

The complaint

Mr H is unhappy that a car he ordered through Yes Lease Limited ('YLL') wasn't provided. And, after he cancelled the order, YLL didn't refund the fee he paid.

What happened

Mr H contacted YLL, a credit broker, to order him a new car and arrange finance for this. On 20 July 2021, Mr H paid YLL a £300 fee and was given an estimated delivery date of around 14 weeks. So, Mr H expected the car to be delivered mid- to late-October 2021. However, the car wasn't ready on time and, in January 2022, he says he was told it would be another 24 weeks before the car was delivered.

As a result of this, on 20 March 2022, Mr H cancelled the order.

YLL said that, as the credit broker, they weren't responsible for the delays, as these were outside of their control. And, while they had already agreed to waive the £600 cancellation fee Mr H had agreed to, they said that the £300 broker fee wouldn't be refunded.

Mr H wasn't happy with this, and he brought his complaint to us for investigation.

Our investigator said that the delays to the delivery weren't something YLL were responsible for, and they'd provided Mr H with regular updates. Given this, she thought that YLL's offer to waive the cancellation fee was reasonable in the circumstances. And she didn't think they needed to do anything more regarding the delays.

With regards to the broker fee, the investigator referred to the Consumer Credit Act 1974 ('CCA'), specifically sections 155 and 173. She said that, while the terms Mr H had agreed to said the broker fee wasn't refundable, section 155 of the CCA said that (because Mr H hadn't entered into a regulated agreement within six months) YLL were only entitled to keep £5 of the fee. And section 173 said that, where YLL's terms were inconsistent with the CCA, then the provisions of the CCA made YLL's non-refund term void in these circumstances.

As such, the investigator said that YLL should refund the broker fee to Mr H, less £5, and pay statutory interest on this refund.

YLL didn't agree with the investigator. They said they'd *"completed the work as a broker to source the deal pay for the enquiry and order a vehicle for the customer ... we have undergone months of work at the cost to ourselves."* They explained that they offered to source Mr H an alternative car *"but as the deal on offer ... was extremely discounted at the time of ordering, the alternative vehicles that could have been supplied were more expensive to which the customer declined."* As such, they agreed to waive the cancellation fee.

YLL felt *"that we have done all that we are able to do as a finance broker to try and help [Mr H] and also be more than fair when he proceeded with the cancellation. I do not think that this is fair on a business that has spent a great deal of time and money during the order process for us to be penalised for trying to help ... should the outcome be the same, we*

would be inclined to issue a full cancellation fee to the customer to cover the costs and losses we have incurred because of the cancellation of the order.”

While the investigator acknowledged the position YLL found themselves in, she said she'd applied what the CCA said when reaching her outcome. As YLL remained unhappy with this, this 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've 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. YLL ordered the car for Mr H as an ancillary action to their credit broking activity – the car was only ordered by YLL as they were also arranging the finance for Mr H, so the two are intrinsically linked. So, as credit broking is a regulated activity, this is something we're able to look at.

When Mr H ordered the car through YLL, he paid a fee of £250 plus VAT (£300). The invoice for this fee clearly stated this is a broker fee. And the paperwork YLL supplied shows the delivery date of the car to be “12 – 14 weeks.”

The Vehicle Purchase Order that Mr H signed on 20 July 2021 specifies a Document Fee of £300 and says “*document fee/deposits are non-refundable. Cancellation charges may occur. Full T&C's attached.*” In signing the Vehicle Purchase Order, Mr H also agreed to YLL's terms and conditions. These say:

Information on “lead times” are estimates only and do not constitute an obligation to supply. [YLL] has no control or influence over manufacturer lead times and will not be held responsible for any losses or inconvenience caused because of a manufacturer delay.

With all orders a deposit may be required, you will be advised of the amount at the point of order. Once your order has been accepted any cancellation by you will result in the loss of your deposit/fee's and will incur additional charges from [YLL] of £600 including vat, in addition to this cancellation charge, additional charges may be payable to the manufacturer/supply dealer.

Furthermore, the Initial Disclosure Document says “*we may charge a processing fee of £300.00 including vat. The processing fee represents the cost incurred by [YLL].*”

Based on what I've seen, given that the amounts are the same, and Mr H only paid this amount once, what YLL separately refer to as a broker fee, document fee, and processing fee, are in fact one and the same fee. And it's not disputed that this represents YLL's fee for arranging the finance agreement and ordering the car.

It's also not disputed that, due to circumstances outside of YLL's control, there was a delay in the car being supplied to Mr H. While the terms and conditions make it clear that YLL have no liability for these delays, I've seen that, in an email dated 21 January 2022, when they explained that the delays in obtaining the car were outside of their control, YLL said that, if Mr H wanted to cancel, *"what we can do is waive the cancellation fee of £600."*

While Mr H didn't cancel the order in January 2022, he did so on 20 March 2022. And, upon this cancellation, YLL didn't charge him the cancellation fee. However, they didn't agree to refund the £300 broker/document/processing fee that Mr H had paid.

Section 155 of the CCA says that *"Subject to subsection (2A), the excess over £5 of a fee or commission for his services charged by a credit-broker to an individual to whom this subsection applies shall cease to be payable or, as the case may be, shall be recoverable by the individual if the introduction does not result in his entering into a relevant agreement within the six months following the introduction."*

Given that, as the car hasn't been supplied and I haven't seen that Mr H has entered into a relevant agreement within six months of the £300 fee being paid, I'm satisfied that section 155 of the CCA only allows YLL to keep £5 of the fee i.e. £295 should be refunded to Mr H. However, I also need to consider that the terms Mr H agreed to say the fee paid isn't refundable.

Section 173 of the CCA says *"a term contained in a regulated agreement or linked transaction, or in any other agreement relating to an actual or prospective regulated agreement, or linked transaction, is void if, to the extent that, it is inconsistent with a provision for the protection of the debtor or hirer or his relative or any surety contained in this Act or in any regulation made under this Act."*

The agreement Mr H signed with YLL is a linked transaction to the regulated agreement they were arranging to finance the car. As such, I'm satisfied that Section 173 of the CCA applies in this instance. This means that any of YLL's terms are void if they are inconsistent with the CCA. And the no refund term is inconsistent with Section 155 of the CCA. Which means that, in this instance, YLL's term is void and Mr H is entitled to £295 of the fee refunded.

This is not to say that I haven't considered YLL's comments about the perceived unfairness of them having to refund their fee to Mr H. However, their cancellation fee term accounts for this, and allows them to cover their costs involved. As such, I don't think that applying the terms of the CCA is therefore inherently unfair.

Notwithstanding this, I've also seen that, in this instance, YLL have chosen to waive the cancellation fee for Mr H. This was a business decision they were entitled to take, but it doesn't mean that they can now retrospectively apply this fee just because their non-refund term is inconsistent with the CCA and invalid. So, had YLL not chosen to waive the cancellation fee, they could fairly charge this, but I don't consider it would be fair or reasonable for them to retrospectively reverse this decision.

Putting things right

Based on the above, YLL should refund Mr H £295 of the £300 fee he paid, and apply 8% simple yearly interest on this refund, calculated from the date Mr H cancelled the order to the date of the refund.

HM Revenue & Customs requires YLL to take off tax from this interest. YLL must give Mr H a certificate showing how much tax they've taken off if he asks for one.

My final decision

For the reasons explained, I uphold Mr H's complaint. And Yes Lease Limited should follow my directions above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 13 July 2023.

Andrew Burford
Ombudsman