

The complaint

Mr P complains that Creation Consumer Finance Ltd (“Creation”) has treated him unfairly in relation to a loan he took out with it.

What happened

I set out below Mr P’s version of events and also Creation’s version of those same events

Mr P’s version of events

In February 2023 Mr P purchased an electrical item online from a third party retailer I will refer to as “J”. Mr P paid for the electrical item using a loan provided by Creation.

The item was meant to be delivered to Mr P and it was meant to be signed for. However, a third party delivery company that I will refer to as “D” left the item on the doorstep of his home, which is at the side of the property. Therefore the parcel was left in full view of the public footpath which runs past the house. Mr P thinks that as a result the parcel was stolen.

Mr P considers that because the item was not delivered to him in accordance with the express instructions he gave to J and in accordance with terms implied by law into the contract, then there has been a breach of contract.

Further, under Section 75 of the Consumer Credit Act 1974 (“Section 75”) Mr P thinks that he has a like claim against Creation as he does against J for these breaches of contract. Mr P considers that due to these breaches of contract Creation can no longer pursue him for the balance of the loan which he wants cancelled in any event.

Creation’s version of events

Creation says it was not a condition of the contract between Mr P and J that Mr P had to sign for the delivery. Rather, Mr P had agreed that the goods could be left unattended at his home. In particular, as part of the contract with J, Mr P designated a safe place for the delivery. Initially Creation told us that this safe place was the doorstep behind the side gate to the rear of Mr P’s home. D provided J with a photo which J sent to Creation. All three said at first that the photo showed the door at the rear of Mr P’s property.

Mr P did not answer the door when the delivery driver knocked. Therefore the delivery driver called Mr P, but Mr P did not reply to the call either. Therefore the delivery driver left Mr P a voicemail. Moreover, on that same day, Mr P was told of this successful delivery by text and by email. J told Creation it was only the day after the delivery that Mr P complained.

It followed that from Creation’s perspective there had been no breach of contract. Therefore it declined to uphold Mr P’s claim under Section 75.

What happened once the complaint came to us

Dissatisfied, Mr P complained to our service.

Once his complaint was with us Mr P responded to say that he had never nominated a safe place for delivery. And in any event D did not leave the parcel at the rear of the property, which is accessed by a gate, rather the photo shows the door at the side of the property. He did not get a voicemail from the delivery driver, but he did get a text.

Further, Mr P was at work at the time D said it had delivered the parcel. At first he thought the parcel might have been delivered to a neighbour. It was only the next day that he managed to speak to all the neighbours and found that none of them said they'd taken delivery of the parcel for him.

Mr P sent us photos showing that the spot where D left the parcel was where Mr P said it was left, which was the side door not the rear door. There is no gate protecting the side door. There is a gate protecting the rear door.

Creation also provided further information, it now said, Mr P had chosen a safe space option, this was his "rear porch", and this was where the parcel was delivered. Mr P had set this preference in the past in relation to previous deliveries. But it had taken this as permission to also deliver this parcel too, to that safe space and it was correct to do so (according to it). Creation added:

"On previous emails it states that [D] mentioned or had instructions for the parcel to be left on the back gate or to be handed on [sic] customer's hands, there's no instruction from the consumer for that to be the case. The parcel hasn't been left at the back of the property it was delivered on the rear porch, rear side door of the property."

"There was no signature required on delivery instructions if the customer wished for the parcel to be left on the back gate this should have been specifically requested at point of delivery."

"We are not upholding the customer's claim, we acknowledge this is not the customer's desired outcome. [D] has followed the customer's instructions."

One of our investigators looked into Mr P's complaint. Our investigator recommended that Mr P's complaint be upheld. The redress he recommended was:

Creation should:

- Take steps to end the contract and ensure that there is no further liability for Mr P moving forward.
- Refund any payments made by Mr P.
- Contact the credit reference agencies and remove all reference to the contract, so that it never existed; for clarity that means that all adverse information is removed which will put Mr P back in the position he was in before the order was first placed in February 2023.
- Pay Mr P £100 for the distress and inconvenience that he's experienced here.

Mr P accepted our investigator's recommendation, Creation did not. It outlined its reasons for its stance which I've set out below:

"We have received confirmation from [J], they have advised that [D] will not investigate this matter any further as they consider this claim as closed."

"Their position that the delivery was fully compliant remains the same."

Creation indicated that it had adopted J and D's position as its own. It told us that it had nothing further to add.

As Creation had rejected our investigator's recommendation and Mr P still wanted to proceed with his complaint, I was asked to take a fresh look at it.

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.

Mr P tells us it was an express term of his contract with J that he must sign for the delivery of the goods. Further, Mr P tells us that it was an implied term of his contract with J that the goods should have been delivered into his personal possession. Mr P also indicates that under the law it was also an implied term of his contract that the risk in the goods remained with J until they were delivered to him.

The parties seem to agree about what terms were implied. They merely disagree about whether the terms were breached. So I'll look at this part of the complaint first.

Mr P purchased goods using finance provided by Creation. Due to the type of finance that was used Mr P has the protection offered by Section 75.

The general effect of Section 75 is that if Mr P has a claim for misrepresentation or breach of contract against the supplier he can also bring a like claim against Creation.

Mr P is a consumer who purchased the goods from J who is a trader, the law implies certain terms into a contract of sale in these circumstances. In particular, the Consumer Rights Act 2015 ("CRA 2015") implies certain terms into the contract regarding delivery of goods, it also defines delivery and talks about where risk resides until the goods come into the physical possession of the consumer. Specifically, the CRA 2015 says:

"28 Delivery of goods

(1) This section applies to any sales contract.

(2) Unless the trader and the consumer have agreed otherwise, the contract is to be treated as including a term that the trader must deliver the goods to the consumer."

"delivery" means voluntary transfer of possession from one person to another"

Moreover, the CRA makes it clear that the goods remain at the trader's risk until they come into the physical possession of the consumer, or a person identified by the consumer to take possession of the goods.

Mr P and Creation disagree about whether the goods were delivered to him. 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.

During the course of the complaint, Creation has put forward a number of versions of the same events. First it told us that Mr P had contracted with J that it did not need to deliver the goods to him in person and get a signature, rather it could leave the goods in a safe space. But Creation has not sent any further information to show this happened.

Later and seemingly in contradiction to its first version of events, Creation said, in relation to previous deliveries Mr P had indicated a safe space where goods could be left, and this is the safe space that D used. This new stance suggests that Mr P did not specifically indicate a safe space for this individual delivery. Rather Creation suggests that J and D were entitled to assume, that as he'd agreed to use a safe space in the past he could be taken to have agreed to the use of this safe space in this instance too.

I'm not persuaded that Mr P did state any such preference in relation to his contract with J. I think if Mr P had told J this was what he wanted there would be an audit trail to show this. But I note that no such information such as Mr P's written instruction has been produced.

Moreover, even if Mr P had previously indicated that he had a safe space for deliveries in the past, I can't see how that would be relevant to this delivery. In other words, I don't see how expressing a preference in the past for unrelated deliveries means that Mr P entered into a binding everlasting agreement with J that it could deliver the goods to the safe space. I note also in any event Creation has not shown evidence to support the assertion that Mr P had nominated a safe space in the past.

Then Creation told us that the safe space was to the rear of Mr P's property behind the gate. But it sent us a photo of where the goods were left. This photo indicates the parcel was left at the side door not the rear door. Later, Creation then changed its stance to say the side door was the safe space and that is where the goods were left.

The inconsistencies in Creation's versions of events about what was agreed regarding delivery and where the goods were actually left, has impacted negatively on the weight I feel able to give to this information.

Moreover, even if I accepted, which I don't, that Mr P had nominated a safe space before and in relation to this contract too, I find it unlikely that Mr P would have agreed that the doorstep of the side door was that safe space. I say this because I'm satisfied that the doorstep of the side door was visible from the public highway. Moreover, the goods were expensive so I doubt that Mr P would have agreed to the goods being left unattended in such an exposed location.

I can see that in some instances leaving a parcel unattended at an address might constitute delivery for the purposes of the CRA 2015, even where no safe space was indicated. Although, I don't think if this is what happened here, it would constitute delivery in the very particular circumstances of this complaint. But that is not the argument that is being put here. Instead Creation tells us the parcel was delivered because D and therefore by extension J and Creation complied with Mr P's instructions which were a term of the contract with J. And I've already set out above why I don't find that likely.

Further, I am not persuaded that on balance the parcel was left at all, given all of the inconsistencies in the evidence provided by Creation.

I don't find it significant that Mr P did not complain to J until the day after D said it delivered the parcel. I say this because I'm persuaded by what Mr P says about this.

For all of these reasons I don't agree that the goods were delivered to Mr P. It follows I'm satisfied that there was a breach of contract, and it is fair and reasonable therefore to say that Mr P must be treated as if he never entered into his contract.

I don't need to look at whether I think it was an express term of the contract that Mr P had to sign for the delivery. I say this now because even if I found that it was, the remedy I could order would be the same I'll order because I think the implied contractual terms were breached. I've not seen the contract of sale. Neither has Creation commented on this point beyond saying it was not an express term of the contract without explaining why. But given the expense of the goods and the proximity of the side entrance (which seems to be the main entrance) to a public highway, if I had to make a finding about this, I would find it more likely than not it was an express term of the contract that the delivery had to be signed for. I'd also find this express term had been breached.

I recognise that the inconsistent information has been provided by J and D. Creation seemingly has just acted as a post-box without interrogating the logic of the arguments J and D put forward. It is fair and reasonable though to expect more of Creation here when it was in the course of looking at the underlying financial service it provided. I think its actions have caused Mr P unnecessary distress and inconvenience for which £100 is an appropriate award.

My final decision

My final decision is that Creation Consumer Finance Ltd must:

- Cancel the finance agreement with nothing at all owed by Mr P under this agreement.
- Refund any payments Mr P has made towards the finance agreement. It must add interest to those payments at the rate of 8% simple per year. The interest to run from the date of payment until the date of settlement.

- Ask the credit reference agencies to remove any information that it or its agents have asked to be registered on Mr P's credit file about the agreement. For the purposes of Mr P's credit file it must appear as if he never entered into this agreement.
- Pay Mr P £100 for distress and inconvenience.

It must pay the compensation within 28 days of the date on which we tell it Mr P accepts my final decision. If it pays later than this it must also pay interest on the £100 from the date of my final decision to the date of payment at the rate of 8% simple per year.

If it considers it is legally required to deduct income tax from the interest I've mentioned above, it must send a tax deduction certificate with the payment so that Mr P can reclaim the tax if he is able to.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 5 October 2023.

Joyce Gordon
Ombudsman