

The complaint

Mr N complains about the way Nationwide Building Society dealt with a claim he sought to raise with it in connection with a used car he bought. Mr N used his Nationwide credit card to make part-payment for the car along with the cost of a warranty on the vehicle.

Background

I recently issued my provisional conclusions setting out the events leading up to this complaint and how I thought the dispute should be resolved. I've reproduced my provisional findings below, which form part of this final decision:

What happened

The background of events leading up to this complaint are already well-rehearsed, having been set out by our investigator and one of my ombudsman colleagues. The circumstances don't appear to be in dispute, so for reasons of brevity I'll simply summarise those events here.

Mr N entered into a contract with a car dealer "V" to buy a car. The cash price attached to the car was £21,000. He paid £500 deposit using his Nationwide credit card, and part-exchanged a vehicle to the remaining value. Mr N also paid £635 for a warranty on the car he was buying. All of Mr N's purchase correspondence with V was conducted by telephone, with V delivering the car to him on 25 November 2022.

Unfortunately, soon after taking delivery Mr N found issues with the car that led him to look to return it to V. He believed he was entitled to do so and receive a full refund on the basis he'd entered into a distance contract. V disputed that this was the case. It also declined Mr N's efforts to reject the car as being not of satisfactory quality as set out in the Consumer Rights Act 2015 ("CRA").

Mr N turned to Nationwide to pursue the matter under the connected lender liability provisions of section 75 of the Consumer Credit Act 1974 ("section 75"). Nationwide credited Mr N's account with the sums he'd paid by card. It proposed arranging to repair the issues Mr N had identified with the car and agreed this with Mr N as a way forward.

During those repairs, an oil leak was discovered. Having already started down the road of repair, Nationwide said it would cover this additional repair cost.

In total Nationwide credited Mr N with £4,136.86, which was the cost of the repairs Mr N paid on 26 August 2023. It also paid him £50 compensation for an initial delay he experienced when dealing with his claim. Following our initial review, Nationwide agreed to our recommendation that it increase this amount by £250, considering the inconvenience to which Mr N was put.

Mr N remains unhappy with the steps Nationwide took in response to his claim. He says, again in summary:

- Nationwide should have allowed him to exercise his right to return or reject the car,

whether under distance sales legislation or under the CRA. He should have been offered the choice of rejection or repair, but Nationwide had only proposed repair.

- As far as he was concerned, he'd entered into a distance contract with V. It was unfair to expect him to know how the relevant legislation¹ applied to the arrangements he had with V. This was a distance sale conducted over the phone, without him ever attending V's premises or (to the best of his knowledge) meeting any of V's staff.
- The card payments Nationwide had credited to him shouldn't count towards the cost of repairs carried out; and
- He sold the car in February 2024 for £16,490, which was a significant loss to him. During his period of ownership he also incurred associated costs of taxing and insuring the car, which he wouldn't have had to pay if he'd been permitted to reject the car. Nationwide should reimburse him, both for the depreciation and these costs

What I've provisionally 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.

As I understand it, Mr N was at all times acting as a consumer; that is, wholly or mainly outside his trade, business, craft or profession. As such I've treated the relevant consumer protection legislation underpinning his claim against V – and by extension, against Nationwide – as applying to his circumstances. That legislation includes, but isn't limited to, the CRA, the CCR

One aspect where there is dispute is over whether the arrangements between Mr N and V constitute a distance contract, such that the cancellation rights in part 3 of the CCR apply as contractual terms. If so, then a further breach of contract occurred when V declined to accept Mr N's return of the car as set out in his 7 December 2022 email.

I'm also conscious of the amounts Nationwide reimbursed Mr N using the chargeback mechanism under the card scheme rules. I appreciate this aspect of Mr N's complaint isn't founded in whether Nationwide ought to have raised a claim via chargeback. Rather, it's the extent to which Nationwide has offset these sums against what it considers to be its liability to Mr N for the issues with the car V supplied to him.

For ease of reading, I'll set out under separate headings my provisional findings on what I consider to be the key issues.

Has Nationwide acted fairly in respect of a claim in breach of contract for V's refusal to accept the car's return under the CCR?

Nationwide doesn't adopt liability for all of V's acts or omissions simply because it provided credit towards the purchase. Under section 75, Mr N can claim against Nationwide only for any like claim he has against V in misrepresentation or in breach of contract. Nationwide wouldn't be liable to Mr N, for example, merely because of poor service from V or a failure by V to explain when he entered into the arrangements that it was not a distance contract.

Mr N hasn't brought a claim in misrepresentation. His concern is founded in his belief that the arrangements he had with V did form a distance contract, such that a failure to allow

¹ in this case, the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 ("CCR")

him to exercise cancellation within 14 days as cited in the CCR amounts to a breach of contract.

Nationwide's position on such a claim isn't entirely clear, but it did say that V was unwilling to accept the car's return. So I've considered the rationale given for the refusal to accept return. V told Mr N that the arrangements it had with him didn't amount to a distance contract. Firstly because the way the transaction took place wasn't its primary business. Secondly, because it did not specifically offer delivery as a routine service and Mr N had the opportunity to attend its showroom to complete the purchase onsite.

I understand why Mr N holds the view he does. As far as he's concerned, he bought the car over the phone, without meeting V in person or visiting its premises. To many people, that sounds like the sale was made at a distance. But that isn't the test I have to apply. Mr N's claim is based on the provisions that would be incorporated into his contract with V if it were a distance contract under the CCR. So I need to consider the CCR definition of a distance contract, rather than how an individual person might define it.

Under the CCR², a distance contract is *"A contract concluded between a trader and a consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded"*

There was no simultaneous physical presence of V and Mr N when the contract was concluded. But the definition also requires that the contract was concluded under an organised distance sales scheme, and with the exclusive use of distance communication. In this respect the position between V and Mr N is rather less clear.

The CCR is derived from the Consumer Rights Directive (2011/83/EU). Guidance to the Consumer Rights Directive³ includes that, if a trader only exceptionally concludes a contract with a consumer by e-mail or telephone, after being contacted by the consumer, such a contract should not be considered a distance contract.

That is essentially the argument put forward by V and if so, would suggest there is no organised distance sales scheme. The mere fact the contract was concluded between Mr N and V by telephone is not sufficient to amount to a distance contract. Instead, this type of contract is likely to be viewed as an on-premises contract, the CCR definition of which is *"a contract between a trader and a consumer which is neither a distance contract nor an off-premises contract."* For the sake of completeness, the arrangements between Mr N and V aren't within the CCR definition of an off-premises contract.

Taking this into account, it's arguable that V was entitled to decline to treat the arrangements as a distance contract, and that there has been no breach of contract in Mr N being unable to avail himself of a 14-day cancellation period. Mr N might be able to persuade a court otherwise, should he look to do so. But I'm not currently minded that I can fairly conclude that Nationwide has treated Mr N unfairly by not accepting this aspect of his claim.

² CCR Regulation 5

³ Commission notice Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights (Text with EEA relevance) 2021/C 525/01

Has Nationwide acted fairly in response to Mr N's claim in breach of contract under the CRA?

It's accepted that Mr N paid using his credit card, and that that the transaction amounts and structure meet the requirements for him to seek to make a claim under section 75. It's further accepted (at least, by Mr N and Nationwide, if not by V) that the car had a number of problems from early on in Mr N's period of ownership that speak to a likely failure to meet the satisfactory quality requirements in the CRA⁴.

Because the CRA has the effect that satisfactory quality is to be treated as a term of Mr N's contract with V, a failure to meet that requirement would amount to a breach of contract. In such circumstances Mr N would have a breach of contract claim against V and, in line with section 75, a like claim against Nationwide.

Where goods are deemed not to conform to contract the CRA sets out a range of potential remedies under section 19(3), as well as other remedies that might be open to Mr N. Although Mr N didn't contact Nationwide immediately, he raised his initial concerns with V within 30 days of taking delivery of the car. As those concerns suggest that the car didn't conform to contract, in those circumstances the CRA gives the consumer the short-term right to reject goods. So I can see why Mr N was aggrieved that V didn't allow him to do this.

But Mr N's breach of contract claim against Nationwide arises from the quality of the car supplied to him, not the failure by V to enact a CRA remedy to that breach. So when he raised the matter with Nationwide, it was entitled to respond to his claim. It did so, albeit with some acknowledged delay, by verifying the problems with the car and offering to rectify the breach of contract by repairing the car.

At that point, Mr N would still have had the right to reject the car. That Nationwide didn't propose this to him was no barrier to him seeking to enforce that right. He was already aware of that right, as shown by his prior correspondence with V. The existence of that right isn't something that prevents the respondent to a claim from offering an alternative resolution. Here, Nationwide proposed a repair, to which Mr N agreed.

Under CRA section 23(6), a consumer who requires or agrees to the repair of goods cannot require the trader to replace them, or exercise the short-term right to reject, without giving the trader a reasonable time to repair them (unless that time would cause significant inconvenience to the consumer). The repair to which Mr N agreed seems to have been carried out in a reasonable period of time, taking into account the additional work that was identified in the course of that repair.

Once the work was completed, Mr N would only have a right to reject the car if it still didn't conform to contract. I've not seen anything to suggest that after the repairs were carried out, the car was not of satisfactory quality.

I appreciate Mr N sold the car some months later. He's financially worse off than he would've been had he rejected it. He's also sought to claim costs associated with the car

⁴ According to the Explanatory Notes to the CRA (para 62) *"the test of whether or not the quality of the goods is satisfactory is determined by what a reasonable person would consider satisfactory for the goods in question, taking into consideration all relevant circumstances including any description, the price and any public statements by the trader or producer or their representatives, such as statements made in advertisements or on the labels of goods. For example, a lower standard might be expected of cheap or disposable goods in comparison to an equivalent item that cost more or was advertised as being particularly durable."*

ownership, such as insurance and tax. The statutory remedies for breach of contract under the CRA do not prevent a consumer from seeking other remedies, including claiming damages.

I've not seen a receipt or bill of sale, or the car's mileage when Mr N sold it. But in any event, I'm not persuaded Mr N's arguments oblige Nationwide to make good the difference between the purchase and sale value, or to reimburse him the other costs he's mentioned.

In my view, Mr N's claim against Nationwide was satisfied by the steps it took in response, even if Mr N himself remains unhappy. Once the car conformed to contract, the price at resale was not attributable to the prior breach. Further, the costs Mr N cited go hand-in-hand with owning a car. Insuring and taxing the car were legal obligations he had on becoming the registered keeper, rather than losses due to the car not being of satisfactory quality.

While it was open to Nationwide to respond differently to Mr N's claim, I don't think it treated him unfairly by handling the claim as it did. But I do note that Mr N had to pay a third party garage £50 for the initial fault diagnosis. It doesn't seem to me particularly fair that he is out of pocket by this amount, which is attributable to the breach of contract. So I intend to include this amount as part of my proposed resolution.

Did Nationwide act wrongly in respect of the funds credited to Mr N's account by its chargeback team?

When Mr N contacted Nationwide, it took steps to credit his account with the money he'd paid by card. This came to £1,135. Nationwide then included this sum in the total it said it had given him towards the costs of repair. I don't doubt that the way these arrangements were structured has caused some confusion. I'll try to clarify the position.

Having accepted Mr N's claim in breach of contract and undertaken to repair the car, Nationwide needed to do so within a reasonable time, without significant inconvenience to Mr N, and to bear any necessary costs in doing so⁵. I've already made the observation that the repair was carried out within a reasonable timescale, and I'm satisfied this was at no significant inconvenience to him.

The costs associated with the repair are set out in Nationwide's correspondence with the garage carrying out the repair. They total £4,136.86, which is the sum Mr N paid to the garage on 26 August 2023. Nationwide credited Mr N's account with £1,135 on 5 January 2023 followed by £3,001.86 on 26 June 2023. So the sum Nationwide has credited to Mr N is the same as the repair costs.

Were Nationwide to have credited the £1,135 and in addition paid the £4,136.86 repair costs, this would have placed Mr N in a better position than he was entitled to be because of the breach of contract. The original £500 and £635 were paid towards the cost of buying the car and the warranty. As far as I'm aware, after the repair Mr N still had the benefit of those items. So those sums don't represent a loss to him.

As such, I'm not minded to find that Nationwide needs to pay him either of those sums in addition to the £4,136.86 he has already received.

I do think, though, that overall Nationwide could have explained things rather better than it did. In addition, Nationwide has acknowledged delays in its initial response to Mr N's

⁵ Right to repair or replacement - CRA section 23(2)(a and b)

claim. Like my colleagues, I think these shortcomings should be reflected by Nationwide increasing its compensation payment to reflect the inconvenience and concern that Mr N experienced in these respects. Noting that Nationwide paid Mr N £50 in May 2023 for this, I find £300 to be a more appropriate sum for it to pay him – in other words, a further £250 as first proposed by our investigator.

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

Response to my provisional decision

Nationwide accepted my provisional findings and made no further submissions. Mr N provided his comments as annotations to my provisional decision. In summary Mr N accepted the events as described but maintained his view that:

- Nationwide should have given him the choice of a repair or refund, and while a repair had been carried out, he had all along wanted a refund, as he was entitled under the short-term right to reject provisions of the CRA. The circumstances of having a faulty car and the financial burden were such that he had no choice other than to go along with the repair Nationwide proposed
- Had he been permitted to reject the car the payments Nationwide credited to him would not have needed to go towards repair
- According to third party car sales websites, V offers home delivery as standard rather than exceptional, so his transaction with V should be viewed as a distance contract. Further, the way in which the transaction was carried out – with the sale and payment conducted by phone and the car being delivered to his home address – all amount to a distance sale
- He'd already received reimbursement of the £50 diagnostic cost from V. But the proposed settlement didn't cover the costs of insuring or taxing the car, or properly reflect the time taken between making his claim and the repair being completed, which he said took nearly six months. He considered a sum of £4,500 to be fair

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.

I've reviewed what Mr N has said in response to my provisional decision and thank him for the clear and concise reasons he's given for why he doesn't agree with my proposed resolution. I also appreciate his letting me know about the reimbursement he's already received for the diagnostic costs.

I must consider whether what Mr N has said offers persuasive reason to reach a different outcome. In this respect, while I understand his strength of feeling and his clearly expressed views of why the arrangements between him and V should amount to a distance contract, I can't disregard the definition of the term in the CCR. It would be wrong to prefer Mr N's view of what constitutes a distance contract in favour of the express definition in the regulations on which he bases his argument about his right to cancel.

As I said in my provisional decision, it's possible that a court might reach a conclusion that the arrangements between V and Mr N do amount to a distance contract, and that by V declining to treat it as such, there has been a breach of contract. But given the explanation I've already provided in respect of the contrary position, I don't think anything Mr N has said

in response leads me to reach a different conclusion from the one I set out previously, which is that Nationwide has not treated Mr N unfairly by not accepting this aspect of his claim.

Mr N's key point, which he has made several times in his correspondence, underlining its importance to him, is that he had no choice other than to agree to have the car repaired. As such, he contends, he was unable to exercise his entitlement to reject the car under the CRA provisions on satisfactory quality.

I'm afraid I can't accept this line of argument. As I noted in my provisional decision, Mr N was already aware that he had the short-term right to reject. He'd already sought to exercise it through V. That V didn't agree to this doesn't amount to a breach of contract for which Nationwide could be held liable under section 75. And while Mr N might have felt he had no choice other than to agree to the repair Nationwide was proposing, I'm satisfied he did have the option not to accept that proposal. His decision to agree to the repair appears to have been driven primarily by factors such as the financial situation he describes, but the fact remains that he did agree.

Having agreed to a repair, Mr N was no longer able to exercise any right to reject the car, other than if that repair failed to ensure the car conformed to contract, or the repair wasn't carried out within a reasonable amount of time⁶. It hasn't been suggested that following the repair, the car was still not of satisfactory quality. What constitutes a reasonable time to repair isn't set out in the CRA, no doubt because this will generally depend on the goods in question and the nature of any repair.

Mr N has mentioned a repair period of nearly six months. That seems to me to be referencing the period between the point Mr N contacted Nationwide with his claim and the point by which the repair was completed, rather than the time from when he agreed a repair and the work was complete. Explanatory Note 133 to the CRA indicates the timescale for repair starts once the consumer opts for a repair.

In Mr N's case, this was in May 2023. Initial repair work was carried out in June, and while the timescale was extended due to the discovery of an oil leak, the repairs were complete by the end of that month. Consequently I see no reason to depart from my provisional finding that this was a reasonable time period for the repair.

I'm aware Mr N is unhappy with the sum I proposed in recognition of the time Nationwide took to deal with his section 75 claim, and I do understand why he feels he should receive a significantly greater amount. However, I've already explained why I don't consider Nationwide is liable to him for the insurance or tax costs he incurred, or the loss he suffered when he sold the car some months later for less than he paid for it.

After careful consideration of his comments, I'm not persuaded there's sufficient grounds to change any of my provisional findings, including those relating to the payments for repair, and so I adopt them in full in this final decision.

I recognise Mr N's candour in letting me know about the reimbursement he's received from V for the diagnostic test. Noting that Nationwide has already confirmed to me that it is willing to pay the sum I proposed, I'm not going to make any change to the redress either. I'm satisfied that my proposed award of £300 in total as recognition of the distress and inconvenience Mr N has been caused is appropriate in all the circumstances.

⁶ As previously mentioned, the Right to repair or replacement - CRA section 23(6)

My final decision

My final decision is that to settle this complaint, Nationwide Building Society must pay Mr N £300 (inclusive of the £50 it has already paid him).

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 28 November 2024.

Niall Taylor
Ombudsman