

## **The complaint**

Ms E complains that Mitsubishi HC Capital UK Plc (MHCC) supplied her with a car that wasn't fit for purpose, and charged her excessive fees when she terminated the hire agreement early.

## **What happened**

In October 2017 Ms E was supplied with a new car through a hire agreement with MHCC. The agreement was for 36 months, with a first monthly payment of £899, followed by 35 monthly payments of £299.94.

The agreement was for a minimum period of 36 months. It included a total mileage cap of 30,000 miles. The agreement had an excess mileage charge, payable at 13.76 pence for every mile travelled over the 30,000 mile cap.

In February 2018 Ms E discovered the air bags in the car couldn't be turned off manually. She said she was never told this. She said this was inconvenient for her as it meant she couldn't fit a child car seat in the front passenger seat, as it was difficult to fit the rear seatbelts around two car seats. She also said she couldn't have her dog in the front seat, nor any of her pregnant friends.

She said she asked MHCC if she could change to a bigger car and if she could increase the mileage allowance. She said they wouldn't allow this, but she said they did offer to reduce the early termination fee. She said she didn't accept the offer as she couldn't afford to buy a new car and pay the excess mileage fee. She told MHCC that it wasn't economically viable due to the excess mileage she'd done.

In November 2018 Ms E complained to MHCC about an issue with the engine management light (EML). Ms E also asked about the cost to terminate the agreement early.

On 7 January 2019 Ms E asked MHCC for the cost of terminating the agreement as she said she could no longer afford it.

She said she'd returned the car to MHCC, 14 months into the agreement. She's unhappy as she now has to pay 50% of the outstanding monthly payments as an early termination fee, plus an excess mileage charge of more than £1,000. She said she wanted these charges to be waived. She also said they wouldn't allow her time to pay and said they'd note this on her credit file.

MHCC issued their final response to Ms E's complaint about the airbag on 10 April 2018. They said she'd never raised this issue with the supplier before acquiring the car. They said it was the manufacturers decision to restrict the option to switch off the air bag, and they understood this had been done this for child safety reasons.

In the same letter they'd offered to reduce the early termination fee to £2,661 and said this offer was available until 15 May 2018.

On 12 September 2018 MHCC issued another final response letter to Ms E. This repeated their position on the air bag issue as set out in the letter of 10 April 2018. It also explained why they were unable to offer the earlier voluntary termination charge due to the time that had passed. They explained the fee due on voluntary termination would now be £3,749.24. They said this was equal to 50% of the remaining rentals and was valid until 15 September 2018. They said they would calculate the mileage on a pro-rata basis and excess mileage charges would be invoiced separately, along with any charge for damage to the car.

On 22 November 2018 MHCC responded to Ms E's complaint about the engine management light issue. MHCC said the fault was diagnosed on 15 November 2018, and the DPF sensor was replaced, at no cost to Ms E. They told her the cost to terminate the agreement early would be 50% of the outstanding rentals.

In January 2019 MHCC provided Ms E with details of the early termination charges. They told her they were willing to accept her request to repay the amount over 24 months, and there was likely to be a negative impact on her credit file. They said she told them she would pay the amount in full.

In March 2019 Ms E told our investigator she had returned the car. She said she couldn't afford the reduced voluntary termination charge due to the addition of the excess mileage fee. She also said she'd asked to increase the annual mileage allowance but was told this would increase her monthly payments to £600, and she couldn't afford this amount. She said she'd originally taken a low mileage allowance as she commuted to work by train. She said she started driving to work when the train became unreliable, and this took her over the allowance.

Ms E was unhappy with MHCC's response, and she brought her complaint to this service for investigation.

Our investigator said that he couldn't look at Ms E's complaint about the air bags issue making the car not fit for purpose. He said this was because MHCC had issued their final response on this matter to her in April 2018, and she didn't bring her complaint to this service until January 2019. This was outside the six month time limit set out in the rules under which this service operates.

He did consider the other complaint issues she'd raised. He said he didn't think MHCC had done anything wrong when it didn't offer the discounted rate for voluntary termination it had offered in April 2018 when she asked later in August 2018.

He said that he thought the engine management light issue made the car of unsatisfactory quality. He said that the repair carried out was a reasonable resolution of the complaint. He noted that Ms E had to take the car to the garage twice over a short period of time. He said that MHCC should pay Ms E £100 to reflect the distress and inconvenience this caused to her.

He also considered the amount MHCC charged Ms E for exiting the hire agreement early. He explained why he felt that MHCC was unfairly benefiting from the amount it was charging. He said MHCC should deduct the amount of £1,212.02 from the combined early termination (£2,999.40) and excess mileage fees (£1,221.42).

Ms E didn't accept our investigator's outcome. She said that the basis of her complaint was that the car was not fit for purpose due to the airbag issue. She said she'd investigated this with the supplier, and with MHCC. She said they agreed with her that the issue could not be resolved so she tried to negotiate with them to avoid litigation. She said she repeatedly

asked to upgrade the car to something more suitable and to increase the mileage allowance so that she would not be left with a car that wasn't suitable, or excess mileage charges.

She said she tried to exhaust all avenues before bringing her complaint to this service.

She said MHCC adopted a cavalier attitude and left her with no choice but to terminate the contract.

MHCC agreed to pay the amount of compensation for distress and inconvenience our investigator had suggested. They also agreed to credit £1212.02, without applying 8% interest, leaving an outstanding balance of £3008.79. They said they did not agree with the 'fairness' of the Early Termination fees.

They later agreed to accept our investigator's approach to resolving this complaint.

Because Ms E didn't agree with the investigator, the matter has been passed to me to make a final 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.

Having done so, I have reached the same overall conclusions as the investigator, and for broadly the same reasons. If I haven't commented on any specific point, it's because I don't believe it's affected what I think is the right outcome.

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. Ms E was supplied with a car under a hire agreement. This is a regulated consumer credit agreement which means we're able to look into complaints about it.

#### *Fit for purpose*

Ms E says that car wasn't fit for purpose because she discovered she couldn't deactivate the front airbag. She said this meant she couldn't fit a child car seat in the front of her car – making it not fit for purpose. She said this should make the contract void.

Why I can't look into this complaint.

The time limits I'm required to consider and are relevant to this case are set out in DISP 2 of the Financial Conduct Authority (FCA) Handbook. The specific rule that is relevant here is DISP 2.8.2. It says;

*"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..."*

I'm satisfied that MHCC issued their final response to Ms E's complaint about the air bag issue on 10 April 2018. In that letter they acknowledged the difficulties she had fitting child seats in the car. And they explained why they were not upholding her complaint.

Ms E said that she continued to discuss the issue with MHCC to avoid litigation. That doesn't change the fact that MHCC clearly explained that she had six months from the date of the letter to bring the complaint to this service. And in bold letters, they say that they will not permit this service to consider the complaint if she didn't bring the complaint within six months of the date of the letter.

I've seen that final response letters issued in September 2018 and November 2018 also referred to this matter. These did not change MHCC's position and merely reiterated the position they had set out in the April 2018 response. So I can't say these letters extended the deadline.

Because Ms E brought her complaint to this service on 22 January 2019, more than six months after the initial Final Response Letter, it's been brought too late.

Our rules say that I can set that time limit aside if I'm satisfied that the failure to comply with it was as a result of exceptional circumstances. The rules give an example of exceptional circumstances as where a consumer might have been incapacitated. Ms E says she continued to try and resolve this with MHCC.

I accept that was what she was doing. But it didn't prevent her from raising the complaint with our service within the six month period. And she hasn't told us about any other circumstances which would've effectively prevented her from bringing the complaint in time. So, I find no reason to set the time limit aside.

I appreciate that this will come as a disappointment to Ms E, but I cannot consider this part of her complaint against MHCC.

#### *Gesture of goodwill offer*

Ms E complained that MHCC wouldn't honour the early termination quote it provided in April 2018 when she made the request again in August 2018.

I've reviewed the relevant correspondence. I'm satisfied that MHCC made it clear to Ms E that the figure quoted was only available until 15 May 2018. They also explained that the lower amount of £2,661 was lower than she would normally have to pay and was offered as a gesture of goodwill.

On 21 May 2018, Ms E confirmed to MHCC that she did not wish to terminate the agreement early.

When Ms E contacted them again in August 2018, they told Ms E that the discounted fee offered in April 2018 was no longer available. I don't think that was unfair or unreasonable. MHCC had made it clear to Ms E that the offer made in April 2018 was time limited. And because it was a goodwill gesture, they were not bound by it.

So I won't be asking them to do anything more in relation to this part of the complaint.

#### *Quality of goods*

Ms E complained that there was an issue with engine management light (EML). MHCC arranged an inspection in October 2018, but no fault was found.

The EML light came on again in November 2018. A further inspection was carried out and identified a fault with the DPF sensor. This was then replaced under warranty.

MHCC supplied the car to Ms E under a consumer hire agreement. This makes them responsible for the quality of the goods.

The Consumer Rights Act 2015 (CRA) says, amongst other things, that the car should've been of a satisfactory quality when supplied. And if it wasn't, as the supplier of goods, MHCC are responsible. What's satisfactory is determined by what a reasonable person would consider satisfactory given the price, description, and other relevant circumstances.

The CRA says the quality of the goods includes their general state and condition and other things like their fitness for purpose, appearance and finish, freedom from minor defects, safety, and durability can be aspects of the quality of goods.

MHCC supplied Ms E with a brand new car. So I think it's fair to say that a reasonable person would expect the level of quality to be higher than a used car.

I'm satisfied there was a fault with the car. A fault with the DPF sensor was identified, and it had to be replaced. I'm satisfied that this means the car was not of satisfactory quality. I say that because I wouldn't have expected to see a fault like this occurring in a car of this age – not yet 12 months old.

The appropriate remedy under the CRA is for the car to be repaired. That is what was done so I think that part of the complaint was resolved fairly and reasonably.

But I do think this caused some inconvenience to Ms E. She had to take the car to the garage on two separate occasions to have the fault identified and fixed. Having considered the impact this had on Ms E, I'm satisfied that MHCC should pay £100 to reflect the inconvenience to Ms E.

#### *Early termination of the agreement*

Ms E asked to exit the agreement early. This hire agreement does not include an option to exit the agreement early. MHCC agreed to allow Ms E to exit the agreement early on payment of both an excess mileage and an early termination charge.

Ms E is unhappy with the amount being charged. I need to consider whether or not the fee being charged is fair and reasonable. But I also have to be mindful of the legal position.

The right to terminate a hire agreement is covered by Section 101 of the Consumer Credit Act 1977 (CCA). But this section does not apply to agreements where the hirer is required to make payments exceeding £1,500 in a year. Because Ms E's payments total more than £1,500 a year, I do not consider Section 101 applies here.

So is what MHCC charging Ms E fair and reasonable.

Here both parties have consented to an early exit from the hire agreement. The agreement has no cancellation rights, and the agreement only explains the liability on Ms E should MHCC terminate the agreement early. It appears early termination is only an option for MHCC. So the contract makes no allowance for these circumstances.

MHCC has charged Ms E two fees – an excess mileage fee and an early termination charge. There's no dispute that Ms E exceeded the mileage cap set out in the original agreement. I agree with the assumption made by our investigator that MHCC has charged both fees to compensate for the loss arising from the devaluation of the car through Ms E exceeding the expected mileage, and from her not fulfilling the agreed payments for the contractually agreed duration of the agreement.

I think that the fee charged by MHCC should fairly and reasonably represent the position MHCC would've been in had the agreement run to its full term. It's important for me to say that I think this approach meets what's expected by the industry regulator the Financial Conduct Authority. I'm referring to their Principles for Businesses, in particular Principle 6, which say that 'A firm must pay due regard to the interests of its customers and treat them fairly'.

I'm satisfied that the formula used by our investigator fairly does that.

Ms E returned the car around 20 months before the agreement was due to be completed. This meant she had £5,998.80 left on the agreement to pay.

The agreement was terminated in January 2019, and MHCC charged Ms E £2,999.40 in an early termination charge.

I'm satisfied the figures provided by our investigator are reliable. And neither party has disputed them. So I'll use those figures in my calculation. He used the motor trade guides to consider the likely selling price of the vehicle had the agreement run for the full term based on the total mileage allowance. He then compared this to the likely selling price of the vehicle when it was actually returned, based on the actual mileage Ms E used.

The approximate market value for the car had the agreement run its full course and she'd driven the expected 30,000 miles was £13,720. The approximate market value for the car when it was actually returned and had driven 22,313 miles was £16,710. This means the approximate trade value is £2,990 more than MHCC would have likely expected to receive had the agreement run full term and within the mileage allowance stated.

Had the agreement run its intended full term, and had Ms E remained within the annual mileage cap, MHCC, in addition to the likely sale price of £13,720 would have received a further 20 months of rentals totalling £5,998.80. So, I calculate the total amount MHCC were expecting to receive, had the agreement run its course and the car been driven no further than its maximum mileage, can be worked out as follows:

- £5,998.80 MHC were expecting in the 20 remaining rentals, plus
- £13,720 MHC would have likely made in selling the vehicle at the intended end of the agreement,

making a total of £19,718.80.

In this matter, Ms E terminated the agreement 20 months early and with excess mileage. Based on the valuation obtained, MHCC could have achieved a likely higher sale price of the vehicle of £16,710. MHCC also asked Ms E to pay £2,999.40 in an early termination fee, and £1,221.42 for excess mileage. So, the total amount that MHCC would've received, through the agreement ending early, can be worked out as follows:

- £2,999.40 in an early termination fee that MHC applied, plus
- £1,221.42 in excess mileage charges, plus
- £16,710 it would have likely made in selling the vehicle on early termination of the agreement,

making a total of £20,930.82.

So it appears that MHCC would have benefitted by around £1,212.02 from the agreement ending earlier and the car being driven further than agreed, when compared to what would have likely been received had the hire agreement run its original full term as expected.

I'm satisfied that it's reasonable for MHCC to charge Ms E for terminating the agreement early. But the fees they proposed to charge Ms E for terminating their agreement did not pay due regard to the interests of Ms E and treat her fairly (as it was required to do by Principle 6) by requiring her to pay what I consider to be a high and disproportionate charge.

### **Putting things right**

It appears that MHCC has benefitted by around £1,212.02 from the agreement ending early and the way it applied both an excess mileage charge and an early termination charge

As I've explained above, I don't think this is reasonable. To put things right MHCC should:

- deduct the amount of £1,212.02 from the combined early termination (£2,999.40) and excess mileage fees (£1,221.42).
- In addition to this, I think MHCC should pay Ms E £100 for the inconvenience arising from the fault with the DPF.

### **My final decision**

For the reasons explained, I uphold Ms E's complaint. Mitsubishi HC Capital UK Plc must follow my directions above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms E to accept or reject my decision before 17 February 2023.

Gordon Ramsay  
**Ombudsman**