevant, DISP 3.3.4BG. SCUK thinks the complaint shouldn't be considered because it's frivolous. The reason SCUK considers the complaint is frivolous is because it says it's been brought too early. Even though Mr R referred his complaint before SCUK issued its final response, I don't think that makes it frivolous. It's quite normal for complainants to contact our service before the firm has issued a final response or eight weeks have passed. And just because SCUK says Mr R may have sought to reject the goods prior to a first repair that doesn't make the complaint frivolous. I therefore don't consider that it would be appropriate to dismiss the complaint on that basis.

I could, however, dismiss a complaint if I thought it would seriously impair the effective operation of the Financial Ombudsman Service. DISP 3.3.4BG sets out examples of the types of complaint that would potentially do that. While the list of examples doesn't cover everything, I don't think Mr R's complaint would seriously impair the effective operation of the Financial Ombudsman Service. I don't think, as SCUK suggest, he's brought the complaint with the intention of using it as a tool to deny SCUK its statutory right to repair as a trader.

I appreciate SCUK says it is entitled to take steps in court against Mr R to enforce its right to repair. SCUK also says if there's any question about its rights, the complaint should be dismissed. But Mr R is also entitled to bring the complaint to our service to consider. Mr R contacted our service because he was unhappy with how SCUK was responding to his concerns about the quality of a car he acquired under a regulated conditional sale agreement – complaints about or concerning financial services products are exactly the sort of thing our service was set up by Parliament to deal with. I do not consider that in considering this complaint I am being asked to decide something that's not the Ombudsman Service's place to do so. Just because SCUK thinks the complaint is better suited to court I am not satisfied that this alone would mean that it would be inappropriate for the Ombudsman Service to consider this complaint.

Overall, I am satisfied that I can consider this matter based on the written submissions and evidence presented by Mr R and SCUK. It is a matter which can be dealt with based on the submissions and evidence provided and does not require the procedures available to a court, for example cross-examination of witness evidence, in order to determine the complaint. For all the reasons I have set out above I don't consider this is a complaint that is better suited to be determined by a court and I do not consider it would be appropriate to dismiss Mr R's complaint on this basis.

Finally, I also note SCUK thinks the complaint should be dismissed because it effectively tampers with its settlement agreement with Mr R in relation to the way car 3's deal was set up off the back of what happened with car 1 and car 2. But that settlement agreement doesn't prevent Mr R bringing a complaint to our service about an act or omission in relation to the current regulated conditional sale agreement. I'm considering a complaint about the conditional sale agreement concerning car 3 only – namely, a complaint about agreement 2. And I'm not persuaded the presence of this settlement agreement between SCUK and Mr R means the complaint about agreement 2 is better suited to court.

Was the car of satisfactory quality?

As I am satisfied this complaint is in jurisdiction and that it would not be appropriate to dismiss, I will turn to the merits of the complaint. DISP 3.6.1R provides that:

> *"The Ombudsman will determine a complaint by reference to what is, in his opinion, fair and reasonable in all the circumstances of the case."*

DISP 3.6.4R sets out what I am required to take into account when considering what is fair and reasonable:

> *"In considering what is fair and reasonable in all the circumstances of the case, the Ombudsman will take into account:*
>
> *(1) relevant:*
> *(a) law and regulations;*
> *(b) regulators' rules, guidance and standards;*
> *(c) codes of practice; and*
>
> *(2) (where appropriate) what he considers to have been good industry practice at the relevant time."*

Mr R acquired the car under a conditional sale agreement. Our service is able to consider complaints relating to these sorts of regulated consumer credit agreements.
The CRA covers agreements like the one Mr R entered into. The CRA implies terms into the agreement that the quality of goods is satisfactory. SCUK accepts that it is the "trader" for the purposes of the CRA and is therefore responsible for dealing with a complaint about their quality.

The CRA says that the quality of the goods is satisfactory if they meet the standard a reasonable person would consider satisfactory – taking into account the description of the goods, the price or other consideration for the goods (if relevant) and all other relevant circumstances. For this case, I think the other relevant circumstances include the age and mileage of the car at the point of delivery.

Section 9(3) of the CRA says:

> *"The quality of goods includes their state and condition; and the following aspects (among others) are in appropriate cases aspects of the quality of goods—*
>
> *(a) fitness for all the purposes for which goods of that kind are usually supplied;*
> *(b) appearance and finish;*
> *(c) freedom from minor defects;*
> *(d) safety;*
> *(e) durability."*

In Mr R's case, the car was described as new when it was supplied and the third-party pre-delivery inspection said that the car had only completed 9 miles. The price of it as set out in agreement 2 was £120,000 (including VAT). It's a very expensive high-performance supercar. Therefore, I think a reasonable person would have expected it to have been in perfect condition, safe to use, durable and free from even minor defects.

I've set out in the background the faults Mr R complained about and the works that were carried out under warranty by manufacturer approved garages. I've also set out the conclusions of the independent report Mr R had carried out, and I've summarised the findings of the other inspections. So I won't go over everything again in detail. But to summarise, Mr R complained about the following issues within a couple of weeks of acquisition:

- *White noise.*
- *Door strut failure.*
- *Door trim finish.*
- *Sill trim issues.*
- *Keyless entry.*
- *Passenger seat 'ghost'.*
- *Panel delamination.*

Further, while not all the faults were found during the subsequent inspection by other manufacturer approved garages, the following repairs were completed within around two months of acquisition:

- *Replace wiper motor.*
- *Rebonding or refitting of panels.*
- *Calibration of keyless passenger seat belt sensor.*

The following repair also took place within the first six month of acquisition:

- *Replace door glass switch.*

After the first six months Mr R complained about the following faults:

- *Passenger seat belt warning alarm fault (ghost issue).*
- *Loud rattle when starting the car.*
- *White noise that Mr R says was not present on another car of the same model he'd driven.*
- *Paint bubbling / rust on door sill.*
- *'Key not found in the vehicle' warning fault.*

Works were carried out in relation to the following:

- *Replaced occupant seat sensor.*
- *Brake component replaced under goodwill to stop squeak.*
- *Key Fault.*
- *Paintwork bubbling.*
- *Windscreen replacement due to stress fracture.*
- *HVAC box coming away.*

But Mr R says the car still had the following issues:

- *White noise.*
- *Interior panel loose.*
- *Rust on window trim.*
- *Front bumper loose.*
- *Keyless entry.*
- *Passenger seat 'ghost'.*
- *Intermittent radio issues.*

The CRA sets out that goods which do not conform to the contract at any time within the period of six months beginning with the day on which the goods were delivered to the consumer must be taken not to have conformed to it on that day unless it's established the goods did conform to the contract on that day or that the application is incompatible with the nature of the goods or with how they fail to conform to the contract.

Faults within first six months of acquisition

Taking into account Mr R's complaint within a couple of weeks of acquisition; the repairs that were carried out in relation to those issues; and the findings of the independent report Mr R arranged, I think there's a strong basis to conclude faults in relation to the following were present or developing at the point of delivery:

1. *White noise.*
2. *Panel misalignment.*
3. *Wiper motor.*
4. *Passenger seat belt sensor.*
5. *Keyless entry.*
6. *Door glass switch.*

Points 1 and 2 were complained about within a couple of weeks of delivery and subsequently found in the expert's report which Mr R commissioned. I'll deal with point 1 first.

Mr R complained about 'white noise' within a couple of weeks of receipt of the car. And he has consistently said the issue remained throughout the time he possessed the car. I'm satisfied the noise the technician has highlighted is in relation to the noise Mr R originally complained about. I note the technician thinks the white noise (or high-pitched whine as he calls it) may be in relation to the power steering and back in December 2019 the manufacturer approved garage inspected the power steering pump in relation to Mr R's complaint about the white noise. I appreciate the approved garage said the noise was 'as expected'. But Mr R has said the noise wasn't present on another car of the same model he'd driven. Taking all this into account, I consider it's more likely than not the white noise is in relation to a fault as opposed to a design characteristic. And I think it's in relation to the power steering.

I don't think Mr R or the pre-delivery inspectors could have known about the white noise during a visual inspection. But the supplying garage confirmed that it had carried out a road test of "maximum 15 minutes /10km (3 miles)" and the white noise Mr R went on to complain about does not appear to have been recorded as occurring. I don't know why the fault wasn't picked up on this road test. Perhaps it wasn't immediately present. Or perhaps the road test wasn't intended to pick those sorts of issues up. The report simply asks whether a road test has been completed. There doesn't appear to be a check recorded for the sound of the car. And also, even if the white noise wasn't immediately noticeable or noticed (which isn't what the report says), it doesn't show the root cause of the issue didn't exist – especially considering the fault was reported in a matter of weeks. When considering all of the available evidence, I am of the view that it is more likely than not that the white noise issue would have been present or developing at the point of delivery. And there's no indication from any of the other inspections occurring after the fault arose that the fault was caused by wear and tear.

As regards point 2, the technician in the report Mr R commissioned is quite clear that various panels are misaligned. The technician refers to the panel alignment as being of very poor standard and that the defects relating to it would have been present at the point of purchase. I've had to consider why they weren't picked up on the initial inspections. But, from looking at the photos, the misalignment isn't stark. It's not clear therefore whether the panels were misaligned at the point of supply or whether the fault occurred shortly afterwards when Mr R complained.

When taking all this into account I consider it more likely than not the panels would have been misaligned at the point of delivery or that the root cause of the fault was developing at the point of supply. And like with the white noise, there doesn't appear to be any suggestion raised in the inspections occurring after the fault arose that the panel misalignment was down to wear and tear.

There were repairs carried out in relation to points 3, 4 and 5 within a couple of months of delivery. Mr R complained about points 4 and 5 within a couple of weeks of delivery too. It looks like point 5 might have been an intermittent fault that wasn't repaired properly. The report Mr R commissioned set out that there was an occasion during testing that the key wasn't detected to start the car. Further, as regards point 6 (the door glass switch), this also had to be replaced within six months of acquisition.

Again, the faults weren't noted on the road test or pre-delivery inspections. That may well demonstrate the faults had not manifested at the point of the road test however it does not demonstrate that the root cause of the problem was not present at the point of delivery. Some of the faults were complained about within a couple of weeks of delivery and other faults were repaired within a few months. I also note again that I've not seen any evidence to suggest these faults were down to usual wear and tear.

Mr R has highlighted a couple of other faults with the car which were noted within six months, and which he says were repaired. I've set those out above. But I've not been provided with job cards or further details of the faults in the inspection Mr R commissioned, so it's difficult to reach firm conclusions here. However, based on the available evidence, when considering the timeline for when those faults developed and that there does not appear to be any evidence suggesting these faults were caused by wear and tear it seems more likely than not that the root cause of those faults would have been present at the point of supply.

Faults outside the first six months

I've also thought about the other issues Mr R has mentioned that were found after the first six months. We've asked for job cards relating to these but have only been given a brief summary of what happened for some of the faults. I've set all of this out above. I can see in August 2020 there was work in relation to: a seat sensor; brake squeaking; key fault; paintwork bubbling. And later in 2020 there was work in relation to the windscreen and the HVAC box. The seat sensor and key fault were noticed by Mr R shortly after acquiring the car. And aside from the brake squeaking (which could feasibly be down to wear and tear), even though we don't have evidence all these faults were found during the road test, they all manifested within a year or so of Mr R acquiring the car. Neither party has suggested that these faults were down to wear and tear or driver misuse. Given how soon these faults developed I consider it more likely than not that the root causes of these issues, aside from possibly the brake squeaking, were developing at the point of delivery.

I should also point out there were other faults mentioned by Mr R after the first year or so of supply including with the suspension, the door glass, and an issue that caused mould. But I've not been provided much evidence of the problems, the cause, or what repairs were carried out. I've noted there was an issue with the door glass switch in the first six months. But I don't have enough evidence to know if the subsequent issue was related to it or not. I'm therefore unable to say whether this is a reoccurrence of the same issue. When thinking about the other faults it's more difficult to reach firm conclusions about those compared to the faults that happened within the first year of so of supply. But I think I have enough evidence of other faults to be able to determine the complaint.

Summary on satisfactory quality

Given the major distraction of the white noise, I think this ought to be classed as a safety issue. I also think the underlying fault is likely as a result of an issue with the car's durability. Taking into account the reports and inspections carried out, I think it likely the fault is related to the power steering, and I wouldn't have expected the power steering on a new car, for this price, to have this sort of defect shortly after Mr R took delivery of it.

I think the fault concerning the panel misalignment which I've said was present or developing at the point of supply meant the car was not free from minor defects. It's also a durability issue. A brand-new car shouldn't have issues with misaligned panels within six months of it being supplied. While not stark, I think it falls below the standard a reasonable person would find satisfactory of a new and expensive high-end performance car.

With regards to points 3 – 6 (the wiper motor; passenger seat belt sensor; keyless entry; door glass switch), I think these were major defects and durability issues. Having issues with wipers, seat belt sensors and door glass motors could all impact safety as well. And an issue with the keyless entry would indicate the car wasn't durable.

I've also set out above the specific faults outside of the first six months in relation to the seat sensor, key fault, paintwork bubbling, windscreen and HVAC box that, on balance, I've found were likely present at the point of supply. I think the seat sensor and key fault seems to be recurring issues as I've mentioned them above, and it looks like they weren't repaired properly. I think the paintwork bubbling, the issue with the windscreen and HVAC box were also major defects and issues with durability.

I have considered all the evidence provided to me about the faults which I consider were present or developing at the point of supply. Having done so, I don't think the issues with the quality of the car which I have set out above would meet the standard a reasonable person would consider satisfactory given that the car was a new, expensive supercar with next to no mileage.

Overall, when considering the faults which were present or developing at the point of supply, I am of the view that the car wasn't free from minor defects; it lacked durability; and had elements that could be considered unsafe. Considering the number of faults which arose and taking into account the age, price and mileage of the car, I'm of the view the car wasn't of satisfactory quality. As such, I do not consider that it has been established that the car did conform to the contract on the day of delivery.

What remedies are available under the CRA?

Where goods don't conform to the contract because of a breach of terms relating to their quality consumers are able to exercise their short term right to reject. In this case, section 22(3) of the CRA says:

> *"The time limit for exercising the short-term right to reject (unless subsection (4) applies) is the end of 30 days beginning with the first day after these have all happened—*
>
> *a) ownership or (in the case of a contract for the hire of goods, a hire-purchase agreement or a conditional sales contract) possession of the goods has been transferred to the consumer,*
> *b) the goods have been delivered, and*
> *c) where the contract requires the trader to install the goods or take other action to enable the consumer to use them, the trader has notified the consumer that the action has been taken."*

But it also says a consumer who has the short term right to reject loses it if the time limit for exercising it passes without the consumer exercising it, unless the trader and consumer agree that it may be exercised later. SCUK doesn't dispute that it is the trader for the purposes of the CRA.

The CRA also says if the consumer requests or agrees to the repair or replacement of goods, the time limit would stop running for the length of the waiting period.

In Mr R's case, he contacted SCUK within the relevant short term right to reject time limit in his October 2019 correspondence and if he had sought to exercise his short term right to reject I consider that he would have been able to do so validly. But, in the contact about the faults in October 2019, he didn't validly seek to reject the car, he just said rejection was available under the CRA.

I've thought about the time limit and whether it would've stopped during a waiting period. The waiting period begins the day the consumer requests or agrees to the repair or replacement of the goods and ends with the day on which the consumer receives goods supplied by the trader in response to the request or agreement. But as Mr R didn't request or agree to repairs through SCUK, I don't think there was an associated waiting period. Mr R contacted SCUK setting out the faults he'd found, and he set out the various remedies as per the CRA. But he simply asked SCUK for comments, rather than specifically asking for a repair. SCUK let Mr R know that an inspection should be carried out to establish the faults. At this point Mr R says he welcomed an inspection but didn't want the supplying dealer to carry it out due to the problems he felt he'd had with it. So the 30 days passed before Mr R eventually made his request to reject in April 2020. Taking all this into account, I don't think Mr R validly exercised his right to the short-term rejection of the goods because the time limit expired before he sought to reject the goods in April 2020.

I've next thought about the right to repair or replacement. In this case, as the goods, to my mind, did not conform to the implied term of satisfactory quality, Mr R had the right to ask SCUK to repair them. The CRA sets out that if the consumer requires the trader to repair or replace the goods, the trader must do so within a reasonable time and without significant inconvenience to the consumer. And the trader must bear any necessary costs incurred in doing so (including in particular the cost of any labour, materials or postage).

In this case, Mr R agreed someone other than the trader could repair certain faults. So I don't think it would be fair to hold SCUK liable for any delays in getting the car repaired here. I also don't think I need to go over all of the repairs that were successful as I've set them out earlier in this provisional decision.

There are other issues I've found which make the car of unsatisfactory quality which I can't see were repaired – the panel alignment; the white noise; the passenger seat sensor, and the keyless entry. I've not seen any evidence to dispute that.

Even though the contract has now ended and SCUK has said it wasn't given its opportunity to inspect or repair, I've also thought about what the CRA says about the right to a price reduction or final right to reject. Mr R didn't request a price reduction, or indeed another repair, he wanted to reject the goods and receive his deposit back. One of the reasons which the CRA says that a consumer can exercise their final right to reject is if, after one repair or replacement, the goods don't conform to the contract.

As I've said above, outside of the short term right to reject period, the trader should be given an opportunity to repair the goods before the consumer has the right to exercise their final right to reject. In this case, Mr R did contact SCUK when he noticed problems with the car. But by deciding to take the car to another manufacturer approved garage I can't say he gave SCUK or its agents the goods to repair. By his own admission, Mr R said he'd lost confidence with the supplying dealer.

As Mr R didn't give SCUK the opportunity to repair the goods, SCUK said he had no right to reject the goods. And I can understand this position taking into account what the CRA says.

However, the law is only one of the factors I am required to take into account when considering what is fair and reasonable. As I have already set out above, DISP 3.6.4R says:

> *"In considering what is fair and reasonable in all the circumstances of the case, the Ombudsman will take into account:*
>
> *(1) relevant:*
>
> *(a) law and regulations;*
> *(b) regulators' rules, guidance and standards;*
> *(c) codes of practice; and*
>
> *(2) (where appropriate) what he considers to have been good industry practice at the relevant time"*

So whilst I need to take the law as one of the considerations into account when determining what is fair and reasonable, it is not the only consideration I am required to take into account. I'm able to depart from the law where I think it's fair and reasonable to do so. I've thought about whether I should do that in Mr R's case.

Mr R asked another manufacturer approved garage to carry out repairs. Mr R took the car to two different manufacturer approved garages to carry out repairs but having done so there were still things wrong with it. One of the first issues raised after SCUK supplied Mr R the car was in relation to the white noise – this remained an issue, despite the car having been seen by two different manufacturer approved garages.

I have therefore considered whether it made a difference that Mr R took the car to one manufacturer approved garage over another. Having done so, I'm not convinced SCUK was prejudiced by not being given the option to carry out the repairs itself, or to provide authority for another approved garage to do so on its behalf. I'll explain why.

Had Mr R asked SCUK to arrange the inspection or repair SCUK initially said it would have asked the supplying dealer to carry it out. As I've set out in the background, SCUK also gave other options to Mr R. It offered to arrange for the car to be inspected by the firm that carried out the pre-delivery inspection. It then proposed an independent inspector to look at the car along with approved technicians. But it said it was unable to get the manufacturer involved. Mr R was unhappy with this, and SCUK ended the email exchanges by saying the two options Mr R had were to take the car to the supplying dealer for inspection and repair if needed, or to take the car to another approved garage and have the inspection carried out there. So, while I appreciate it was trying find a solution for Mr R, I think it could've been clearer when setting out what it felt was acceptable given there'd been various options put forward for Mr R.

SCUK made the point originally that the inspection it wanted to arrange would be carried out with manufacturer trained technicians (potentially with an independent expert carrying out a report as well). By taking the car to one approved garage over another (with manufacturer trained technicians) I think it more likely than not that Mr R has ended up in the same position. I've not been told that the inspection SCUK was going to arrange would have been fundamentally different to what the approved garages would have been required to do prior to deciding whether to carry out repairs. Mr R has said he chose the particular approved garage because he was told the best technician worked there. Given the garage(s) SCUK was proposing to use and the garage Mr R went to were approved garages on balance, I think they would have taken largely the same steps, in carrying out repairs. And I consider they would have taken the same steps with or without an independent expert present as well.

I consider it more likely than not that the network of these approved garages would have similarly skilled mechanics, and similarly specialised equipment. And any repairs that were required would be completed using genuine parts. SCUK hasn't explained how things would have fundamentally played out differently had Mr R taken it up on one of the offers I've set out above as opposed to doing what he did. It also hasn't explained how things would have played out differently had another independent report been carried out. SCUK hasn't said, for example, that it was going to arrange a more thorough inspection that is likely to have established the faults that Mr R went on to complain about. So, in all the circumstances, on balance I don't think SCUK was prejudiced by Mr R's decision to take the car for inspection and repairs at a different manufacturer approved garage, without an SCUK expert present.

I've also thought about SCUK's later offer to resolve things when it proposed to have a jointly instructed independent report carried out. It also mentioned having an independent expert to assess the repairs carried out after the inspection. Mr R had already had the car repaired by an approved garage at this point. There's nothing to suggest the quality of the inspection and repairs Mr R arranged himself would have been deficient compared to what SCUK was originally proposing. I consider it more likely than not that further faults with the car would have arisen following those initial repairs whether or not Mr R had done what SCUK initially asked him to do i.e., going back to the supplying dealer, or having another approved manufacturer inspect the car with a nominated expert present. Had Mr R done what SCUK initially asked him to SCUK would have been provided one opportunity to carry out a repair. As I consider it more likely than not that further faults would have arisen following the repairs it would have been open to Mr R at that stage to seek rejection of the car. As such, I do not consider that it makes any difference that Mr R refused the offer of a joint inspection.

So overall, while I can understand the position SCUK took, had Mr R gone through the supplying dealer or another dealer with SCUK's nominated expert present as opposed to the other manufacturer approved garage then, on balance I think we'd have broadly ended up in the same position. So, I don't consider SCUK was prejudiced by not being given an initial opportunity to repair. As such, I don't think it was fair and reasonable in the circumstances to insist on starting another inspection with the supplying dealer or by arranging a jointly instructed independent inspection.

Further, I don't think Mr R was intentionally trying to take an action that would adversely impact his rights under the CRA. I agree any repair or rejection should have been arranged through SCUK for the purposes of the CRA. But Mr R had concerns with the supplying dealer, which is why he sought another manufacturer approved garage. The relationship between SCUK and Mr R started to break down. And I've set out above that the instructions from SCUK could have been clearer.

Moreover, Mr R had concerns about who was going to carry out the jointly instructed independent report, whether he'd have sight of it, and who would carry out the repairs. He was hesitant to put up a significant sum of money for that report, so he ultimately decided to pay for his own report. I think it's also important to note this was the third consecutive car he'd been in possession of that he says had issues with quality. In all the circumstances, looking more widely based on what is fair and reasonable I can understand why Mr R was frustrated and I think he tried to resolve things in a way he thought was fair.

SCUK has questioned why Mr R continued to use the car if he wanted to reject it. It has said this continued use is not compatible with seeking to reject the car and it has provided a note of the rationale applied by a Sheriff of the Sheriff's Court in Scotland in a recent judgment by that court. In summary, the note demonstrates that a Sheriff's Court issued a judgment which concluded that under Scots Law an individual is unable to reject goods under the CRA where that individual has continued to use the goods after attempting to reject them. The case concerned the quality of a car acquired under a finance agreement and the continued use of that car after attempting to reject it. The case was appealed and SCUK has provided me with a copy of the recent judgment of the Sheriff Appeal Court setting out the appeal had been refused.

I note there is no governing law clause in the conditional sale agreement but if SCUK is correct that Scots law is the relevant law in this matter I consider it would be fair and reasonable to depart from the law for the following reasons.

As it stands, Mr R referred his complaint to us around the time he was told he couldn't reject the goods. And he continued to use the car. But he did highlight to SCUK that he was being asked to continue to pay for the goods and he requested an alternative car to be provided while the dispute was ongoing. This didn't happen. Mr R acknowledges he was driving it to keep it 'ticking over', but his use increased when he lost access to another vehicle. Based on the mileage covered, it's not clear this is what's shown. I think Mr R's use has been quite consistent. He covered around 4,000 miles per year. Although due to the faults arising from the unsatisfactory quality of the car at the point of supply, I think the use has been impaired for near enough the whole period, which I'll come on to in more detail later.

Mr R took the decision to carry on using the car. I can understand SCUK's point that he ought to have stopped using it when he decided to reject it, but I can't see that he received an instruction not to do so. Mr R has said he had to use the car because his wife uses the other family car. He says his work trip is 50 miles. It's easy to see how the miles can quickly add up simply with commuting trips.

I don't think it's that uncommon for a consumer to carry on using a car (where it's still driveable) but after they've asked to reject it. I don't think Mr R knew he was doing something that could prejudice his rejection request. The court cases SCUK has referred to are relatively recent, and I don't think Mr R would have been aware of them. He could have stopped paying for the car, but this likely would have had a detrimental impact on his credit file while he was waiting for things to be resolved. The payments towards this car were significant, so I can also understand why Mr R would have been hesitant or perhaps unable to pay towards another vehicle while waiting for his complaint to be considered.

Given Mr R didn't have readily available access to another car; he needed a car for work; he'd not been told to stop using this car; he likely was unaware of the judgments; and he was paying a lot for the car so was unlikely in a position to pay towards another one, I don't think it would be fair and reasonable to say rejection should not have been considered when Mr R continued to use the car after unsuccessfully seeking rejection. However, I don't think SCUK should be left in a worse position as a result of Mr R continuing to use the car. So I will go on to consider what Mr R should pay for his continued use of the car.

For completeness, I've also thought about a couple of other points SCUK mentioned to see if they would impact my decision.

SCUK has said Mr R effectively abandoned the car when it was in an approved garage for repair, implying he breached the agreement by not keeping the car in his possession. I don't agree. Mr R chose to deliver the car to an approved garage which carried out repairs. He didn't want to return to the supplying dealer because he had concerns about it. But this doesn't mean he abandoned the car.

SCUK also highlighted other terms of the agreement that say Mr R should have inspected the goods on delivery and if they weren't satisfactory, he should have told it of any defects promptly. And that if he had any complaints, he should have raised it with SCUK first. I've set out above why the faults may not have been noticed on Mr R's own inspection before taking possession of the car. I'm mindful Mr R did raise his complaint about the quality of the car promptly. And he did this through SCUK.

How should SCUK put things right?

Mr R has told us he's now handed back the car. So I don't need to propose ending the agreement. However, if applicable, any adverse information should be removed from Mr R's credit file.

I've thought about the £22,767.53 deposit that was transferred over to the agreement for car 3. Section 56 of the Consumer Credit Act 1974 is relevant here. This provision has the effect of deeming the supplying dealer to be the agent of SCUK in any antecedent negotiations. So SCUK is responsible for the antecedent negotiations the supplying dealer carried out direct with Mr R. SCUK is also responsible for any negotiations with Mr R conducted by itself in relation to the making of the regulated agreement.

Mr R has explained in September 2019 he was told he'd be refunded his deposit along with partial payments after the issues he had with car 2. He tells us on the week that was meant to happen the supplying dealer, in partnership with SCUK offered him car 3. He said this was done on the basis of his payments staying at £725 per month, along with the same mileage allowance. Mr R says there was a large discount because his deposit was put towards the deal, along with further financial support from SCUK and the manufacturer. He says this is what he was told by SCUK and the supplying dealer. Mr R also wanted to highlight there would be no way he would have received a discount of around £60,000 without his deposit being put towards the deal.

SCUK has said Mr R can't claim back his deposit because of the arrangement he entered into when handing back car 2, and that it formed part of a settlement agreement once Mr R entered into the agreement for car 3. But on balance, I'm satisfied that under section 56, by agreeing to reduce the price of car 3 by including the amount of the deposit under agreement 1, the deposit under agreement 1 became part of agreement 2. As I highlighted earlier, the price reduction was more than the deposit. But despite the discrepancy in the figures, I think Mr R's account of what was discussed has been consistent and credible. On balance, I'm satisfied the deposit formed part of the discount applied to agreement 2.

Therefore, I'm satisfied the deposit forms part of the antecedent negotiations for agreement 2 and is part of agreement 2, despite not being set out in writing in the conditional sale agreement. Mr R only had car 1 and 2 for just over a year. I can't see he would have been willing to effectively lose a £23,000 deposit off the back of handing back two cars he says weren't of satisfactory quality – despite the fact he was getting a large discount. Seeing as I think Mr R should have been able to reject car 3, the unwinding of agreement 2 as a result of rejection would mean that the benefit provided by that deposit is effectively lost. I don't think this is fair. Therefore, I think it's fair he now gets a full refund of that deposit.

I've thought about whether SCUK should reimburse Mr R anything else. I don't think he should receive a full refund of the monthly repayments he's made. The CRA says a deduction can be made from the refund to take account of the use the consumer has had of the goods in the period since they were delivered. It doesn't set out how to calculate fair usage and there's no exact formula for me to use. So I've thought about what a fair deduction would be and have taken into account relevant guidance on what fair usage should be, such as the guidance set out in the "Consumer Rights Act: Guidance for Business" published by the Department for Business, Innovation and Skills. I've been mindful of the following elements of the guidance which would be relevant to this complaint such as that fair usage should reflect the use the consumer has had from the goods. Deductions shouldn't be made for the time the goods were being repaired or having faults assessed. Considerations can be made for all relevant information when assessing how much use the consumer has had and what level of deduction would be appropriate to reflect this and relevant information can include, for example, the type of goods, the intended use, expected lifespan etc.

I've thought about a fair starting point for usage. Along with the conditional sale agreement Mr R also entered into a sales agency agreement with SCUK that essentially said he could give or 'sell' the car back for a guaranteed price of around £105,000 (providing he'd not exceeded 8,000 miles per year and he'd looked after the car), which is the same as the final payment that is required after three years if Mr R wanted to buy the car. So SCUK was willing to say it didn't think the car would be worth less than this, and Mr R could walk away after three years without owing anything, as he's now done. This would also indicate Mr R's monthly rentals of £725 broadly would have offset the depreciation of the car.

As a starting point, I think £725 is a reasonable figure to use for a month's worth of use of the car. But I'd say this figure would be fair if the goods conformed to the contract and were able to be used as intended. But in this case, for the reasons given above, I don't think that's what happened.

Mr R covered around 11,500 miles. Although he says some of this was covered by the various garages when the car was in for repairs. Like I've pointed out above, we've tried to obtain all the job cards but have been unsuccessful. So I can't confirm exactly how many months Mr R wasn't able to use the car. Mr R has told us the car has been with various garages for around six months over the last couple of years. And he said he was given a courtesy car around half the occasions the car was in the garage. He's been consistent. And in the absence of anything to say otherwise, I'm minded to accept what Mr R has told us.

Mr R acquired a prestige car and paid a significant sum towards the agreement. I imagine he's been thoroughly disappointed with it and a lot of the enjoyment was taken away. Aside from all the repairs, there were aesthetic issues with the misaligned panels, and he's had to deal with a number of faults, some of which have been reoccurring, including a major distraction i.e., the white noise. So I think it's fair to say the use Mr R had of the car was significantly impaired. Moreover, when car 3 was in for repairs and Mr R didn't have a courtesy car, he clearly had no use. And for the times he had a courtesy car, given it was a lower specification, I don't think Mr R had reasonable use of what he was paying for.

I'm also mindful that while it's clear Mr R has continued to use the car, he's been saying throughout he's not used it as much as he would have done, had it not been for the various issues. There's no way to know exactly how much his use was impacted. But I think it's fair to say the faults with the car have meant Mr R didn't use the car as much as he would have done. While I appreciate not everyone takes the car to the mileage limit, Mr R only covered around half the mileage limit on the three-year agreement. This is significantly less than what he predicted he'd use when he acquired the car.

Taking everything into account, including the length of time Mr R was likely without use of the car; the impaired use; and the periods he was supplied a courtesy car that was a lower specification, I think it fair he effectively receives a part-refund of the monthly payments he's paid towards the agreement. Like I've said above, there's no exact scientific formula for this. But I think, in the round, a 50% deduction is a fair. My reasoning for this is that he only covered around half the miles that he expected to. On balance, I think Mr R used the car less than he otherwise would have done as a result of the faults which I've found made the car of unsatisfactory quality. For the miles he has covered, his use has been impaired. Mr R has also said the distracting white noise has been present for the whole time he's had the car, as has the misaligned panels. And there's been a number of other faults too, some of which have reoccurred.

Mr R has received £7,500 direct from the manufacturer, I think it's only fair this amount is deducted from the refund. I say this because the manufacturer has said these payments are normally made in recognition of repair delays or where cars have been off the road for a long time. On balance, I'm satisfied that's what happened here.

I've thought about whether a further deduction should be made for the bolts and car cover Mr R says was given to him. It's not clear whether this was in relation to compensation for the problems he was having. Mr R has said they were a gift. He's also said these were returned with the car when it was handed back. In the circumstances, I'm not minded to direct SCUK to deduct their value off from the proposed redress.

I've also been told Mr R had a cherished number plate on the car, which he had to pay to place back on retention. Given the contract ended, and Mr R was always intending to hand back the car, and therefore incur this cost, I'm not minded to direct that it be deducted from the redress.

However, I think it's fair that SCUK reimburse Mr R the cost of the independent report he obtained, together with interest. He would not have had to get the report had the car been of satisfactory quality. I think this is a fair and reasonable outcome for both parties.

Mr R accepted the provisional decision, but SCUK didn't agree. In summary, it said:

The remedy wasn't fair or reasonable

The refund of the deposit, 50% refund of instalments paid and conclusion that Mr R could rely on the sales agency agreement in order to avoid any further liability in respect of car 3 cannot be properly sustained as a matter of law nor based on what is fair and reasonable. SCUK explains that Mr R would be unjustifiably enriched by the remedy that's been proposed. It said it's not fair Mr R was able to enjoy the use of car 3 (with a list price of £192,170 including VAT) over the course of three years, covering approximately 11,500 miles, at a total cost to him of less than £13,000.

SCUK also point to a legal practitioner textbook – *Benjamin's Sale of Goods (11th ED.)* at paragraph 14-106, footnote 750 which it notes says:

> *"It would appear that the calculation of any amount to take account of the use the consumer has had of the goods should focus on the prevention of the consumer's unjustified enrichment, and so reflect the benefit enjoyed in respect of the goods, though if the goods have suffered from wear and tear in use, this could also be reflected in the calculation: see Quelle AG v Bundersverband des Versbraucherzentralen und Verbraucherverbande (C-404/06) [2008] E.C.R. I-2685 at [39]."*

SCUK says it's grossly unjust I've disregarded the settlement agreement's terms and conditions which stipulate that car 3 would serve as complete and final settlement without further recourse. It says Mr R is obligated to comply with the terms of the settlement agreement and that those terms would be undoubtedly upheld in court. SCUK says it and Mr R exercised great caution before signing the settlement agreement and SCUK provided Mr R with £1,000 to seek independent legal advice before executing the agreement. It says the terms of the settlement agreement are clear and definitive and that I should not attempt to disregard them. By signing the settlement agreement, which was negotiated when he had representation, Mr R waived any claim for payment of sums paid under the prior finance agreement with SCUK for car 2.

I'd made errors of law in relation to the availability of the final right to reject

SCUK says there was no proper basis to ignore the statutory provisions which set out what needs to happen before Mr R could exercise the final right to reject. And that I'd not carried out proper analysis of the law applicable to the loss of a right to reject nor of Mr R's conduct which SCUK contends plainly gave rise to the loss of that right, it if existed at all.

SCUK says it was wrong to put in place a test which required to show it was prejudiced by the absence of the opportunity to repair and SCUK says this has no basis in law. SCUK says the CRA recognises the trader must be given the first right to repair since the trader will suffer the consequences if it does not. SCUK says that the prejudice if it is not given that opportunity is clear – it simply cannot comply with the statute and is therefore at risk of suffering the potentially severe financial consequences of rejection without the opportunity to avoid them.

SCUK says the suggestion that repair by an alternative firm was not a matter which caused prejudice to SCUK is a fundamentally flawed analysis. It said a firm which was not involved in the supply of car 3 (or indeed 1 or 2) would have less incentive to make sure the repair was carried out effectively and to the required standard (and if necessary to go the extra mile). The only correct conclusion is that Mr R was not entitled to exercise the final right to reject, as a matter of law, and there is no proper basis on which to depart from the law.

SCUK says that even if it is correct to depart from the law and find that the final right to reject was available to Mr R, Mr R lost his right to reject as a natural and proper consequence of his actions. It said I'd ignored the facts that Mr R had already rejected cars 1 and 2 so should have been aware of his rights and obligations in doing so. And that he was receiving (or had received) professional assistance. SCUK says the assumption which should be drawn is that Mr R knew what continued use of the car could mean for the purported rejection.

SCUK says it was not able to offer legal advice to Mr R and that he had his own advisers. SCUK says continuing to use car 3 and pay for it suggests Mr R didn't reject it and that individuals who genuinely want to reject goods typically cease using them and terminate any finance agreements in place. It's unrealistic to suggest Mr R couldn't make alternative arrangements for transport considering the car he was purporting to reject cost almost £200,000. And that car 3 – a supercar – isn't a typical vehicle for commuting and it cannot seriously have been acquired with that in mind.

SCUK says it's fundamental to note Mr R chose to rely on the terms of the agreement to return car 3 without making any further payment pursuant to the terms of the Sales Agency Agreement. And that Mr R clearly couldn't sell car 3 if he had truly rejected it as he'd have no interest or legal ability to do so. It's only because Mr R hadn't rejected car 3 that SCUK was able to sell it on his behalf. SCUK says that this is the clearest affirmation of the agreement. SCUK adds that Mr R did not seek to reserve his rights, he simply returned car 3 in accordance with the terms of the agreement. SCUK repeat that Mr R cannot properly be treated as a person who was ignorant of his rights. SCUK says it is wholly inconsistent with a rejection of car 3, and the failure to address it at all in my provisional decision cannot be consistent with a requirement both to consider the relevant law and (if it is thought necessary to do so to achieve a fair and reasonable result) to explain why I have chosen to depart from it. SCUK does not consider this point can be dismissed as something Mr R was not aware of, as it considers to be the way I have treated the decision in the Scots law court judgments it sent me. It adds that this is not an appropriate way to approach the law, particularly where there is evidence that Mr R received legal advice.

SCUK says the principle that a right to reject is lost if the contract is affirmed in clear and unequivocal terms is trite law. It refers to the comments of HHJ Godsmark in *Van Gordon v Volkswagen Financial Services (UK) Ltd* in which it was noted at paragraph 48 of that judgment that *"For there to be a subsequent affirmation of a contract, that must be communicated in clear and unequivocal terms...As a proposition of law this has not been disputed before me. Whether there has been such a clear and unequivocal communication is a question of fact".* SCUK argues on the facts of that case the claimant was found not to have affirmed the contract but, unlike Mr R, had declared the vehicle to be "off road" rather than using it to the same extent as he had prior to the purported rejection. SCUK also note that in *Van Gordon*, unlike the position here, there was no clear indication that the claimant was relying on the terms of the agreement.

The compensatory sums have been calculated incorrectly

SCUK says no remedy should be awarded to Mr R. But it also wanted to highlight why it thought the remedy was flawed.

Mr R entered into a contract for car 3 for £120,000 when its list price was £192,170 at the time of supply (it says this price included a lengthy list of optional extras). SCUK says the difference in price was because Mr R received a substantial discount, and the carrying over of the deposit in respect of car 1.

SCUK said it was wrong to say the monthly payments are broadly offsetting the depreciation of the car, as I said in my provisional decision. SCUK says if the difference between the list price and the guaranteed future value is taken as a measure of likely depreciation – that figure could amount to £87,170 or approximately 120 instalments of £725. SCUK says that the 36 instalments of £725 under Mr R's agreement cannot be said to offset the depreciation of the car. SCUK said the agreement was bespoke to enable Mr R to use car 3 for 36 months at a very beneficial rate and then benefit from a final instalment which was very much lower than the true value of the car.

It said a typical market rate to finance a vehicle of this type would be £3,334.35 per month, with a final payment of £81,500.00. SCUK has provided me with a sample quote from what it describes as a comparable car. SCUK says it's unrealistic to conclude Mr R only benefitted from the use of car 3 to the extent of 50% of the intended use.

Moreover, SCUK says it is informed by the supplying dealer (who is a major manufacturer retailer) that a comparable vehicle would have mileage ranging from 6,000 to 9,000 regardless of the mileage allowance specified in the agreement and that it's common for this sort of car to only be driving 2,000 or 3,000 miles per year as they are not typically used for daily driving. Mr R's use was therefore within normal range. SCUK suggests Mr R had nearly full access and use of car 3 and was also provided equivalent courtesy cars while repairs were carried out thereby allowing him uninterrupted use of a supercar during the operation of the finance agreement. SCUK says the fact the agreement permitted a higher usage than this is not reflective of the typical use of such vehicles and the fact Mr R's usage was broadly uniform across the period he retained car 3 also suggests he used it as much as he intended to. SCUK concludes a 50% deduction is manifestly excessive.

SCUK says any award in favour of Mr R would represent an unjust enrichment. In order to avoid an unjustified windfall to Mr R there should be no award of the deposit because to do so would include double counting. SCUK goes on to say the inclusion of the deposit (and the discount) produced an artificially low monthly instalment which I selected as a benchmark for the cost of use. It suggests the deposit should therefore either be left out of the calculation entirely, or a more realistic benchmark for cost of use (which SCUK considers would be based on what they have set out above) should be selected.

As well as having received a copy of my provisional decision, Mr R has also been provided with a copy of SCUK's submissions in response that decision. Mr R's comments are summarised as follows:

- The car was dangerous, and he only had use of it when he had no other access to a vehicle.
- The price of the car SCUK has highlighted isn't realistic. Repayments towards the previous car were almost identical, and he thinks the supplier subsidises deals for almost all cars.
- He had no benefit of the car.
- SCUK's legal team have aggressively emailed him for three years.
- The inspection report Mr R arranged proved the car was faulty at point of delivery.
- SCUK refused to give him a hire car, so he was forced to drive car 3 when it was his only daily car.
- Mr R settled car 2 in goodwill that car 3 would be perfect, and it wasn't. He shouldn't lose the deposit. If SCUK was allowed to keep the deposit SCUK could settle every faulty car with another effectively stealing the deposit.
- He's badly out of pocket.
- SCUK is using other finance agreements that are irrelevant against him.
- He could never have known car 3 would have been unsafe to drive so it makes SCUK's arguments invalid because it didn't supply a car that was fit for purpose. The independent report proves this.
- Saying 11,000 miles being normal use isn't fair when he signed an agreement for 24,000. He also says the supplier sells the model as a car for daily use. And the lack of miles covered is as a result of the problems.
- He had no enjoyment of use with the white noise and electrical faults.
- He's carried out data gathering on offers from the supplier to customers in similar situations and he's found nearly 30 customers with ongoing faults and disputes.

Following on from this I wrote out to the parties to say I proposed a change to how the deposit should be dealt with in the proposed redress. I'd concluded in my provisional decision that a 50% deduction should be made to the monthly payments in recognition of the issues Mr R had with the car. But I didn't set out that the deposit should be reduced as well. I also set out provisions on tax deduction from the interest award.

Regarding the deposit, I said:

If I were to reach the conclusions in the Final Decision mentioned above, I would consider it fair and reasonable to deduct 50% from the deposit to account for use because the deposit is, in effect, an up-front payment towards the sum owed under the agreement. Moreover, I'm conscious that Mr R has always said that he intended to hand back the car at the end of the term and I consider his evidence to be persuasive. So, I consider that if things ran without issue, Mr R would more likely than not have returned the car at end of the agreement. Although this complaint concerns a conditional sale agreement, this agreement appears to have been treated by the parties as more akin to a hire agreement, in that Mr R made monthly payments under agreement 2 but did not intend to own the car at the end of agreement 2. Consequently, if in my Final Decision I were to uphold the complaint and conclude that the deposit should be considered and form part of the redress along with the 50% reduction in the monthly payments, I would also consider that it would be fair and reasonable to treat the deposit as just another payment towards agreement 2 and therefore to make a 50% deduction from the deposit to account for use of the car.

Mr R didn't agree with the proposal and thought the deposit should be treated differently. He said if the car had been perfect, he'd likely have stayed with the brand and his deposit would have rolled over into the next car. He also says that if the car had maintained value, it would have been returned. He reiterates the car was faulty so he's lost the options he otherwise would have had, and he shouldn't be penalised for this.

SCUK responded to say it remained of the view that the approach was fundamentally wrong because it doesn't reflect the fact Mr R benefitted from a settlement agreement reached on car 2 so that the true cost of car 3, which is the subject of the complaint, is not accurately reflected in the finance agreement. It said the calculation is also predicated on a loss of use of 50%, which for the reasons already given, can't be justly maintained. It reiterated some of the arguments made in its response to the provisional decision. It didn't make any further comments on the provisions of tax.

I also thought it was important to give some additional reasons why I didn't think the settlement agreement should prevent a complaint about the transferred deposit being made. SCUK says I am disregarding the terms of the settlement agreement by proposing that it refund the deposit carried over from agreement 1 to agreement 2. SCUK says both parties took great care in the preparation of the settlement agreement and its terms should be complied with. I wrote to the parties and said:

As I set out in my provisional decision, Mr R had said that he was offered a large discount because his deposit was put towards the deal, and he says he was told this by SCUK and the supplying dealer. Mr R also noted that there was no way he would have received a discount of £60,000 without his deposit being put towards the deal. I am satisfied, as I was in the provisional decision, that Mr R has been consistent and credible in his recollections on this point. I also note that SCUK, in the submissions it made in response to the provisional decision, does not appear to dispute that the deposit from agreement 1 was carried over to agreement 2. In its response to my provisional decision SCUK has said:

"...Car 3 had a list price of £192,170 at the time of the supply, a price which included a lengthy list of optional extras. He [Mr R] received an allowance against that price of £72,170 (again, inclusive of VAT) leaving a cash price of £120,000. This was manifestly less than Car 3 was worth, reflecting both the discount which was applied to it, and the carrying over of the deposit paid by the Customer in respect of Car 1 (which was in turn applied to Car 2 and then, in accordance with the terms of the settlement agreement, applied against Car 3)" (my underlining)

It therefore appears that SCUK is in agreement that the deposit from agreement 1 was carried over to agreement 2 although it says this was done in accordance with the terms of the settlement agreement. In further correspondence from SCUK I note that it has said that the deposit was waived as part of the settlement agreement. Having considered all of this, I do not agree with SCUK's suggestion that the deposit was carried over in accordance with the terms of the settlement agreement., In particular, I do not consider that the settlement agreement acted to waive Mr R's rights to bring a complaint about the deposit carried over from agreement 1 to agreement 2. Having reviewed the settlement agreement I cannot see that it contains any express term clearly stating that Mr R's rights in relation to the deposit or agreement 2 would be modified. As such, I am satisfied that it is sufficient to conclude, on balance, that it is more likely than not that the deposit from agreement 1 was transferred to agreement 2 without being subject to any waiver of rights to bring a complaint about that deposit.

When reaching my decision, I have had regard to the to the main principles of contractual interpretation. In summary, these main principles are (i) Having loyalty to the text and considering the text of the provision and giving it appropriate weight; (ii) taking a whole of contract approach and considering the remainder of the contract in which the provision appears; (iii) considering the context such as the factual, legal and regulatory background to the contract; (iv) giving appropriate weight to business common sense or the commercial purpose of the contract; and (v) avoiding giving literal effect to the words of the contract where that would lead to very unreasonable results. I am mindful that contractual interpretation is an objective test and the viewpoint of a reasonable person is adopted. In a written contract, what the parties have written, rather than what they intended to write, constitutes the agreement.

The settlement agreement discharge provisions, including the waiver clause at clause 3.1 of the settlement agreement and the definition of 'dispute', make no reference to the deposit. The definition of 'dispute' makes no reference to agreement 2 or car 3. This accords with the context of the settlement agreement as a whole, which provides that a new agreement (agreement 2) will be entered into between the parties for car 3. Agreement 2, which is annexed to the settlement agreement, is governed by its own new set of contractual terms, which make no reference to the settlement agreement and contains entirety of contract provisions. Section 56 of the Consumer Credit Act 1974 says SCUK is responsible for the antecedent negotiations of the supplying dealership and for the antecedent negotiations it carried out itself. The antecedent negotiations resulted in an agreement to reduce the price of car 3 by including the deposit from the previous agreement. This resulted in the deposit becoming part of agreement 2. I am also of the view that my interpretation that the discharge provisions do not waive Mr R's rights to bring a complaint in relation to agreement 2 or car 3 is not contrary to business common sense. Finding that the settlement agreement does not waive Mr R's rights to bring a complaint about the deposit on agreement 2 does not create an absurd outcome.

In addition to the above, I would also not consider it fair and reasonable for Mr R to be prevented from raising a complaint concerning the transferred deposit when there is no clear and explicit reference in the settlement agreement stating that Mr R is prevented from doing so.

Mr R didn't have anything to add to the side letter. SCUK responded to say, in summary:

- It remains of the view the deposit should be excluded from any consideration, as otherwise Mr R will receive a windfall benefit.
- Considering the deposit will result in a situation where Mr R would continue to benefit from the terms of the finance agreement and settlement agreement negotiated in his favour, but he'd be allowed to avoid the waivers.
- The settlement agreement cannot be dissected in this way. Both parties had legal representation and considerable time was taken in negotiation.
- Mr R received a huge benefit when acquiring car 3. Those terms were only made available because of the express warranties of the settlement agreement.
- There are a number of the recitals in the settlement agreement which deal expressly with the parties' intentions when entering into the settlement agreement and finance agreement.
- On any objective reading the deposit formed part of *"…all the terms of the Conditional Sale Agreement and any other matters relating to the Conditional Sale Agreement".*
- It referred to the waiver at 3.1 of the settlement agreements and that there "*is no other reasonable analysis that could conclude that Mr R was not waiving his right to claim the deposit on Car 2 (or indeed to maintain any claim against SCUK in respect of Car 2 or the previous finance terms)".*
- The terms should be given their everyday meaning.
- The text of the settlement agreement is very clear and sets out Mr R waived his rights in relation to or arising from any part of the dispute. The parties' intentions were made expressly clear.

What I've decided – and why

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

A large number of points have been made by both parties. I want to thank the parties for their responses. If I don't deal with a matter expressly in the final decision it doesn't mean I've not considered it. I'm required to determine what is fair and reasonable in all the circumstances of the complaint and I'll directly address the points I need to in order to reach a fair and reasonable outcome.

I will address the comments made by both parties below. But before I do that, I wanted to address some typographical errors in the provisional decision. I do not consider that these amendments materially change the findings in my provisional decision, and I only clarify these typos here for the sake of completeness. Underlined wording indicates added text and crossed through wording indicates deleted text:

- A sentence in the extract from the provisional decision above at page 10 should read "*The following repair also took place within the first six month<u>s</u> of acquisition"*
- A sentence in the extract from the provisional decision above at page 14 should be

read without subsection (4) being underlined when setting out what section 22(3) says.

- A sentence in the extract from the provisional decision above at page 16, final paragraph should read "*Given the garage(s) SCUK was proposing to use and the garage<u>s</u> Mr R went to were approved garages on balance, I think they would have taken largely the same steps, in carrying out repairs".*
- A sentence in the extract from the provisional decision above at page 21, first paragraph should read "*But I think, in the round, a 50% deduction is ~~a~~ fair".*

On page 17 paragraph 3 I explained what I understood were the options SCUK had presented to Mr R but note I didn't specify all the options it gave him. For the sake of completeness, I also wanted to confirm that one of the options was to take the car to another dealer with the SCUK nominated expert present. But this doesn't materially alter the conclusions I reached in my provisional decision.

I also wanted to set out that I'd not included an exception when setting out what DISP 2.8.2R says but it's not relevant to the facts of this case and makes no difference to my findings on jurisdiction.

The remedy wasn't fair or reasonable

SCUK said it's not fair and reasonable for Mr R to cover 11,500 miles at a cost of less than £13,000. With the amended redress proposed the usage cost will now be closer to £25,000 (around £700 per month) for the three years Mr R had the car. As I've already set out, I think Mr R's use was impaired for near enough the whole time he was in the agreement. I don't think he used the car as much as he would have done had there not been any issues with it. I'll go on to explain a bit more about why I think that's fair in the section below on compensatory sums.

I thank SCUK for its response to my side letter concerning the settlement agreement. SCUK is of the view the deposit should be excluded and that Mr R would unfairly benefit if it's considered. SCUK has said the deposit formed part of the definition of the "dispute" due to the wording *"…all the terms of the Conditional Sale Agreement and any other matters relating to the Conditional Sale Agreement".* The conditional sale agreement referred to here is agreement 1. I have considered what SCUK has said but I don't interpret that this wording would extend to the deposit. The deposit forms part of agreement 2 which was designed to be and is a separate agreement. It is governed by its own set of contractual terms which have no reference to the settlement agreement and contains an entirety of contract provision. The wording that SCUK highlighted doesn't extend to the contents of agreement 2, including the deposit.

I've also set out that section 56 of the Consumer Credit Act 1974 deems SCUK responsible for antecedent negotiations carried out by itself and the supplying dealer. And the carrying over of the deposit formed part of those negotiations for agreement 2.

SCUK has highlighted, in summary, that agreement 2 was used to settle the dispute with no further lability between Mr R and SCUK and to discharge and waiver all claims or complaints between the parties involving any aspect of the "dispute". SCUK also highlighted both parties had legal representation. But this doesn't change my interpretation. The settlement agreement may settle liability regarding agreement 1 but the deposit formed part of agreement 2. I'm not satisfied the deposit falls within the definition of the "dispute". Therefore, I don't think Mr R is prevented by the settlement agreement from bringing a complaint about agreement 2 – including the deposit for it.

As I don't consider the definition of "dispute" applies to the deposit or agreement 2, I don't think the waiver provision at 3.1 is relevant. Even applying the everyday meaning makes no difference to the interpretation I've reached.

Moreover, I additionally remain of the view it would not be fair and reasonable to prevent Mr R from raising a complaint concerning the transferred deposit when there is no clear and explicit reference in the settlement agreement stating that Mr R is prevented from doing so.

Overall, I consider that it is not fair that Mr R should lose the benefit afforded by the deposit being carried over from agreement 1 to agreement 2 as a result of the rejection of car 3.

I remain of the view the deposit should be treated the same as the monthly payments, and a 50% deduction should be made to the refund of the deposit. I don't think this creates an unfair windfall benefit for Mr R. I'll expand on this, and SCUK's comment about the significant discount, later in the decision. I also appreciate Mr R says if he'd stayed with the brand, he might've had his deposit transferred over to a new car or that he may have had it returned. But I've not seen any evidence that's what would likely have happened. Mr R has been consistent and convincing that he intended to return the car at the end of the agreement.

I'd made errors of law in relation to the availability of the final right to reject

I've also thought about what SCUK said with regards to my provisional decision to depart from the law and conclude that Mr R should have been able to reject the goods. SCUK has said that there was no proper basis for me to ignore the statutory provisions which set out the criteria which must be satisfied before a customer can exercise the final right to reject. To be clear, I have not ignored the relevant law. As I pointed out, DISP 3.6.4R demonstrates that I need to take the law into account when determining what is fair and reasonable, but it is not the only consideration I am required to take into account. I'm able to depart from the law where I consider it's fair and reasonable to do so.

SCUK says that in departing from the law I have put in place an arbitrary test which required SCUK to convince me that it was prejudiced by the absence of an opportunity to repair car 3 itself or at its direction. SCUK says the requirement for proof of prejudice is something which I have created, and which has no basis in law. SCUK also says the CRA recognises the trader itself must be given the opportunity to put the problem right, since it is the trader that will suffer the consequences if not. As noted in my provisional decision, I am required to determine complaints by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. I'm not saying SCUK should put in place a different test when deciding whether a customer should be allowed to reject goods. All I am saying is that I've found in the very particular circumstances of Mr R's case, it would have been fair and reasonable to allow him to reject the car. I say this because I've found SCUK was broadly in the same position it would have been in had it arranged for the inspection and repairs to be carried out itself. Each case is considered on its own merits.

At this point I should explain that I noted in my provisional decision that: *"So overall, while I can understand the position SCUK took, had Mr R gone through the supplying dealer or another dealer with SCUK's nominated expert present as opposed to the other manufacturer approved garage then, on balance I think we'd have broadly ended up in the same position. So, I don't consider SCUK was prejudiced by not being given an initial opportunity to repair. As such, I don't think it was fair and reasonable in the circumstances to insist on starting another inspection with the supplying dealer or by arranging a jointly instructed independent inspection."* To clarify, I should add for completeness, for the reasons set out in my provisional decision, that I also do not consider it fair and reasonable in the circumstances for SCUK to have insisted on another inspection upon the terms SCUK proposed.

SCUK wanted to highlight its letter of 14 November 2022. It said I'd only considered two of its points that set out Mr R lost his right to reject because he:

1) Didn't give it the opportunity to inspect/repair.
2) Exercised his rights under the sales agency agreement.
3) Maintained payments.
4) Kept the car.
5) Repaired the car.
6) Used the car.

SCUK says it considers my finding that repair by an alternative firm was not a matter which caused prejudice to SCUK to be a fundamentally flawed analysis. It says a third-party firm which had no involvement in the supply of car 3 would have less incentive to make sure a repair was carried out effectively (and if necessary, go the extra mile) than SCUK and/or the supplying dealer. Mr R didn't take the car to a third-party garage that was underprepared for dealing with this specialist sort of model. He took it to a manufacturer approved garage, with specially trained technicians and equipment.

I also thought SCUK could have been clearer when presenting Mr R with options to resolve things. While I appreciate Mr R was represented when SCUK was discussing those options with him (before he sought to reject the car), the options that were given to him kept changing. And the final two options given to Mr R could have been made clearer. SCUK said Mr R could either take the car back to the supplying dealer for inspection and repair if warranted, or he could take the car to another manufacturer dealer to have an inspection carried out there. SCUK didn't explicitly mention having a nominated expert present in that final email although I note that it had been mentioned in previous emails. Given all the options that had been discussed, I think it should have been clearer.

I'm not convinced by SCUK's argument that the supplying dealer would have resolved everything by going the extra mile. On balance, there's no evidence to suggest the supplying dealer would have done anything differently. As I've said above, all manufacturer approved garages would have similar equipment and procedures, use approved parts, and have similar expertise. Mr R took the car to different approved garages various times and the problems weren't all resolved. Ultimately, I've set out my reasoning in the provisional decision that I think the garage SCUK was going to use would have taken largely the same steps in carrying out repairs as the garage Mr R chose. And I think it would have been the same whether or not an independent representative was present as well. As I found it more likely than not problems would still have arisen, regardless of who inspected or repaired the car initially, I think SCUK ought to have allowed Mr R to reject the car when he sought to do so in April 2020.

I appreciate SCUK is saying Mr R lost his right to reject by continuing to use the car. I've provided a summary of the case law SCUK relied on in my provisional decision however, I wanted to take this opportunity to set out in further detail what the Sheriff Appeal Court found. SCUK provided a judgment from the Sheriff Appeal Court refusing the appeal against a decision from Kilmarnock Sheriff Court where summary decree was granted in a matter concerning the attempted rejection of a motor vehicle under the CRA. In the case, the court held that where the consumer had expressed their rejection of the motor vehicle under the CRA, but they continued to make the contractual monthly payments, tax, insure and drive the vehicle etc, they were unable to rely on rejection under common law, and nothing in the CRA displaced the common law on this point. SCUK said Mr R shouldn't be able to reject the car because he continued to drive it and kept up his repayments after seeking to reject it.

While I noted the position on the law, in Mr R's case, I considered it would be fair and reasonable to depart from the law. I've explained in my provisional decision why I think he continued paying towards the agreement and using the car. Moreover, on a fair and reasonable basis, I don't think continuing to pay for the car should have prevented Mr R from being able to reject it. If he'd stopped paying towards the agreement, it would have adversely impacted his credit file, which could have led to other issues.

I also take on board that Mr R had representation early on. But I can't see he had representation after he formally sought rejection of the car in April 2020. Mr R has said he wasn't aware of the Scots law cases that SCUK has referred to. I appreciate SCUK's point that this is not an appropriate way to approach the law. However, when determining what is fair and reasonable, I consider it is important to take into account that Mr R is not legally trained, and he's said he wasn't aware of the judgments. Moreover, they are both dated after Mr R ceased to have representation. In any event, this is only one of several reasons I consider it would be appropriate to depart from the law.

I think it's relevant Mr R did try to reject the goods but was declined by SCUK. This meant the parties were effectively at a stalemate. SCUK didn't provide an alternative car while the dispute was ongoing. Although on occasions Mr R was given a lower specification courtesy car by the garages while repairs were being carried out.

I've already set out my findings in my provisional decision regarding why Mr R carried on using the car, and why he had repairs carried out. Perhaps it was unusual that Mr R decided to use a supercar to commute. But if that's what Mr R wanted the car for, I don't see why he couldn't have had that in mind when he acquired it.

SCUK has said it's unrealistic that Mr R couldn't find alternative transport considering the amount he could afford to spend on a supercar. Making payments of £725 per month is significant. And I don't think it would be fair and reasonable for Mr R to have incurred the cost of alternative transport when I think SCUK should have allowed him to reject the car in April 2020. Mr R has said he had to repay agreement 2; he had a large mortgage repayment; costs associated with having two children; and as the sole earner in the household, he couldn't afford another car. He said he had some pool use of a company truck but only when it wasn't being used for business. And the other family vehicle was only available when his wife wasn't using it. I think his testimony helps explain some of the reasons why he continued to use car 3.

SCUK has said by relying on the terms of the sales agency agreement it shows Mr R can't reject the goods. SCUK also highlights Mr R didn't seek to reserve his rights and that by entering into the sales agency agreement he's affirmed the contract. I don't think Mr R should be prevented from being able to reject the goods as a result of the way he handed the car back. Even if that's wrong in law, I think it would be fair and reasonable to depart from the law for the following reasons.

Mr R decided to hand the car back at the end of the term because he didn't want it anymore. He'd asked to reject it a long time before this. It's not fair to hold Mr R responsible for the delays in getting an answer to his complaint. I think he was simply trying to give the car back in the most straight-forward manner at the earliest opportunity he'd been given. Entering the sales agency agreement was the means by which he was able to do that. The other option would have been to make a final balloon payment. By handing the car back he acted in a way consistent with seeking to reject it. This helped mitigate his loss and I don't consider this to be a reason to say rejection should not be considered. With regards to not reserving his rights, Mr R isn't legally trained, and by the point he handed the car back, he wasn't represented. He just wanted to return the car, as he had done for a long time. I don't think he should be penalised for not seeking to reserve his rights.

Therefore, having considered everything SCUK has said, including the six points referred to above, I'm still of the view that in the particular circumstances of Mr R's complaint, it would have been fair and reasonable to allow Mr R to reject car 3.

The compensatory sums have been calculated incorrectly

Finally, I take on board SCUK's comments that Mr R received a significant discount, so he was paying less for this car than a typical customer would have. And I've also thought about the fact the deposit was part of the discount, and SCUK thinks Mr R is benefitting twice from the redress.

Mr R says suggesting £3,300 per month for car 3 is not reflective of what happens – he says through his own research he's found the supplier regularly subsidises car deals. This seems to be backed up by the fact Mr R tells us he was paying £725 per month for cars 1 and 2 as well. SCUK has said the 36 instalments of £725 under Mr R's agreement cannot be said to offset the depreciation of the car. SCUK says it would be more appropriate to look at the difference between the list price and the guaranteed future value as a more accurate measure of depreciation.

Calculating fair usage isn't an exact science as I've already mentioned. I appreciate SCUK tells us Mr R benefitted from lower payments at a preferential interest rate. But what SCUK hasn't acknowledged is that Mr R's use of the car has been impaired for near enough the whole duration of the agreement. While he's been able to use the car, it's not the same as being able to use it without issue. And Mr R explained the courtesy cars provided by the garages were not comparable supercars. He's given us a list of models he was provided and from what I can see none can be considered 'equivalent' as SCUK has asserted.

Ultimately, the deal was for Mr R to be able to use car 3 – that should have been of satisfactory quality – for three years at £725 per month (after his deposit had been transferred over). I've found car 3 wasn't of satisfactory quality. I don't think it's fair Mr R should have to pay the full deposit and £725 a month when the car was not of satisfactory quality. And while the payments don't cover the depreciation between the list price and the guaranteed future value – the £725 a month does offset the depreciation between the guaranteed future value and the price SCUK supplied the car to Mr R for after taking into account the deposit carried over from agreement 1 and the further additional discount applied.

In any event, while SCUK said Mr R had average use of the car, and that it's common for supercars to only cover 2,000 to 3,000 miles per year I still don't think he used it as much as he would have done had it not been for the issues. I can see from the settlement agreement negotiations that Mr R asked for a 10,000 annual mileage limit. The fact he only covered around half of the lower 8,000 mile per year limit he was given I think is also indicative of the impairment. As I've explained above, Mr R has also pointed out that the car 3 model is sold as a car for daily use. I'm not aware there's anything in the sales material for this model to suggest Mr R couldn't use it in this way.

As I've already mentioned, taking into account the number of issues; the type of issues; the time without use of the car; the time with a courtesy car that wasn't comparable; the mileage covered; and the overall problems he's faced, I find a 50% reduction in the monthly repayments (and deposit) to be broadly fair. I don't find this needs to be amended because he received such a large discount. Regardless of the discount or the recommended retail price, the car was supplied at £725 per month and the cost of the use of the car is what was set out in the agreement. Had things gone to plan, and the car was of satisfactory quality SCUK was prepared for Mr R to use car 3 for £725 per month – along with transferring his deposit over. However, the car was not of satisfactory quality and therefore I find it fair that the usage he should be required to pay is in the form of a reduced monthly payment and deposit. I find it fair and reasonable that the monthly payments of £725 (and deposit) is the cost for the use of the car for 3 years. But that both should be reduced by 50% to recognise all the problems with car 3.

SCUK has indicated as Mr R's use of the car was relatively uniform that it shows he used it as much as he wanted. But I have to bear in mind there were problems with the car starting shortly after the point of delivery, which lasted throughout. I think it's more likely than not the lower mileage covered, compared to the expected mileage, was as a result of the problems with the car.

My final decision

My final decision is that I uphold this complaint and direct Santander Consumer (UK) Plc trading as McLaren Financial Services to:

1. If relevant, remove any adverse information relating to the agreement from Mr R's credit file.
2. Reimburse Mr R £2,500 for the cost of the independent report carried out on 27 August 2020*.
3. Refund Mr R 50% of the deposit – £11,383.77.
4. Refund Mr R 50% of the rentals he's paid, less £7,500**.

*Interest should be added to the amount in point 2, calculated at a rate of 8% per year simple, from the date payment was made to the date of settlement.
**For point 4, interest should be added to payments made from May 2020 (the month after Mr R sought to reject the goods), calculated at a rate of 8% per year simple, from the date each payment was made to the date of settlement.

If SCUK considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr R how much tax it's taken off. It should also give Mr R a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

For completeness' sake, I don't think Mr R should be responsible for any loss in resale value that arose/arises after returning the car to SCUK. Should he be due any payment as a result of the sale this can be deducted from the above amounts.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 21 December 2023.

Simon Wingfield
Ombudsman