DRN-4365970

The complaint

Mr B is unhappy that a car he ordered through Applied Leasing Ltd ('AL') wasn't provided. And, after he cancelled the order, AL didn't refund the fee he paid.

What happened

In December 2022, Mr B placed an order with AL, a credit broker, to lease a new car and arrange finance for this. He paid a £250 holding deposit and a £360 service fee. AL initially told Mr B that the car would be delivered within three months. However, in March 2023, AL told him this wouldn't happen, and he was given an updated estimated delivery date of late May or early June 2023. Mr B said he had no confidence in the delivery dates he'd been given, and he asked to cancel the agreement.

AL didn't think that, as the credit broker, they were responsible for the delays, as these were outside of their control. And, while they agreed to cancel the order, they said their fees wouldn't be refunded. Mr B wasn't happy with this, and he brought his complaint to the Financial Ombudsman Service for investigation.

Our investigator explained why we had the jurisdiction to consider Mr B's complaint. He also said that the agreement Mr B signed included a £250 cancellation fee. So, he thought that AL were acting reasonably by charging this.

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

As such, the investigator said that AL should refund the service fee to Mr B, less £5, and pay statutory interest on this refund.

AL didn't agree with the investigator. They said the £260 service fee is chargeable for *"the provisions of Sourcing, Ordering and delivering the vehicle, not facilitating the Credit Agreement."* While they acknowledged that they hadn't delivered the car to Mr B, they said that *"the delivery would've taken place, despite manufacture delays"* if the order hadn't been cancelled by Mr B.

AL also explained that they've since updated their terms, which now breaks down their fee. And, given this, they think that a refund of £120 including VAT would be reasonable.

However, AL went on to say that we'd previously said that credit broking wasn't a regulated activity, so didn't fall within our jurisdiction to consider. They said that an industry trade body also confirmed to them that this was the case. So, they think this contradicting view is mis-leading and unclear.

Because AL didn't agree with the investigator, this 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.

Firstly, I'd like to address AL's comments about whether we can consider this matter. While they've referred to another decision we made, and provided an extract of this, I want to make it clear that we consider every case on its own merits, based on individual circumstances, facts, and evidence. As such, while we might decide that, given certain circumstances, we're unable to consider one case about a credit broking fee, it doesn't necessarily mean that we're then unable to consider *every* case about credit broking fees.

In this instance, AL ordered the car for Mr B as an ancillary action to their credit broking activity – the car was only ordered by AL as they were also arranging the finance for Mr B, so the two are intrinsically linked. And, as credit broking is a regulated activity, I'm satisfied that the CCA applies in this instance, and this is something we're able to look at.

When Mr B ordered the car through AL on 17 December 2022, he paid a £250 holding deposit and a service fee of £360. The Leasing Broker Service Agreement, dated 12 December 2022, states the service fee was chargeable to *"source, order and arrange delivery of the vehicle and does not represent or guarantee an acceptance of finance."*

Term 6.2 of AL's terms and conditions also says:

> *"If the Customer for any reason … wishes to terminate the Contract 14days after the 'Commencement Date' they must inform AL in writing and will incur an administration charge of £250 which will be satisfied by the forfeit of the 'Holding Deposit', in addition AL reserves the right to retain the full 'Sourcing Fee'."*

I'm satisfied, and it's not disputed, that the sourcing fee referred to in the terms and conditions and the service fee referred to in the service agreement are one and the same.

It's also not disputed that, due to circumstances outside of AL's control, there was a delay in the car being supplied to Mr B. The order form stated the car's availability as being *"March 2023 (Anticipated Delivery Date, NOT Guaranteed)."* But in March 2023, Mr B was told the car was still awaiting a build slot, and the anticipated delivery date was now late May or early June 2023. As a result of this, Mr B cancelled the order.

The terms Mr B agreed to are clear in that cancellation of the order after 14-days would incur a £250 charge, and this is collected by way of him forfeiting the holding deposit. As this is a separate charge to the fees Mr B paid upon order, then I'm satisfied that AL are reasonable to charge this. And I won't be asking them to waive this fee.

While Mr B cancelled the order within six months, I've considered whether the car was likely to be provided to him within six-months of the order, as this timescale is relevant to the CCA.

Mr B placed his order and paid the fees to AL on 17 December 2022. As such, the six months expire on 17 June 2023. In the update that AL provided to Mr B in March 2023, he was told the car had an anticipated delivery date of a few weeks before the six-month timescale expired. But I've noted this was an anticipated date, and not a guaranteed date. Given the reasons AL gave for the initial delay – Brexit, Covid-19, and the semiconductor shortage - and that these are still factors which would affect the supply of new cars, I'm satisfied that it's more likely than not that the car wouldn't have been supplied to Mr B by 17 June 2023 had the order not been cancelled.

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 B has entered into, or was likely to enter into, a relevant agreement within six months of the £360 fee being paid, I'm satisfied that section 155 of the CCA only allows AL to keep £5 of the fee i.e., £355 should be refunded to Mr B.

However, I also need to consider that the terms Mr B agreed to say the fee paid isn't refundable and that *"AL reserves the right to retain the full 'Sourcing Fee'."*

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 B signed with AL 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 AL'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, AL's term is void and Mr B is entitled to £355 of the fee refunded.

This is not to say that I haven't considered AL's comments about their subsequent change in terms which would mean that Mr B would've been entitled to a £120 refund had he signed these terms. But, in this instance, he wasn't offered these terms. And I don't think it's reasonable for AL to now apply them retrospectively.

As such, I don't think that applying the terms of the CCA is therefore inherently unfair.

Putting things right

Based on the above, AL should refund Mr B £355 of the £360 fee he paid, and apply 8% simple yearly interest on this refund, calculated from the date Mr B cancelled the order to the date of the refund.

HM Revenue & Customs requires AL to take off tax from this interest. AL must give Mr B 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 B's complaint. And Applied Leasing Ltd should follow my directions above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 2 November 2023.

Andrew Burford
Ombudsman