

The complaint

The estate of Mr W complains about a hire purchase agreement Mr W took out with Toyota Financial Services (UK) Plc ("Toyota FS").

What happened

The estate of Mr W is represented by Mr W's executor and daughter Mrs W. Prior to Mr W's death Mrs W was his representative and she initially brought his complaint to us in that capacity.

In summary this is the estate of Mr W's position. In November 2019 Mr W entered into a hire purchase agreement with Toyota FS for a brand-new car. The cash price of the car was £30,890.70, the monthly payments were around £530 per month and Mr W paid a deposit of £5,800.

According to the estate of Mr W at the time when Mr W entered into the contract he lacked mental capacity therefore the agreement is void, alternatively it should be set aside.

In addition, in any event, Mr W was vulnerable due to his mental and physical health and due to his age at the time he contracted, Toyota FS did not take Mr W's vulnerability into account as it should have done. However, if it had properly taken account of Mr W's vulnerability, it would never have entered into the agreement with him. On this basis the agreement should now be set aside for this reason too.

Moreover, the lending to Mr W was also unaffordable. It appears that initially the estate of Mr W wanted Toyota FS to reimburse it for all payments made towards the agreement. It also wanted interest to be added to this sum. In addition, it wanted Toyota FS to return the deposit. Later it appears it was prepared to accept a refund of all payments made from the point at which Mr W was diagnosed with lacking mental capacity together with the deposit. Mr W was diagnosed with lacking mental capacity in January 2020. At this point Mr W's driver's licence was either relinquished or revoked.

In brief this is Toyota FS's stance. It does not agree that it had acted incorrectly. However, at first and purely as a goodwill gesture it was willing to cap Mr W's liability to £14,000. This offer was made when Mr W was still alive. The significance of the £14,000 is that the car dealership who I will call "P" had offered to buy back the car for this amount. This would have meant that Toyota FS was effectively writing off the balance of the agreement.

Before the complaint came to us there was a lot of to and fro between Mrs W and Toyota FS and P about Mrs W's authority to act on behalf of her father. Toyota FS has adopted P's positions re Mrs W's authority to act. As I have mentioned in January 2020 Mr W was diagnosed with lacking mental capacity by reason of dementia. But in July 2020 he agreed to a property and financial affairs lasting power of attorney ("LPOA") at which point he had to have had capacity. Therefore, P questioned how Mr W could have given valid consent to the LPOA in July 2020, if he lacked capacity in January 2020. Further, Toyota FS was only prepared to engage fully with Mrs W once it had a copy of the LPOA and Mr W's consent for his attorney to act for him.

Moreover both P and Toyota FS indicated that Mr W had not shown any signs of vulnerability when he contracted, indeed the opposite. Mr W came to P's showroom by

appointment, on more than one occasion, talked through the options, applied for finance, and provided P with documents that Toyota FS needed to assess his application for finance.

Dissatisfied with Toyota's response, Mrs W on behalf of Mr W complained to this service.

One of our investigators took a look at this complaint. Our investigator recommended that the complaint be upheld in part. He thought that Toyota FS only became aware that Mr W had dementia in July 2020. Moreover, only one further payment was made to the agreement after July 2020, namely the payment made on 1 September 2020. Consequently, our investigator said that Toyota FS should write off the remaining balance and refund the payment that was made on 1 September 2020 with interest.

Neither Toyota FS nor the estate of Mr W accepted our investigator's recommendation.

Toyota FS's stance remains it did not do anything wrong. It told us it would refund the 1 September 2020 payment and write off the balance, but only as a goodwill gesture, so strictly speaking it was not accepting our recommendation. Moreover, it reiterated that if Mr W had the capacity to agree to the LPOA in July 2020 then how was it that the estate of Mr W say that in November 2019 Mr W did not have capacity.

The estate of Mr W provided a detailed response. In summary, it reiterated its previous stance. The estate of Mr W also provided further information about Mr W's day-to-day life during the relevant period. Specifically, it indicated that a particular person in Mr W's life who had appeared to be helping him had taken advantage of him financially.

The estate of Mr W indicated that it wanted an ombudsman to take a fresh look at the complaint.

I looked into the complaint, and I issued a provisional decision. This is what I said about what I'd decided and why:

"First, I'm very aware that I've summarised this complaint in far less detail than the parties and I've done so using my own words. I'm not going to respond to every single point made by all the parties involved. No discourtesy is intended by this. Instead, I've focussed on what I think are the key issues here.

Our rules allow me to do this. This simply reflects the informal nature of our service as a free alternative to the courts. If there's something I've not mentioned, it isn't because I've ignored it. I haven't. I'm satisfied I don't need to comment on every individual argument to be able to reach what I think is the right outcome.

The parties disagree about most of the key points. Where the evidence is incomplete, inconclusive, or contradictory (as some of it is here), I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances.

Mental capacity

The estate of Mr W suggests that at the time he contracted with Toyota FS Mr W lacked mental capacity. But the question of whether someone lacks mental capacity is not something a layperson such as the estate of Mr W can speak to. Rather, the lack of mental capacity is a medical diagnosis.

Mr W contracted with Toyota FS in November 2019. Mr W was diagnosed with lacking mental capacity only in January 2020. Prior to that there was no medical diagnosis of lack of mental capacity.

It follows I have no proper basis for finding that because Mr W lacked mental capacity in November 2019 it is fair or reasonable that Toyota FS treat the hire purchase agreement as void or set it aside. It also follows I don't uphold this part of the complaint.

Vulnerable consumer

A vulnerable customer is someone who, due to their personal circumstances, is especially susceptible to harm, particularly when a firm is not acting with appropriate levels of care.

The estate of Mr W suggests that Mr W was a vulnerable consumer by reason of his mental health condition in November 2019. The estate of Mr W also suggests that Mr W was also a vulnerable consumer at this point due to his physical health and age.

The estate of Mr W indicates due to his mental health vulnerability Mr W did not have the ability to understand the consequences of his actions in entering into the contract. That, in itself, the estate of Mr W suggests should mean that Toyota FS cannot hold him to the contract.

Vulnerability is something Toyota FS must take on board. Toyota FS is expected to provide its customers with a level of care that is appropriate given the characteristics of the customers themselves. It is expected that frontline staff such as the staff at Toyota FS and the staff at P who dealt with Mr W, should have the skills and capability to recognise characteristics of vulnerability and respond to individual consumer needs where there are clear indicators of vulnerability. Toyota FS can be held to account even though it did not deal directly with Mr W at first because it has this responsibility even where, like in this situation, it transacts through an intermediary.

The estate of Mr W suggests that Mr W was demonstrating clear signs of lacking mental capacity by reason of his dementia and this ought to have alerted both P and by extension Toyota FS that he was vulnerable. Whereas Toyota FS seems to be saying that it may be that Mr W was vulnerable due to his dementia in November 2019 but there were no clear indications of that vulnerability at the relevant time.

The estate of Mr W relies on three main sources when talking about Mr W's mental health and how it presented in November 2019 namely:

- Mrs W's recollections.*
- A statement from a relative and informal carer for Mr W I'll call this person "Mr S".*
- Information provided by Mr W's GP in a Debt and Mental Health Evidence Form that Toyota FS asked to be filled in to help it assess Mr W likely mental state at the time he contracted with it.*

I'll look at what each of these three parties say in turn.

I think it is significant that Mrs W has said this about Mr W's likely behaviour in November 2019 "when speaking to my father he could easily have come across as understanding information provided to him at the time of discussion". I find it likely that Mrs W's description of her father is accurate. Therefore, I find it difficult to understand how P and Toyota FS might have known from the way Mr W behaved when he was entering into the deal with Toyota FS that he was vulnerable by reason of his mental health.

The estate of Mr W has indicated that Mr S was taking advantage of Mr W economically. I have no reason to doubt what the estate of Mr W has told us about this. That being so I have difficulty placing weight on Mr S's account of events.

I've looked at what the GP said the GP suggests Mr W likely did have dementia at this point. This persuades me that Mr W was vulnerable by reason of his dementia in November 2019. But nothing in that form suggests that when Mr W contracted with Toyota FS his vulnerability due to dementia would most likely have been apparent to it and I think this is significant.

Moreover I also take on board that from the information I have it was likely that in November 2019 Mr W had good days and bad days. That is that he was not consistently showing signs of dementia which fits with the information that I have seen more generally about how dementia typically presents.

I also think it is significant that despite what the estate of Mr W says about Mr W's vulnerability due to his mental health due to dementia in November 2019, no one had at that point suggested that a LPOA should be put in place.

Age can indeed make a person vulnerable. But the estate of Mr W's point appears to be simply because Mr W was in his 80s at the time of contracting he was vulnerable and therefore it was inappropriate to contract with him. I don't find this persuasive. Age alone should not be a barrier to contracting. Indeed if Toyota FS had taken the standpoint that it could not contract with Mr W solely based on his age it would have been acting in a discriminatory manner based on age and that would have been inappropriate.

Further, I regret to hear that in November 2019 Mr W was physically much frailer than he had been previously. A person's physical condition can make them vulnerable. But the estate of Mr W has not explained why because Mr W was less physically robust than he was in the past, Toyota FS ought reasonably have considered him vulnerable and ought not to have contracted with him due to this.

P tells us it had a longstanding relationship with Mr W. it suggests he was knowledgeable about cars and would pop in from time to time for a chat with it. Further, it tells us he had acquired a number of cars with help from it in the past and had carried out some relatively complex deals with it such as carrying over negative equity from previous finance into new finance. I've no reason to doubt that this was the case.

P also tells us that when Mr W acquired the car in November 2019 he did not do so on the spur of the moment rather he made appointments which he kept. Moreover he had to organise himself to bring in the documents that were needed in order to apply for the finance. The estate of Mr W suggests Mr W did not make any such appointment or bring in the necessary documents. Moreover it suggests that P and Toyota FS behaved cynically taking advantage of someone who was vulnerable and who they ought to have known was vulnerable to boost their bottom line.

I think the circumstances of how Mr W came to enter in the contract with Toyota FS are significant because they'll shed some light on whether Mr W was organised seemingly in charge of himself and making his own decisions or whether he was the victim of sharp practice on the part of P and Toyota FS.

From what I've seen prior to acquiring the car in November 2019 Mr W had suggested to at least one person in his life that he wanted to acquire a new car. I find it likely therefore that he did make an appointment with P to do this. Further, I've been provided with copies of the documents such as a driving licence and bank statements that P and Toyota FS suggest Mr W provided. When I think about how Toyota FS most likely came into possession of Mr W's documents, I think the simplest possibility is the most likely one, that is that Mr W brought the documents with him when applying for finance. And that he handed them over to P to copy to support his application for finance.

For all of these individual reasons I don't uphold the complaint point about Toyota FS entering into an agreement when it ought reasonably to have not done in the circumstances because the consumer was vulnerable.

That said, I've thought about whether at the point when Toyota FS became aware that due to his worsening mental health Mr W had agreed to a LPOA, it should have taken a look again at the situation. I think this is the significant date not January 2020 because at some point between then and July 2020 Mr W had regained capacity. In particular, I have thought about whether Toyota FS should it have stopped taking payments. Especially since it was also told that due to the loss of capacity diagnosis in January 2020 Mr W had relinquished his driving licence or it had been revoked (we have been told both and it is not clear which it was). But I am also aware that Mr W and then Mrs W had kept the car well beyond this point when it was open to them to simply hand the car back to its owner Toyota FS. This would have stopped repayments falling due. It would not have prejudiced any arguments that Mrs W or the estate of Mr W wanted to make on behalf of Mr W about lack of capacity or vulnerability or unaffordability. Toyota FS was entitled to charge for access to the car. Mr W may not have used it much, if at all, but it appears that Mr S was using the car. Moreover Mrs W prevented Toyota FS's agents from recovering the car in June 2021. On that basis, for all of these individual reasons, I am not minded to say that it is fair or reasonable that Toyota FS must reimburse the estate of Mr W for the payment made on 1 September 2020.

However, I think where Toyota FS did let Mr W down is that it did not write-off the outstanding balance once it had recovered its car. By this point, it knew the consumer was vulnerable, it knew he could no longer drive the car, it knew it was likely that his financial circumstances had changed for the worse since he contracted. I say this because by this point it seems that Mr W had moved from his own home to residential care which it appears he was paying for. In short, Mr W's situation had changed drastically from the time when he contracted and in the circumstances it was fair and reasonable that Toyota FS should write-off the outstanding balance.

The lending decision

Firms such as Toyota FS must make a reasonable assessment of creditworthiness, based on sufficient information prior to lending. They must not lend unless they can demonstrate that they have had proper regard to affordability risk in the individual case.

The extent and scope of an assessment should depend upon, and be proportionate to, the individual circumstances. In particular, the firm should take into account, amongst other things, the type and amount of credit, its duration, the cost of the credit, and the total amount payable, both in absolute terms and relative to the customer's financial situation where known.

Moreover the higher the affordability risk in the particular case, the more rigorous the assessment is likely to need to be. The affordability risk may be higher given for example the amount the consumer is borrowing or given the duration of the finance agreement or given the consumer's overall debt position. In such cases, the firm may need to obtain additional information, or subject it to additional scrutiny. Firms should consider whether information should be verified, and by what means, to ensure that it is reasonable to rely on it, and how it should be factored into the assessment.

In this instance Mr W was borrowing a significant sum in absolute terms over a relatively long period that is 60 months. That suggests to me that the checks should have been relatively rigorous. As far as I can see Toyota FS did not check what other borrowing Mr W might have had neither did it ask for information about Mr W's income and expenditure. So in the circumstances it is hard to see how it established to its satisfaction that the lending was affordable. I don't think its checks went far enough in the circumstances.

Before I go any further I don't agree with the estate of Mr W that Toyota FS should have established in what capacity Mr W held his home or whether he was entitled to any benefits he might have been receiving, just because I think the checks it did were not sufficient.

That said it is not enough for me to uphold this complaint just because I find Toyota FS's checks were not proportionate. I also have to be satisfied that if it had carried out the checks it should have done it would have found that the lending was unaffordable. And when I look at Mr W's financial situation given what I have seen about his disposable income I find that the lending was affordable.

It follows that I do not uphold this part of the complaint.

Customer service

I recognise that the estate of Mr W finds it unacceptable that Toyota FS would not fully engage with it until it saw a copy of the LPOA. However, I think this was good practice in the circumstances given the information it had about Mr W's mental capacity. And this caution seems all the more necessary given what the estate of Mr W has told us about Mr W being economically exploited by a person he appears to have trusted.

That said once Toyota FS received a copy of the LPOA a further complication arose, Toyota thought that it needed Mr W's authority to deal with Mrs W under the LPOA. Alternatively it suggested if Mr W had lost capacity after the he agreed to the LPOA it would need evidence of this. Mrs W did not agree this was necessary. Therefore there was an impasse. I've looked at relevant guidance about this point, in particular guidance from the Office of the Public Guardian ("OPG"). Mr W indicated when the LPOA could be used there were two options:

- As soon as it's registered.*
- only when the donor lost mental capacity.*

Mr W chose the option that said the LPOA could be used as soon as it was registered. Further the notes about this option make it clear that Mr W's attorneys (there are two, but they could act jointly or severally) could continue to act for Mr W in relation to his property and financial affairs should he lose capacity.

Toyota FS appeared to think that it needed Mr W's consent before it could accept Mrs W's authority to act as his attorney or it needed proof that he had lost mental capacity. But having read the LPOA and the guidance, information on the OPG site and other relevant guidance I don't agree that was necessary. That said I don't think this was the cause of this complaint going on for so long in the circumstances. For instance, as I have mentioned before, I can see even after this impasse Mrs W would not return the car when Toyota FS first sent someone to collect it. Albeit I think this was because Mrs W was understandably overwhelmed by all that was happening at that time. But I can't fairly and reasonably say that Toyota FS was responsible for this.

It follows I don't uphold this part of the complaint."

My provisional decision was:

"My provisional decision is that Toyota Financial Services (UK) Plc must write off the outstanding balance owed under the finance agreement and must stop pursuing the estate of Mr W of Mr W for payment."

I invited the parties to respond to my provisional decision should they wish to do so, they both did.

In brief, the estate of Mr W responded to repeat her previous stance. The estate of Mr W also gave further detail about the circumstances surrounding the signing by Mr W of LPOA. In particular, the estate of Mr W said Mr W had talked to his GP privately before signing the LPOA and he signed it in his GP's presence. Further at some point in early 2020 Mr S had

tried to get Mr W to sign a LPOA in the presence of a solicitor from a firm who I will call "G". G refused to continue because it thought Mr W was confused and was not aware of what he was being asked to sign. The estate of Mr W indicated this service ought to rely on the statement from Mr S because it showed Mr S in a bad light and yet still he made it. The estate of Mr W does not agree that Mr W entered his PIN to pay his deposit, as its position is Mr W would not have been able to remember his PIN or key in his PIN due to arthritis. The estate of Mr W points out that having been treated badly by Toyota FS Mrs W did not return the car to its agents because she felt she needed it as a "*bargaining tool*".

In summary, Toyota FS covered these points in its response. From its perspective it had worked constructively with all parties at all times to get the best possible for outcome for the consumer. It pointed out that from the onset it had been willing to write off the balance. It said that it had been prepared to accept £14,000 to settle the debt, when in fact the outstanding debt at that point was almost £23,000. It also pointed out that if Mr W had had to voluntarily terminate the agreement, which was another route it could have insisted on his liability would have been around £9,000. But it had waived its right to these large sums of money. The only reason it did not write off the shortfall after the sale of the car in November 2021 was because the complaint was with this service, and it was waiting for a final decision. But it never pursued the estate of Mr W for the debt.

Toyota FS said it objected to refunding the payment of 1 September 2020 because the estate of Mr W held up the sale of the car which meant the car was worth less when Toyota FS sold it than it would otherwise have been. It did not agree that its affordability checks were not sufficient. In particular it said what it did was within the relevant rules. Toyota FS explained that when Mr W contracted with it he also paid off pre-existing car finance as part of the deal, this reduced his monthly repayment by around £50 per month so he was better off after the contract than before it. And it said it had asked for bank statements to show whether the finance was affordable.

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 thank both the estate of Mr W and Toyota FS for their responses to my provisional decision. It has been particularly helpful that each of the parties took the time to set out their views on what I said in the provisional decision and provided further information which they wanted me to consider, so that I have been able to gain a fuller understanding of their respective positions and concerns. I'll look at their responses below.

I'm very aware that I've summarised this complaint in far less detail than the parties and I've done so using my own words. I'm not going to respond to every single point made by all the parties involved. No discourtesy is intended by this. Instead, I've focussed on what I think are the key issues here.

Our rules allow me to do this. This simply reflects the informal nature of our service as a free alternative to the courts. If there's something I've not mentioned, it isn't because I've ignored it. I haven't. I'm satisfied I don't need to comment on every individual argument to be able to reach what I think is the right outcome.

Mental capacity

I recognise that the estate of Mr W considers that Mr W did not have mental capacity when he contracted with Toyota FS. Whether a person lacks mental capacity is a medical diagnosis as I already said in my provisional decision. Nothing I've seen in response to the provisional decision demonstrates there was a medical diagnosis that Mr W lacked mental

capacity at the relevant time. It follows I have no basis for saying the finance agreement is void or should be set aside by reason of Mr W lacking mental capacity when he contracted.

That said, Toyota FS has come at the point of mental capacity from a different angle. It has repeatedly mentioned that it finds it inconsistent that the estate of Mr W can say Mr W lacked mental capacity in November 2019 but had it in July 2020. The implication being that Mr W therefore must have had mental capacity in November 2019. The estate of Mr W has set out the circumstances under which Mr W signed the LPOA in July 2020, thinking perhaps that Toyota FS is disputing the legitimacy of the LPOA. But, for the reasons set out above, I don't need to deal with the question of what happened when Mr W signed the LPOA when looking at Mr W's mental capacity to contract with Toyota FS in November 2019.

Moreover, even if this point was relevant, which it is not, the OPG has written to Toyota FS telling it Mr W did have capacity when he signed the LPOA.

I can see this particular point, has become a contentious issue between the parties that is why I mention it here. But I'll underline again, the ins and outs of this shed no light on and are not relevant to, whether Mr W had mental capacity in November 2019.

Vulnerable consumer

The estate of Mr W has told us more about the behaviour of Mr S. Specifically, that against Mr W's wishes and while Mr W was confused Mr S who had been economically exploiting Mr W tried to get him to sign a LPOA making Mr S his attorney. I have no reason to think what the estate of Mr W says here about Mr S's conduct, is inaccurate. In the circumstances, I feel able to place no weight on the written statement from Mr S.

Moreover, the fact that Mr S tried to set up a LPOA in early 2020 does not persuade me that Mr W's vulnerability due to his mental health was likely to be obvious to P and Toyota FS in November 2019. I say this because, the estate of Mr W had already told this service that Mr W had good days and bad days at this point. And on his good days he seemed his normal self. I can't discount Mr W may have contracted with Toyota FS on a good day. In addition, in any event, the estate of Mr W has mentioned "*when speaking to my father he could easily have come across as understanding information provided to him at the time of discussion*", which is another reason for finding on balance when contracting with Toyota FS Mr W most likely showed no signs of his vulnerability due to his mental health. I also find it significant that Mr S took this action re the LPOA after the agreement was made. So even if Mr W was showing signs of vulnerability in early 2020 it does not mean this was the case in November 2019.

Mr W was able to pay the deposit. It seems he did this via a card payment using a card terminal where he would have to insert his PIN. The estate of Mr W tells us Mr W could not remember his PIN. However, I'm not persuaded by this. I find it unlikely that P knew and entered the PIN which is what the estate of Mr W seems to be saying. How would it have known the PIN? Just because Mr W was a long standing customer it does not follow that P would have known the PIN. Moreover this would have been very sharp practice indeed on the part of P and nothing I have seen suggests that P engaged in sharp practice here. Rather, I think it likely in the circumstances that Mr W entered his PIN. Further, I've not seen anything to show that Mr W's health condition prevented him from physically keying in his PIN in a card terminal.

I acknowledge that Mrs W thought she needed a "*bargaining tool*" and that is why she kept the car. However, this does not persuade me I should set aside the reasoning I set out in my provisional decision in relation to this point.

Toyota FS could have written off the debt at any time either before it sold the car or after. It did not need to wait for this service to make a decision on that issue. Especially since Toyota FS's response seems to indicate that regardless of what this service decided, as a minimum,

Toyota FS had already made up its mind that it was going to write off the debt and not pursue Mr W when he was alive or the estate of Mr W after his death.

I've already found that Toyota FS is entitled to keep the payment of 1 September, so I don't need to deal with Toyota FS's response any further.

I note Toyota FS's stance remains its affordability checks went far enough. I don't agree for the reasons I set out in the provisional decision. That is that the relevant rules say that the checks must be tailored to the individual in that they must be specific enough to demonstrate that most likely the consumer can afford repay in a sustainable manner. And for the reasons I set out in the provisional decision and repeat again here, I am not persuaded Toyota FS did that here. Nothing that Toyota FS has said in response persuades me that that reasoning should be set aside, and the finding reversed. That said my finding that the lending was affordable still stands.

I've not been persuaded by the responses to my provisional decision. It follows I've reached the same conclusions for the same reasons that I set out in my provisional decision and in this decision.

I want to say this, from a purely formal perspective it is the estate of Mr W bringing this complaint and it is the estate of Mr W I have to address in this decision. However, I am well aware that behind the estate of Mr W is Mrs W who is clearly a grieving daughter who feels strongly about this complaint. And whilst I cannot deal with Mrs W's feelings in the complaint due to the rules I must follow. I am aware of them and do acknowledge them.

My final decision

My final decision is that Toyota Financial Services (UK) Plc must write off the outstanding balance owed under the finance agreement and must not pursue the estate of Mr W for payment.

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mr W of Mr W to accept or reject my decision before 28 December 2022.

Joyce Gordon
Ombudsman