

The complaint

Mr F complains about a car he acquired with finance provided by Creation Consumer Finance Ltd.

What happened

In August 2022, Mr F entered into a regulated hire purchase agreement with Creation to pay for a used car. The car was four years old, its cash price was £17,980, and according to the agreement its mileage was 34,568 miles. Its MOT history shows that it had passed its MOT test in June 2022 with a mileage of 33,518. It had been serviced in the same month.

In December 2022 the car broke down. It was repaired by replacing a drain plug gasket. However, in May 2023 the car broke down again. Mr F complained to Creation that he had been sold an unroadworthy car, and that the dealership he had bought it from was denying that it had sold it to him. Meanwhile, the repairs were carried out at a cost of £1,791.

In September 2023, the car broke down again, and Mr F was told that he would need to replace the engine. He complained about that, and he also complained that the car had failed its MOT test in May 2023.

Creation told Mr F that it was his responsibility to provide expert evidence showing that the breakdown was the result of a defect which had been present at the point of sale. Without such proof, it would not accept responsibility. It did not uphold the rest of his complaint either. Meanwhile, Mr F had already brought this complaint to our service. (He later added that the odometer was not accurate.¹)

Our investigator did not think that Mr F had proved that the car had been defective at the point of sale. She pointed out that the car had already been four years old when he'd bought it, and that he had driven it for over 5,000 miles before the problems started, so she thought the problems had arisen through subsequent wear and tear. However, she thought that Creation had failed to explain to Mr F in May 2023 that it was his responsibility to obtain evidence to prove that the car had been faulty when he got it. She said Creation had waited six weeks to follow matters up with the dealership, and Creation had failed to give Mr F its final response within eight weeks. As Mr F had said that this had caused him stress and the car had developed further problems in the meantime, the investigator recommended that Creation pay him £200 for his inconvenience.

Neither party accepted that opinion, so the case was referred for an ombudsman's decision. I wrote two provisional decisions, which read as follows.

My first provisional decision

I've considered all the available evidence and arguments to decide what's fair and reasonable

¹ In another decision, I ruled that the complaint about the odometer was not within our service's jurisdiction, because Creation had not had an opportunity to consider it. But that does not mean it is inadmissible in evidence.

in the circumstances of this complaint.

Under the Consumer Rights Act 2015, it was an implied term of the hire purchase agreement that the car would be of satisfactory quality on the date it was delivered to or collected by Mr F. If the car was not of satisfactory quality at that time – having regard to its age, mileage and price at the time – then Creation would be liable for that. But Creation is not liable for any defect which is discovered afterwards, unless that defect was already present all along. When a defect is discovered within six months, it is presumed to have been present all along, unless Creation can prove otherwise. But when a defect is discovered more than six months later, it is for Mr F to prove that it was present when he acquired the car.

It can therefore be presumed that the drain plug gasket which had to be replaced in December was faulty when Mr F acquired the car. However, a drain plug gasket failing on a four year old car is likely to be ordinary wear and tear, and so I would not consider that to mean that the car was not of satisfactory quality when the car was delivered or collected.

The breakdowns in May and September 2023 were beyond the six month threshold, and so there are presumed to be the result of new defects, for which Creation is not liable, unless Mr F can prove otherwise.

The roadside recovery service produced a brief report about each time it attended. The May report says that there was an intermittent multiple misfire, which was attributed to a possible faulty cam and crankshaft position sensor. It recommended having this diagnosis verified in a garage. The garage to which the car was towed produced an invoice, which confirmed the sensor fault. Several other components needed to be replaced to enable the car to pass its MOT test, which was carried out at this time.

In September, the roadside recovery service found that the cam belt had failed. The garage emailed Mr F to tell him that the entire engine would have to be replaced.

None of this evidence addresses how or when these problems arose. I note that a cam belt should be replaced around every four or five years, and this cam belt failed at five years, so it could easily be a wear and tear issue. On balance, I don't think Creation acted unfairly by declining to take responsibility for the car breaking down, or for telling Mr F that he needed to obtain expert evidence to support his claim (on receipt of which, Creation undertook to re-evaluate his claim).

I have considered the point that Creation did not tell Mr F to obtain expert evidence until September 2023, and that it could have told him this in May. However, I don't think this makes any difference to the outcome, because after Mr F was told this, he still didn't get expert evidence. So I doubt that he would have obtained any in May, if he had been told to then.

I am therefore currently not persuaded that Creation should pay Mr F the £200 that was recommended by my colleague.

Responses to my provisional decision

Creation accepted my provisional decision; Mr F did not. He said that the drain plug gasket was not the only part of the car that had failed in December 2022; he said that all of the problems that had been present in May 2023 had been present in 2022, and that he had reported them to Creation at the time – within six months of acquiring the car. He said that a fault code had indicated that the problems were caused by the crankshaft position sensor failing.

He also said a sensor should last for 100,000 miles, so it should not have failed so soon. This was unlikely to be wear and tear.

Mr F also denied that he had driven 5,000 miles since getting the car. He reiterated that Creation had not told him to get independent evidence until September 2023.

My second provisional decision

I have seen no evidence that the cause of the breakdown in December 2022 was because of the crankshaft position sensor failing, or that any of the problems in 2022 had anything to do with the breakdown in May 2023. So I remain of the view that the burden of proving that the car was faulty at the point of sale lay with Mr F, and that Creation was entitled to deal with his claim on that basis.

However, I agree with Mr F that a crankshaft position sensor should not fail after only less than 40,000 miles. (The job card from the garage which repaired the car in May 2023 gives the mileage as 39,655.) A crankshaft position sensor is expected to last for 100,000 miles, or ten years. So this makes it less likely that the sensor failed due to simple wear and tear. It may have been defective all along. On the balance of probabilities, I am currently minded to find that it was.

Creation was entitled to one attempt to repair the car, so Mr F was not entitled to reject the car in May. But Creation is liable for the cost of the May repair, which was £1,791:96. So I am minded to order Creation to refund that amount to Mr F, with interest.

I have not seen evidence to show that this is what caused the cam belt to fail. So I remain of the view that Creation is not liable for what happened in September, and that Mr F is not entitled to reject the car. If I am provided with evidence showing that these issues are linked, I will reconsider this.

My revised decision is that I currently intend to uphold this complaint, and to order Creation Consumer Finance Ltd to pay Mr F £1,791:96, plus simple interest on that amount at the rate of 8% a year from 20 May 2023 to the date of settlement.

Responses to my second provisional decision

Creation did not respond to that decision. Mr F did, and he referred to an email which the repairing garage had sent to him on 11 September 2023, and he asked me to take it into account.

(Mr F also said that he had made several attempts to terminate the hire purchase agreement, but Creation had not allowed him to. That is something he would need to raise as a new complaint; I cannot deal with it as part of this complaint.²)

My findings

I have seen the 11 September 2023 email before, as Mr F had provided it to us in November 2023. I have read it again to see if I had missed anything, but all it says is that the car was towed to the garage with a possible engine issue, and that the garage had found that there was internal engine damage and that the entire engine would have to be replaced. This is what I said in my summary of the evidence in my original decision.

² But I take this opportunity to remind Creation of its obligations under sections 99 and 100 of the Consumer Credit Act 1974.

For completeness, I will add that the email also says that the engine had not failed because it had been poorly maintained. So for the avoidance of any doubt, there is no suggestion that the engine was damaged because Mr F did anything wrong. But that does not mean that he automatically wins his complaint. It still remains the position that I can only uphold this complaint if Creation provided him with a car that was of unsatisfactory condition at the point of sale.

The evidence is clear that the roadside recovery service in September 2023 found that the cam belt had failed. Nothing in the garage's email contradicts that. The cam belt failing would certainly cause extensive damage to the engine. So I remain of the view that the car broke down in September because the cam belt failed, and that this was the result of wear and tear, because the belt was five years old. Nothing in the email to which I have referred contradicts that, or says anything about the reason why the cam belt failed.

There is therefore no reason for me to depart from the findings I made in my last decision, and so I confirm them here.

My final decision

My decision is that I uphold this complaint in part. I order Creation Consumer Finance Ltd to pay Mr F £1,791:96, plus simple interest on that amount at the rate of 8% a year from 20 May 2023 to the date of settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 30 August 2024.

Richard Wood
Ombudsman