DRN-3946688

The complaint

Mr C complains Capital One (Europe) plc ("Capital One") has declined a claim he brought under section 75 of the Consumer Credit Act 1974 ("CCA").

What happened

Mr C paid a car dealership I'll call "S" £585 on his Capital One credit card as a part payment towards a car on 30 August 2022. The car cost £2,785 and Mr C paid the rest of the balance by debit card. The car was about eight years old with over 100,000 miles on the clock, but was described in an online advert as "drives very well". Mr C says he noticed some cosmetic wear and tear but he wasn't told about any faults and that on a 5 minute test drive everything seemed fine.

Shortly after driving the car away from the dealer's premises on 2 September 2022 to go and buy fuel, Mr C says a smell of burning oil became apparent and the engine seemed noisy. The next day he took the car to a branch of a well-known automotive company for a "health check". Mr C says he got a call from the company stating the car had a severe oil leak which they couldn't pinpoint the source of as it was "vast", a boost leak and a noise from the gearbox. This was followed up by confirmation in writing.

Mr C contacted S but he says they refused to do anything, citing a declaration that he'd signed at the point of purchase. Mr C then started the process of making a claim against Capital One under section 75 of the CCA. He was asked for more information, which he provided, and Capital One also asked S for further information. S responded, refuting Mr C's claims and providing a copy of the declaration he'd signed, stating the car was being sold "with faults". Capital One ultimately rejected Mr C's claim, noting that he'd been aware the car was faulty because he'd signed the declaration saying so.

Mr C complained about this decision but Capital One refused to change its mind, stating in a final response to the complaint that the declaration he'd signed took precedence over previous adverts, although it accepted there was a discrepancy in how the car had been described.

Dissatisfied with this response, Mr C brought his complaint to the Financial Ombudsman Service for an independent assessment. One of our investigators looked into the matter, concluding that the complaint ought to be upheld. She made the following findings:

- The declaration Mr C signed was of no legal effect because its exclusion of Mr C's consumer rights to purchase goods of satisfactory quality meant it was automatically unfair under the relevant legislation.

- Faults specifically brought to Mr C's attention prior to sale couldn't be used by Mr C to argue the car was not of satisfactory quality, but there was no evidence specific faults had been highlighted to him. The car did appear to be faulty and not of satisfactory quality.

Our investigator considered Mr C should get a refund of everything he'd paid for the car,

minus £1,000 he'd received for having had it scrapped, plus compensatory interest. She did not consider Mr C should get a refund of his car insurance or the cost of fuel as these were associated with his use of the car.

Mr C accepted our investigator's assessment, but Capital One did not. It reiterated that it thought the declaration Mr C had signed was important because it confirmed *"…he understood that the car was faulty and that he was buying a faulty car"* and that, as our investigator had said, Mr C couldn't use faults that had been brought to his attention prior to sale, to later bring a complaint about the vehicle.

As no agreement could be reached, the case has been passed to me to decide.

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.

Section 75 of the CCA allows consumers who have purchased goods or services using a credit card, to claim against their credit card provider in the event of a breach of contract or misrepresentation by the supplier of the goods or services, subject to certain technical conditions being met.

Nobody has argued that the technical conditions (relating to the price of the purchase and the parties involved in it) are not in place here, so I will not dwell on these. I will say only that having reviewed the evidence I conclude these conditions are in place. This means if there was a breach of contract or misrepresentation by S in relation to the car, that is something Mr C could claim against Capital One for by virtue of section 75 of the CCA, and so that is the main issue I need to consider.

Mr C was a consumer purchasing goods, meaning the relevant parts of the Consumer Rights Act 2015 ("CRA") would apply to his purchase. Under the CRA it is an implied term of a contract for goods that those goods will be "satisfactory quality", taking into account their description, the price paid, and other relevant circumstances. A consumer can reject and receive a full refund for goods which are not satisfactory quality, so long as they intimate this rejection within the first 30 days (or in other specified circumstances which aren't relevant for the purposes of this complaint).

Other relevant circumstances which might affect what is meant by "satisfactory quality" would include here the age and mileage of the vehicle. It would probably be fair to describe the car in this case as being somewhat "tired", having covered over 100,000 miles from new. What could reasonably be described as satisfactory quality would obviously be quite different for this car compared to a brand new one.

That said, in my view a car of even this advanced mileage would still not be expected to have serious faults at the point of purchase. There doesn't appear to be any dispute in this case that the car did have serious faults which became apparent within 24 hours of Mr C driving it off the dealer's forecourt, namely a severe oil leak and a boost leak, with further issues suggested by a noise from the gearbox. Although the evidence is a little limited I think there is enough for me to conclude the car was not of satisfactory quality and Mr C would ordinarily have had the right to reject it for a full refund.

This brings me to the reasons why Capital One (and S) have said Mr C cannot use the faults with the car as a reason to reject it. The first reason cited is section 9(4) of the CRA, which states a consumer cannot use any of the following to argue that goods are not of satisfactory quality:

"(a)[anything] which is specifically drawn to the consumer's attention before the contract is made,

(b) where the consumer examines the goods before the contract is made, which that examination ought to reveal, or

(c) in the case of a contract to supply goods by sample, which would have been apparent on a reasonable examination of the sample."

This was not a sale by sample, so subsection (c) is not relevant, and it's not been suggested that the faults ought to have been obvious to Mr C during the test drive, which discounts subsection (b). And while it's possible Mr C was alerted by the declaration he signed to the possibility of faults *in general*, no *specific* faults appear to have been drawn to his attention. So I don't think subsection (a) acts to restrict his ability to argue that the car was not satisfactory quality.

The declaration Mr C signed itself is the other piece of evidence Capital One has presented as key in making his claim invalid. Our investigator considered the declaration incorporated terms which would be considered unfair, so it was of no effect and didn't prevent Mr C from pursuing his case that the car was not satisfactory quality.

The Competition and Markets Authority ("CMA") published, in 2015, guidance on unfair terms in the context of the CRA. The CRA contains provisions for deeming terms of a consumer contract (or notices given to consumers) unfair. Terms or notices which are deemed to be unfair are not binding on consumers.

The CMA guidance stated that terms which deny consumers the right to receive goods which are of satisfactory quality are "blacklisted" and automatically considered unfair under the CRA. The following extract from the guidance is particularly relevant to Mr C's case:

"5.4.5 ***Second-hand goods****. Disclaimers are just as likely to be unfair where their use is restricted to second-[hand] quality or damaged goods, for example using the phrase 'sold as seen'. It is appropriate to warn the consumer when the standard of quality that can reasonably be expected is lower, but the law forbids the use of terms which disclaim responsibility for failure to meet any reasonable standard."*[1]

I've read the declaration Mr C signed, which reads as a broad attempt by S to disclaim any liability for any faults which might be present or develop in future with the car, along with any representations it had made earlier about its condition (for example, in the advert). It is in my view a variation of the kind of "sold as seen" disclaimer referred to in the CMA guidance and just as likely to be considered unfair, and therefore not binding on Mr C. I note Trading Standards has also been highly critical of such disclaimers and shares the CMA's view that they would not be effective or enforceable.[2]

I should say here that ultimately whether a term or notice is to be deemed unfair is a matter for a court to decide, but when determining what is fair and reasonable in all the circumstances of this case I must naturally consider what I think a court would have been likely to decide here. For the reasons I've explained, I think the declaration Mr C signed would be likely to be determined as unfair and not binding on him. This means the car still needed to be of satisfactory quality, which I've already concluded it was not. Mr C was therefore entitled to reject it and receive a full refund.

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[1] *CMA Unfair contract terms guidance: Guidance on the unfair terms provisions in the Consumer Rights Act 2015*, p.72

[2] https://www.businesscompanion.info/focus/car-traders-and-consumer-law/part-b-your-obligations-under-consumer-rights-act-2015-cra section 12. Accessed 7 March 2023.

Due to Capital One's connected liability under section 75 of the CCA, Mr C can seek a remedy from it instead of S, and its failure to honour his claim means it has not treated him fairly or reasonably.

My starting point is that Capital One should pay Mr C the equivalent of a full refund of the amount he paid for the car. But the car has now been scrapped and Mr C has received £1,000 for it, so it's fair that this is deducted from any money he is owed by Capital One. Regarding the insurance and fuel Mr C paid for, while it is perhaps an arguable point I agree with our investigator that these are things associated with Mr C's limited use of the car and which he did to some extent benefit from, so I make no award in respect of these items.

My final decision

For the reasons explained above, I uphold Mr C's complaint and direct Capital One (Europe) Plc to take the following actions:

A) Add together the payments Mr C has evidenced he made towards the car (£585 and £2,200) and then deduct the amount he received for scrapping it (£1,000).

B) To the total calculated in A), calculate 8% simple interest per year*, from the date Capital One wrote to Mr C declining his section 75 claim, to the date he receives the refund described in C) below.

C) Pay Mr C the total of A) plus B).

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 4 April 2023.

Will Culley
Ombudsman