DRN-3597504

The complaint

Mrs H complains that she has been charged for excess mileage when her agreement with RCI Financial Services Limited ("RCI") was voluntary terminated.

What happened

In January 2017, Mrs H entered into a hire purchase agreement with RCI to acquire a new car. The cash price of the car was £22,587.47 and the total repayable under the agreement was £25,022.69. Mrs H was required to make 48 monthly payments of £356 (after factoring in the initial deposit and purchase activation fee) and there was a final optional payment of £7,726.69, if she wished to buy the car at the end of the agreement.

The agreement entitled Mrs H to terminate the agreement at any time before the final payment was due. If Mrs H exercised this option, the agreement set out that RCI would be entitled to the return of the car and at least half of the total amount repayable under the agreement. This was £12,511.35.

As part of the agreement, Mrs H had an annual mileage allowance of 5,000. RCI said that if Mrs H exceeded this allowance, she would be required to pay 8 pence (including VAT) for every mile that she exceeded the allowance by.

In March 2020, Mrs H contacted RCI and said she wanted to exercise her right to terminate the agreement early. She explained that due to her personal circumstances changing, she had used the car more than anticipated. RCI processed Mrs H's request to voluntary terminate her agreement without delay. However, RCI was unable to collect the car from Mrs H due to the government restrictions imposed by the Covid-19 pandemic. The car was collected by RCI's recovery agents – who I'll refer to as "B" – in June 2020.

RCI noted that when the car was handed back, the mileage was 46,321. It calculated that Mrs H had the car until March 2020, which was 38 months, despite the car being collected in June 2020. This is because Mrs H exercised her right to voluntary terminate the agreement in March 2020. RCI said that Mrs H had the car for 38 months and so, she had a total pro-rated mileage allowance of 15,833. It said because Mrs H had travelled 46,321 miles in the 38 months she had the car, she had exceeded her mileage allowance by 30,488 miles. RCI charged Mrs H £2,439.01, as she had exceeded the mileage allowance on the agreement. This was in addition to half of the total amount repayable under the agreement and the £65 damage charge identified by B. In total, it said Mrs C owed it £2,504.01.

RCI adjusted the pro-rated mileage to 17,083 in July 2020, to account for the additional three months Mrs H had the car until June 2020. This meant the adjusted excess mileage charges for the 41 months Mrs H had the car was £2,339.04. Due to non-payment of the excess mileage charges, in August 2020, RCI passed the account to a third party to collect the outstanding balance. I'll refer to the third party as "S".

In September 2020, Mrs H paid the £65 damage charge and queried why S was pursuing her for £2,504.01, rather than £2,339.04. S reduced the amount to £2,339.04. It later passed the account back to RCI, due to discussions between RCI and Mrs H about a potential payment plan and the complaint she had made. RCI looked into the complaint in November 2020 and agreed it didn't send an income and expenditure form to Mrs H when it should have done. RCI also updated Mrs H's balance as she had paid the damage charge of £65 and so, her outstanding balance was £2,274.04.

In February 2021, Mrs H complained to RCI and said as she had paid half of the total amount payable under the agreement, she wasn't required to make any further payments to RCI.

RCI issued its response to Mrs H's complaint in March 2021. It said it acknowledged it had taken 20 days for it to send the income and expenditure form and apologised for this. It offered Mrs H £75 in recognition of the inconvenience and upset caused. It said it wouldn't reduce the excess mileage charges as they formed part of Mrs H's contract with RCI.

Unhappy with this, Mrs H referred her complaint to this service. She reiterated her complaint and said she wasn't liable for the excess mileage charges. She said that she couldn't afford to make this payment and she felt that RCI had harassed her. To put things right, she said she wanted RCI to stop asking her to pay the excess mileage charges.

Our investigator looked into the complaint. She said she thought the agreement clearly set out that the charges for excess mileage accrued before Mrs H terminated the agreement and that Mrs H would be liable to pay the charges if she exceeded the permitted annual mileage allowance. And so, she didn't think RCI had acted unfairly when it charged Mrs H for the excess miles she travelled in the car.

Mrs H disagreed. She said RCI didn't tell her about the consequences of exceeding the permitted mileage under the agreement. She said in December 2018, she had a change in her personal circumstances and she had to relocate. This meant she had a longer distance to travel to work for around one month, but this was reduced once she relocated closer to her place of work. Mrs H told this service about her personal circumstances and the impact of these circumstances to her health and her finances. She said as a result of these, she couldn't afford to keep the car and so, she exercised her right to voluntary termination. She also said she felt harassed by RCI as it continually asked her to make payment for the excess mileage charges. Mrs H said she wanted these circumstances to be taken into account.

Our investigator contacted RCI who said it hadn't pursued Mrs H for the outstanding balance since August 2021, as it placed the account on hold. It said it would be happy to discuss an affordable payment plan for Mrs H going forward.

As Mrs H remains in disagreement, the case has been passed to me to decide.

Mrs H hasn't disputed the charge for the alloy wheel. So I haven't considered this as part of this decision.

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.

I've read and considered the whole file and acknowledge that Mrs H has raised a number of different complaint points. I've concentrated on what I think is relevant. If I don't comment on any specific point it's not because I've failed to take it on board and think about it – but because I don't think I need to comment on it in order to reach what I think is the right outcome. The rules of this service allow me to do this.

In considering this complaint, I've had regard to the relevant law and regulations; any regulator's rules, guidance and standards, codes of practice, and what I consider was good industry practice at the time. Mrs H was supplied with a car under a hire purchase agreement. This is a regulated consumer credit agreement which means we can look into complaints about it.

Considerations under the Consumer Credit Act 1974 ("CCA")

Having looked at Mrs H's hire purchase agreement, I can see that page two of the agreement states that an excess mileage charge will be charged, if Mrs H exceeds the agreed amount of mileage.

I've considered Sections 99 and 100 of the CCA. These set out the rights consumers have to voluntary terminate their hire purchase agreements and the liability that is due on termination. I consider these relevant to determine what is fair and reasonable here.

Section 99 of the CCA refers to a consumer's right to terminate a hire purchase or conditional sale agreement by giving notice. It states:

"99 Right to terminate hire-purchase etc. agreements.

(1) At any time before the final payment by the debtor under a regulated hire-purchase or regulated conditional sale agreement falls due, the debtor shall be entitled to terminate the agreement by giving notice to any person entitled or authorised to receive the sums payable under the agreement.

(2) Termination of an agreement under subsection (1) does not affect any liability under the agreement which has accrued before the termination…"

Section 100 of the CCA sets out the consumer's liability on termination:

"100 Liability of debtor on termination of hire-purchase etc. agreement.

(1) Where a regulated hire-purchase or regulated conditional sale agreement is terminated under section 99 the debtor shall be liable, unless the agreement provides for a smaller payment, or does not provide for any payment, to pay to the creditor the amount (if any) by which one-half of the total price exceeds the aggregate of the sums paid and the sums due in respect of the total price immediately before the termination…

(3) …If in any action the court is satisfied that a sum less than the amount specified in subsection (1) would be equal to the loss sustained by the creditor in consequence of the termination of the agreement by the debtor, the court may make an order for the payment of that sum in lieu of the amount specified in subsection (1).

(4) If the debtor has contravened an obligation to take reasonable care of the goods or land, the amount arrived at under subsection (1) shall be increased by the sum required to recompense the creditor for that contravention…"

In the "*TERMINATION: YOUR RIGHTS"* section of Mrs H's hire purchase agreement on page three, it refers to the amount that is due on termination and in this case, that was £12,511.35.

Whether or not it is fair for a lender to apply the charge will depend on the terms of the agreement that has been entered into. I have to decide whether the agreement has been constructed in a way to allow the charging for excess mileage, without contravening what is set out in the CCA regarding voluntary termination. In Mrs H's case, I think it has. I'll explain why.

Section 99 sets out that any liabilities which accrue prior to termination are not affected by the termination. What this means is that Mrs H is liable to pay any charges which have built up prior to the termination of the agreement, and that these charges are in addition to the other liability for early termination. So if the liability for excess mileage charges has accrued prior to termination, it is not incompatible with what is permitted under section 99. I've considered Mrs H's agreement to determine whether such liability has accrued prior to termination.

The second page of Mrs H's hire purchase agreement has a section headed: *"Excess Mileage Charges"*. This section sets out the mileage allowance and what charges will apply if that mileage is exceeded. It says that if the agreement is terminated early, the mileage

allowance will be pro-rated to the reduced period of time and that, *"This will be payable on expiry, or the earlier ending of this Agreement or where you have requested to exercise your Customer Option in paragraph 11 or your right to voluntary terminate under paragraph 12 of the terms of this agreement".*

Paragraph 11 of the terms and conditions of the agreement states:

*"**11. Final Repayment – Customer Option***

11.1 If you are able to meet the conditions set out in paragraph 11.2, you may at your option, decide not to pay the Final Repayment shown on page 1. Instead you may return the Goods to us in accordance with paragraph 13. Subject to the conditions set out in paragraph 11.2, you will then have no further obligations under this Agreement.

11.2 In order to take advantage of this option the following conditions must be satisfied:

(a) you must have paid in full all sums which have fallen due to us under this Agreement, including the payment of any Excess Mileage Charges in accordance with paragraph 10 (if applicable), apart from the Final Repayment;

(b) you must notify us in writing of your intention to take advantage of this option. This notice must be received by us not less than 30 days before the Final Repayment falls due for payment…"

Paragraph 12 of the terms and conditions of the agreement states:

*"**12. Voluntary termination and right of withdrawal***

12.1 Where you exercise your statutory right to terminate the agreement at any time (as set out on page 3 and subject to any liability also set out on page 3 in the notice "TERMINATION: YOUR RIGHTS") you must arrange for the goods to be inspected and returned in accordance with paragraph 13.

12.2 You have the right to withdraw from this Agreement in accordance with the rights set out under the heading "Rights of Withdrawal" on page 2. If you wish to do so, you must repay the amount set out in this section together with any [other allowances we have made in relation to this Agreement, including, without limitation, any finance deposit allowance or contribution and/or any other sums or allowances together with interest within 30 days beginning from the day after you provide us with notice that you wish to withdraw".

The relevant provisions in paragraph 10 of the terms and conditions state, as referenced by paragraph 11 say:

*"**10. Excess Mileage Charges***

10.1 You must not exceed the Annual Mileage Allowance shown on page 2. If you do so, you will be required to pay the Excess Mileage Charge (also shown on page 2) immediately upon our request…

*…10.5 For the purpose of calculating whether any Excess Mileage Charges are payable where this Agreement terminates for any reason prior to the end of the term (shown on page 2), we will calculate your minimum contractual mileage by multiplying the Annual Mileage Allowance by the duration of this Agreement (in years) ("the **Maximum Contractual Mileage**") and this shall be reduced proportionately to the reduced term on a pro-rata basis. If the mileage exceeds the Maximum Contractual Mileage calculated on a pro-rata basis, you must pay the Excess Mileage Charges calculated on a pro-rata basis as compensation for increased fair wear and tear of the Goods, considering the age and mileage of the Goods."*

Having read the terms of Mrs H's agreement, I'm satisfied the liability for excess mileage charges accrue prior to the termination. In this case, I think a reasonable interpretation of the contract is that the charges for excess mileage will accrue before the agreement has been terminated, or the option to voluntary terminate the agreement hasn't been taken. So it follows that liability for the excess mileage accrued before this point.

Overall, I think my interpretation of how the charges are set out in the agreement is reasonable. So I consider the charges arising out of Mrs H's contract are consistent with what is allowed under section 99 of the CCA.

I also have to take into consideration whether the excess mileage charges are permitted under section 100 of the CCA.

Section 100(1) of the CCA sets out the consumer's liability on termination. It allows RCI to charge Mrs H one half of the *"total price".* If Mrs H has already paid this in monthly repayments, under certain circumstances she would not have to pay anything more. But if Mrs H had failed to take *"reasonable care*" of the vehicle, there is an exception to this. If this had happened, under section 100(4) of the CCA, RCI would be entitled to increase the amount owed by Mrs H under section 100(1) of the CCA to compensate for this.

Section 189 of the CCA defines "*total price*" as the total amount payable by Mrs H under the hire purchase agreement, including any option to purchase charge. But it excludes any sum that might be payable as compensation for a breach of the agreement.

I've thought about whether the excess mileage charges make up an additional part of the price of hire. And so, whether they're allowed to be charged as part of the "*total price*" under section 100(1) of the CCA. Having done so, I'm satisfied they are. The agreement lists that the maximum annual mileage is 5,000 miles. I consider exceeding the mileage a breach of the agreement and so, it can't give rise to a charge that comes within the total price and is charged for under the calculation required by section 100(1) of the CCA.

I've mentioned the exception that applies under section 100(4) of the CCA, if Mrs H had failed to take reasonable care of the vehicle and this exception allowing RCI to increase the liability owed under section 100(1) of the CCA to compensate for the breach. Having reviewed the documentation Mrs H received, specifically section 10.5 of the terms and conditions, I think exceeding the mileage set out in the agreement, would count as failure to take reasonable care of the vehicle.

Having considered the documentation Mrs H was provided, I'm satisfied that driving more miles than the contract allowed should be treated as Mrs H failing to take reasonable care of the vehicle.

So, as I am satisfied that the agreement does make provision for a charge following voluntary termination of the agreement, if the maximum mileage allowance is exceeded – I think that the term is consistent with the protections of the CCA in respect of voluntary termination. As a result of this, I think RCI can rely on the terms and conditions to make Mrs H liable for more than the £12,511.35 she has already paid. Whilst I appreciate Mrs H said she wasn't told about the consequences of exceeding her mileage allowance, I think the terms and conditions of the agreement are clearly set out and so, I think RCI has acted fairly and reasonably when it calculated the excess mileage charge.

The clarity of the contract

In addition to Mrs H's agreement and the CCA, I've also considered the rules set out in the Financial Conduct Authority's Handbook.

I consider that the contract should be clear about the cost of ending the agreement early and that this is an important consideration as to whether it is fair and reasonable to impose an excess mileage charge, in the particular circumstances. In considering what is fair and

reasonable, I've considered the relevant provisions of the FCA's Consumer Credit Sourcebook (CONC) including:

"CONC 2.3.2

A firm must explain the key features of a regulated credit agreement to enable the customer to make an informed choice as required by CONC 4.2.5 R (adequate explanations).

CONC 4.2.5

(1) Before making a regulated credit agreement the firm must:

(a) provide the customer with an adequate explanation of the matters referred to in (2) in order to place the customer in a position to assess whether the agreement is adapted to the customer's needs and financial situation; ...

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

(a) the features of the agreement which may make the credit to be provided under the agreement unsuitable for particular types of use;

(b) how much the customer will have to pay periodically and, where the amount can be determined, in total under the agreement;

(c) the features of the agreement which may operate in a manner which would have a significant adverse effect on the customer in a way which the customer is unlikely to foresee."

I've also considered that principle seven of the FCA Principles for Businesses states that, "*A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading".*

Thinking about the clarity of the information Mrs H was given about the agreement she was entering into, I've based my findings on the documentation I've been provided. I can also see that Mrs H was given an opportunity to read a separate sheet headed "CUSTOMER WRITTEN SUMMARY ".

This document states *"**3. Early Termination:** If I end the credit agreement early, RCIFS will be entitled to the return of the vehicle and to half the total amount payable under the credit agreement. If I have already paid at least this amount plus any overdue instalments and have taken reasonable care of the goods, I will not pay any more.*

If I have a PCP agreement or a Lease Purchase agreement, and decide to terminate my agreement early, I may have to pay RCIFS excess mileage charges on a pro-rata basis and also pay for any damage which is not considered to be fair wear and tear."

Mrs H has signed this document. So, this document, coupled with the terms and conditions and the hire purchase agreement, persuade me that Mrs H was clearly told that an excess mileage charge would be paid upon terminating the agreement early and that she was reasonably made aware of this. This in line with CONC 2.3.2 and CONC 4.2.5.

I think the agreement was clear, fair and not misleading, So I don't think RCI has breached principle seven of the FCA Principles for Businesses. So, overall I think it's fair and reasonable for RCI to impose an excess mileage charge in these particular circumstances.

Mrs H also told this service that the dealership told her she wouldn't need to worry about any excess mileage charges. Whilst I accept that Mrs H had a change in her personal and financial circumstances, which led to her deciding to voluntary terminate the agreement, I don't think her statement about being told not to worry about the excess mileage is consistent with some of her previous testimony.

RCI's notes from March 2020, which is at the time Mrs H enquired about the voluntary termination, explain that Mrs H told RCI the reason why her mileage had increased and she said at the time, if she kept the car with her circumstances at the time, she would put another

20,000 miles on it. In May 2020, Mrs H wrote to RCI and said, *"Whilst I understand I have a set mileage I had the PCP on.."*. She went on to ask RCI to reconsider or waive the excess mileage charges due to the Covid-19 pandemic and her personal circumstances which, *"caused me to significantly go over the mileage".* Mrs H didn't mention that she was told not to worry about the excess mileage charges, which I would have expected her to do, given she appeared to acknowledge she would go over the permitted mileage. And so, having thought about this carefully, I'm not persuaded on balance, that Mrs H was told not to worry about the excess mileage charges.

Overall, I'm satisfied that Mrs H is liable to pay the excess mileage charges. This is because I consider that the excess mileage charges as specified in the contract, are consistent with what is allowed to be charged under the CCA. I'm satisfied that RCI has met the requirements under the FCA Principles for Businesses and CONC. And I consider that it would be fair and reasonable to charge for excess mileage in these particular circumstances.

Has RCI acted unfairly or unreasonably in any other way?

Mrs H told RCI she couldn't afford to pay the excess mileage charges. She explained that this was due to her personal and financial circumstances changing. I'm sorry to hear about the change in Mrs H's circumstances and I acknowledge the impact of this.

In circumstances where an individual is suffering from financial difficulties, such as Mrs H's case, a lender is obliged to treat the individual with forbearance and due consideration. A lender may choose to do this in a number of ways. Some examples of this include, freezing any interest and charges applicable, rescheduling the debt onto more favourable terms and entering into a repayment plan. I've considered whether I think RCI treated Mrs H with forbearance and due consideration.

I can see that when Mrs H told RCI about her financial circumstances, it agreed to carry out an income and expenditure with her to review her circumstances. It agreed to send her a form to complete, but accepts it didn't do this for around 20 days following a complaint from Mrs H. It offered Mrs H £75 in recognition that it didn't do this sooner. I consider this offer to be fair and reasonable for the delay in providing the income and expenditure form.

RCI has told this service it is still willing to complete a review of Mrs H's circumstances to establish how to treat her with forbearance and due consideration. Having considered this, I think RCI is treating Mrs H with forbearance and due consideration, as it hasn't taken any action to collect the debt since August 2021. It is also willing to discuss arranging an affordable repayment plan with Mrs H going forward.

I appreciate that Mrs H would like RCI to write off the whole amount instead due to her circumstances, but I don't think that would be fair without allowing RCI the opportunity to review Mrs H's current financial circumstances, to decide how best to treat her with forbearance and due consideration. I'd recommend that Mrs H contacts RCI to carry out an up to date income and expenditure assessment, so RCI can carry out a review of her financial circumstances. I'd also like to take this opportunity to remind RCI of its obligations to treat Mrs H with forbearance and due consideration when reviewing her financial circumstances.

Mrs H also mentioned that RCI was harassing her. However, I've reviewed the notes and the level of conduct between RCI and Mrs H. Having done so, I don't consider that RCI harassed Mrs H when it attempted to collect the payment she owed for the excess mileage charges. I've seen no actions by RCI that suggest it was acting unreasonably or contacting Mrs H excessively. So it follows that I don't think RCI need to do anything further.

My final decision

RCI Financial Services Limited has already made an offer to pay £75 to settle the complaint and I think this offer is fair in all the circumstances.

So my decision is that RCI Financial Services Limited should pay Mrs H £75, if it hasn't already done so.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs H to accept or reject my decision before 9 February 2023.

Sonia Ahmed
Ombudsman