

The complaint

Miss L is unhappy with Nationwide Building Society's response to a breach of contract claim she's made under section 75 of the Consumer Credit Act 1974 ("section 75").

What happened

I recently issued a provisional decision setting out the background to this complaint and how I thought it best resolved. I've reproduced my provisional conclusions here, which form part of this decision.

"Miss L bought a used car from B, a third party trader, paying in part using her Nationwide credit card. At the time of purchase, the car was a little over nine years old and had covered around 46,000 miles. A few months later, after Miss L had done another 2,000 miles she began to experience problems with the car. It was suffering intermittent engine speed when in low gear. She took the car to a local dealership "Y", who carried out a service and fault investigation, diagnosing a possible fault with the throttle body. A replacement part was recommended but not at that stage fitted, as it needed to be ordered.

A month later the car displayed a warning light and Miss L noticed a loud metallic noise from the engine. A mechanic told her this sounded like a loose timing chain and she contacted B about the problem. Miss L says B told her she would need to pay for the car to be transported to it and that it would charge around £1,500 to change the timing chain. Miss L took the car to a local garage "J", who confirmed the timing chain diagnosis and replaced it at a cost of £950. However, the noise persisted the following day and J said a new engine would be required. This was supported by the conclusions of an RAC inspector who tested the car.

The car was recovered to B, who undertook its own inspection. It said the noise and damage was due to incorrect fitting of the timing chain, and that it was therefore not responsible for the problem. Although Miss L pointed out that the problem with the timing chain occurred before she took the car to J, B maintained its stance. The car has been off the road since.

Miss L made a section 75 claim to Nationwide, saying that the car was not of satisfactory quality as required by the Consumer Rights Act 2015 ("CRA"). In particular, she noted that the manufacturer had issued a recall in certain territories (although not in the UK) over the timing chain, and that the maintenance schedule indicated the chain should be replaced at 180,000 miles. Miss L felt this pointed to a lack of durability.

Nationwide didn't uphold Miss L's claim. It said it couldn't be sure whether the problem with the engine was caused by the work J had carried out. In order to proceed with the claim, Nationwide told Miss L she would need to get an independent report to specify the problem, its likely cause and when that would have arisen. It also suggested that Miss L could ask the Motor Ombudsman to investigate, as B was registered with that service.

Miss L complained to Nationwide about its response to her claim. She referenced the body of evidence she'd already submitted. But Nationwide wasn't willing to change its position and so Miss L contacted us.

Our investigator noted that the fact there was a fault with the car didn't necessarily mean it was defective when B supplied it to Miss L, which was relevant to the CRA requirement. He didn't think the available evidence was sufficient to determine whether the fault was present at the point of supply, and that it wasn't a matter of regular wear and tear given the age of the vehicle. He didn't recommend the complaint should be upheld.

Miss L didn't accept the investigator's conclusions and has asked for this review.

My provisional findings

Miss L's claim against Nationwide is founded in section 75 of the Consumer Credit Act, which applies here because she used her credit card towards the car purchase. One effect of section 75 is that, where an individual buys goods from a supplier using credit provided under pre-existing arrangements between the lender and the supplier, that individual can bring a claim for breach of contract or misrepresentation against the lender in the same way they could against the supplier. The supplier here was B; Nationwide was the lender.

The CRA implies certain terms into consumer contracts for goods, digital content and services. One of those implied terms is that goods will be of satisfactory quality. Whether goods are of satisfactory quality is determined by reference to whether they meet the standard a reasonable person would consider satisfactory, taking account of matters such as price and description, and includes (among other things) freedom from minor defects and durability.

Miss L's claim is that the car B supplied to her failed to meet this requirement and that this amounted to a breach of the term implied into the contract. That she can bring that claim against Nationwide isn't in dispute between the parties.

Having the right to bring a claim is not the same as saying that claim will be successful. The respondent is usually entitled to defend a claim brought against it. The question for me to address is whether, in light of the available evidence, Nationwide is treating Miss L unfairly in the way it has responded to her claim.

The claim doesn't, as far as I'm aware, include the initial fault identified with the throttle body. Although that was the original problem Miss L identified, it wasn't the reason she took the car in to B. For the sake of completeness, I note that the throttle body is a part that can become clogged over time which impairs its effectiveness. It's possible this problem was down to the age and prior use of the vehicle and it could well fall into the category of ordinary wear and tear rather than being indicative of any underlying defect. I don't discount the possibility that the problem could be connected to the other problem Miss L experienced with the timing chain, but I don't consider it fundamental to the outcome of this complaint.

According to Y's records, when Miss L took her car to Y for investigation of this problem, it undertook some additional activity. First, it carried out a service on the vehicle, including replacing the existing engine oil and filter. Y also checked for any outstanding recalls (there were none). Miss L's evidence is that within a month and a few hundred miles of this service, the engine warning light illuminated and the noise – identified as a loose timing chain – became apparent. It seems possible the timing chain issue could have been a latent defect that lay undiscovered until after the oil was changed.

The warning light and noise appeared before Miss L took her car to J to have the timing chain and tensioner replaced. It was also within six months of the date B supplied the car to Miss L. That there was a fault with the timing chain is clear; this was a view taken by Miss L's mechanic and by J. Neither B nor Nationwide has offered evidence to suggest the timing

chain was at the correct tension or that the noise was due to any other intervening cause since Miss L took ownership.

Given the manufacturer's guidance that the timing chain doesn't generally require replacement at 48,000 miles, this might suggest various possibilities - possibly that the part was defective, or that it points towards a lack of maintenance to ensure the chain was suitably tensioned. There are other potential explanations, but the case Miss L has put forward is in my view enough to suggest this was not a matter of ordinary wear and tear.

The presumption under the CRA is that where a lack of conformity to contract exists at any time within six months of delivery to the consumer, the goods are deemed not to have conformed at the point of supply. This is a rebuttable presumption, but as I've already noted, the evidence Nationwide has referenced doesn't establish that the fault didn't exist when Miss L took delivery of the car. Nor do I find it persuasive that the fault only arose after the work J carried out.

In light of the clear way in which the CRA places this obligation on the trader rather than the consumer, I find it difficult to understand why B didn't investigate when Miss L first raised the problem, or why Nationwide subsequently insisted that Miss L obtain an independent report into the fault. Given the timescale at play in this case, it was incumbent on Nationwide to establish that the car was of satisfactory quality when supplied, not the other way round. It follows that I don't find that Nationwide dealt with Miss L's claim correctly when she made it.

There has been work carried out to the car since delivery. It is possible that work has made it more difficult to establish the root cause of the problems with the car, though I understand all parts removed from the vehicle were made available for inspection. I don't think Miss L should be criticised for attempting to get the problems investigated and repaired. She attempted to get B to do so first, but went elsewhere because of what she understood B would charge for this. In doing so, I'm satisfied she was taking what I consider reasonable steps to mitigate the impact of being without the use of the car.

Having considered the arguments put forward by both parties, I'm not currently minded to conclude that Nationwide has treated Miss L fairly in taking the position it has. She provided a significant amount of evidence in relation to her claim and the actions she took. Nationwide doesn't appear to have placed much weight on that evidence when considering its potential liability under section 75. Instead, it said she needed to provide more evidence, even though that was more properly its responsibility if it was to defend her claim. Based on what I've seen, Miss L's evidence is sufficiently conclusive that Nationwide should have either accepted her claim, or made rather more effort to obtain evidence to support why it wasn't accepting it. Because it did not, I propose to uphold the complaint.

It's possible even at this stage that the car could be examined to see if it is possible to establish the root cause of the timing chain fault and whether it was present at point of supply. But I'm not inclined to say that this represents an appropriate way to resolve Miss L's complaint. She has changed her position significantly in the two years since the problems arose with the car. She's bought another vehicle, which is entirely understandable given that the original car has been unusable.

With this in mind, I intend to require Nationwide to take the following steps:

- 1. recover the car from Miss L at no cost to her, with Miss L relinquishing all ownership rights to the vehicle*
- 2. pay Miss L £5,495 representing the purchase price of the car*

3. pay Miss L £943.88 to cover the cost of the replacement timing chain and associated work undertaken by J

4. pay interest on the sums in 2. and 3. at a rate of 8% simple annually from 22 July 2022 (being the date on which I consider it reasonable that Nationwide should have taken different action in response to Miss L's claim) until the date it pays this settlement. If Nationwide deducts tax from this interest, it should provide Miss L with the appropriate tax deduction certificate, should she ask for one

5. pay Miss L £400 in recognition of the additional costs, time and trouble to which she's been put in dealing with matters

I invited both parties to let me have any further comments they wished to make in response to my intended conclusions.

Response to my provisional decision

Miss L accepted my findings and proposed resolution. But Nationwide didn't agree. It said:

"We've carefully considered your comments and are unable to accept the view you have reached for the following reasons:

There have been a several problems identified with the vehicle Miss L purchased. Initially, there was said to be a fault with the throttle body, although we gather this wasn't replaced. Next, it was said to sound like a loose timing chain. This was subsequently changed by a third-party garage 'J', however it was later explained the vehicle would need a new engine.

When the car was returned to B, it was explained that the continued problems the car experienced were in fact due to the incorrect fitting of the timing chain by J.

Miss L had a third-party inspect and carry out repair work to the vehicle rather than B that supplied it, meaning B hadn't their right to repair before J's involvement.

The vehicle continued to have issues after being inspected by J, which means we can't draw a direct line that B is in breach of contract, that Nationwide are jointly liable with for any faults with the car.

Miss L herself, explained J hadn't done a good job, and so should Nationwide have accepted the claim, it is likely it would be covering for mistakes made by J.

Without a report to clarify what the issues were before it was taken to J, it hasn't been established that B is in breach of contract that would make Nationwide jointly liable under Section 75."

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.

In my provisional decision I set out the chain of events. I made particular note of the fact that the problems Miss L experienced had already begun before she took the car to J. A local mechanic had diagnosed the likely cause as a loose timing chain. I further noted that before she went to J, Miss L had first approached B, who told her that she would need to pay for the car to be transported to it and for any repair that was needed. And when it undertook the repair, J had warned Miss L that replacing the chain might not be enough to address

damage already done.

It's disappointing that Nationwide hasn't mentioned these key points in its response. Had it done so, Nationwide might have had cause to reconsider the arguments it has sought to make (which are effectively reiterations of its previous stance). Given the chain of events I can't accept the contention either that the problems with the car are down to work carried out by J, or that B wasn't given the opportunity to investigate and put things right prior to J's involvement. Neither argument is supported by the facts of the case, which Miss L carefully documented.

While a report is often useful in establishing the existence and underlying cause of a fault, it's not the only means of establishing whether there's been a breach of contract. The background circumstances and other evidence are also relevant considerations. Further, as I said in my provisional decision, the car has been available for inspection. If Nationwide considered it necessary to determine the claim outcome, it had ample time to arrange for such a report.

I should further clarify the point Nationwide has sought to make about B's 'right to repair'. The right to repair is a breach of contract remedy available to a consumer under section 23 of the CRA, rather than a right afforded to a trader whose goods don't conform to contract. S23(2) says:

"If the consumer requires the trader to repair or replace the goods, the trader must—

(a) do so within a reasonable time and without significant inconvenience to the consumer, and

(b) bear any necessary costs incurred in doing so (including in particular the cost of any labour, materials or postage)."

When Miss L approached B to report the problem with her car, she was doing so because she didn't think it was of satisfactory quality. An independent mechanic had already suggested a problem with the timing chain as a likely cause. Miss L contacted B within six months of taking delivery. So it was incumbent on B to establish that the fault the mechanic had identified was not present or inherent when it supplied the car.

I've seen nothing to suggest that B undertook to inspect the car when Miss L contacted it, in order to provide an effective rebuttal of the CRA presumption that faults arising within six months are deemed to be present at the point of supply. If B instead decided to tell Miss L that she would need to incur costs in order for it to perform this obligation, then that can hardly be said to be Miss L failing to give B the opportunity to rectify the fault. And B's response to Miss L didn't indicate that it would bear the costs of transportation or of any repair. As I've previously said, I'm satisfied that in light of B's stated position, Miss L acted reasonably in taking the car to J for further diagnosis and attempted repair.

Taking all of this into account, I don't find Nationwide's further submissions sufficiently persuasive that I should depart from the findings or remedy I proposed in my provisional decision.

My final decision

My final decision is that I am upholding Miss L's complaint. To settle it, I direct Nationwide Building Society to take the following steps, within 28 days of receiving Miss L's acceptance:

1. recover the car from Miss L at no cost to her, with Miss L relinquishing all ownership rights to the vehicle

2. pay Miss L £5,495 representing the purchase price of the car
3. pay Miss L £943.88 to cover the cost of the replacement timing chain and associated work undertaken by J
4. pay interest on the sums in 2. and 3. at a rate of 8% simple annually from 22 July 2022 (being the date on which I consider it reasonable that Nationwide should have taken different action in response to Miss L's claim) until the date it pays this settlement. If Nationwide deducts tax from this interest, it should provide Miss L with the appropriate tax deduction certificate, should she ask for one
5. pay Miss L £400 in recognition of the additional costs, time and trouble to which she's been put in dealing with matters

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss L to accept or reject my decision before 4 October 2023.

Niall Taylor
Ombudsman