complaint

Mr D complains that The Car Finance Company (2007) Limited ("TCFC") continued to pursue him for a debt while he was disputing it.

background

In 2015 Mr D acquired a used car under a hire purchase agreement financed by TCFC. That company is no longer trading, and Go Car Credit Limited (trading as GCC Servicing) ("GCC") has been corresponding with the Financial Ombudsman Service about complaints brought against TCFC, including this one.

In 2017 Mr D took the car to a garage to repair a fault. There is a dispute about whether the car was repaired once or twice, and about who would be liable to pay for the second repair (if there was one). The garage refused to release the car until it had been paid for the second repair. TCFC didn't agree that it was liable for any repairs, and also decided that it would be uneconomical to pay for the repair anyway, as the garage's bill exceeded the value of the car. So instead TCFC served a default notice on Mr D, and transferred ownership of the car to the garage. TCFC held Mr D liable for the outstanding payments due under the hire purchase agreement, but Mr D disputed that he owed anything. He argued that by transferring the car to the garage, TCFC had unlawfully repossessed the car without a court order.

In June 2018, TCFC contacted Mr D about the outstanding debt. He complained that TCFC had breached regulations by doing so. He said that the dispute would be settled in court, and in the meantime TCFC should not be pursuing him for the debt until then. (I understand that litigation had already commenced, but that no date had been set for a court hearing.)

TCFC said that it had complied with the regulations, by investigating the dispute and providing Mr D with its conclusions. As it had concluded that the debt was a valid one, it was entitled to resume contact with a view to collecting the debt from him, without waiting for the outcome of any litigation. Being dissatisfied with that answer, Mr D brought this complaint to our Service.

Mr D's complaint was initially only about TCFC contacting him about the debt during an ongoing dispute about whether he owed it. But our adjudicator also investigated the underlying issue of repossession, as she thought it was impracticable to consider whether TCFC had been entitled to pursue Mr D for the debt without also considering whether there was a proper basis for the debt. She concluded that TCFC had unlawfully repossessed the car, and that as a result, under section 91 of the Consumer Credit Act 1974, Mr D no longer owed anything under the hire purchase agreement. She also thought that TCFC should refund all of the payments Mr D had made already, with interest on the refund of his deposit.

By this time, GCC had taken over responsibility for this complaint. GCC's solicitor denied that the car had been repossessed, and argued that as the garage had exercised a lien over the car, Mr D had already lost possession to the garage. GCC asked for an ombudsman to review this case.

I wrote a provisional decision which read as follows.

my provisional findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

Regulations made by the Financial Conduct Authority say:[1]

> "A firm must suspend any steps it takes or its agent takes in the recovery of a debt from a customer where the customer disputes the debt on valid grounds or what may be valid grounds."

But then they go on to say:

> "Where a customer disputes a debt on valid grounds or what may be valid grounds, the firm must investigate the dispute and provide details of the debt to the customer in a timely manner. … A firm must provide a customer with information on the outcome of its investigations into a debt which the customer disputed on valid grounds."

The parties were already in litigation when TCFC called Mr D in 2018, so it's clear that there was a dispute ongoing. But as the parties' lawyers had corresponded with each other and set out their respective positions, I think that satisfied TCFC's duty to investigate the matter and then report its findings to its customer – its lawyers did that on its behalf. TCFC investigated the matter again when Mr D complained about the phone call, and its final response letter was also a report of TCFC's findings, this time from TCFC directly.

The regulations don't explicitly state whether a firm may resume recovering a debt after it has provided a customer with the outcome of its investigations. But I think it's implied that it can. If the FCA had intended to prohibit a firm from ever pursuing a debt again, I think it would have said so in clear terms, and not left it to inference.

I could stop here, and say that I do not uphold this complaint, since this issue is the only issue Mr D asked our Service to address. But since our adjudicator upheld this complaint on the basis that the car was unlawfully repossessed, I think Mr D would ask me to consider that issue too. (He didn't object to the adjudicator's broadening of the scope of his complaint once he received her decision.) It is also relevant to whether TCFC investigated the matter properly and in good faith, so I can see why our adjudicator considered it.

I am not going to consider the question of whether the car was repaired once or twice, and I am not going to consider whether Mr D told the garage that he could not afford to pay for the second repair. These are matters which are best dealt with in court, and under the rules of the Financial Ombudsman Service, I don't have to make findings about issues which I think should be dealt with in court. So I expressly make no findings about those two questions. That is because I don't have power to investigate or cross-examine a third party – in this case, the garage.

I do however find that TCFC (and, subsequently, GCC) was entitled to believe the garage when the garage told it that the car had been repaired twice, and that Mr D had paid for the first repair but not the second one. (That is a slightly different question to whether that was actually the case or not, which I am not considering.) To be clear, I think that TCFC had to

[1] https://www.handbook.fca.org.uk/handbook/CONC/7/14.html

form a view about whether what the garage told it was true or not, and that it was entitled to decide that it was. It was not so implausible that no reasonable person could believe it.

Once TCFC accepted that the garage had repaired the car for a second time, and that Mr D had told the garage that he couldn't afford to pay for it, I think TCFC was entitled to conclude that it wasn't going to get the car back again. The garage had exercised its right of lien over the car, meaning that it would keep it until someone paid its invoice. The garage was charging storage fees of £30 a day, and the invoice was for more than the car was worth.

Section 90 of the Consumer Credit Act says that where certain conditions are met, "the creditor is not entitled to recover possession of the goods *from the debtor* except on an order of the court" (emphasis added). However, I don't think TCFC transferring ownership of the car to the garage amounted to recovering possession of it from Mr D, because he was no longer in possession of the car at the time. The garage had possession of the car, because Mr D had left it there, and the garage was retaining possession in exercise of its lien. So I don't think TCFC needed a court order under section 90, and consequently section 91 does not apply.

By allowing this situation to come about, Mr D had breached the terms and conditions of the hire purchase agreement. These included the following paragraph (emphasis added):

> "We are the owners of the goods and you rent them from us. Until you own the goods you must not suggest that you are the owner of them, sell them or give them away *or let them become part of any lien* or security (where you allow another person to take control of the goods in return for a debt being paid)."

So I think that TCFC was entitled to serve him a default notice, and subsequently to terminate the agreement once Mr D had failed to retrieve the car from the garage.

So my provisional decision is that I do not intend to uphold this complaint.

responses to my provisional decision

GCC accepted my decision (and clarified that the account is now with Arrow Global Ltd).

Mr D did not accept my decision. He said that under Scots law (which is the law applicable to his finance agreement), there is no such thing as lien. He insisted that as soon as he had made his first payment under the hire purchase agreement, TCFC had been obliged to get a court order to repossess the car. He clarified that he had not paid the garage for the second repair because he was exercising his right to a free repair under the Consumer Rights Act 2015, the first repair having been unsatisfactory. He said that the garage had acted fraudulently, and a contractor who had worked on Mr D's car for the garage provided me with his account of events, which supported Mr D's claim. Mr D said that TCFC had failed to investigate the fraud allegations (which he has since reported to the police).

my findings

I agree that Scots law applies to Mr D's hire purchase agreement, but I do not think that changes the outcome of this complaint. I am satisfied that lien does exist in Scots law,[2] and that sections 90 and 91 of the Consumer Credit Act apply to Scotland. The only relevant

[2] I referred to *Pledge and lien in Scots law,* the PhD thesis of AJM Steven (1997), available online at the Edinburgh Research Archive: https://era.ed.ac.uk/handle/1842/22654

difference between Scots and English law is that in Scotland the criteria for section 90 applying are more generous to the consumer than in England, in that in England the section does not apply until the consumer has paid one third of the total price of the goods, a rule which does not apply in Scotland. However, I said in my provisional decision that section 90 did not apply to Mr D's car because the car was no longer in his possession, not because he had not made enough payments, and I still think that is the case. TCFC was entitled to repossess the car without a court order because the car was already not in Mr D's possession.

I still remain of the view that whether Mr D owed the garage money for the second repair, or whether the garage acted fraudulently, are matters which are better resolved in court.[3]

I think that TCFC complied with its duty under FCA rules to investigate the debt and to refrain from taking steps to recover the debt until it had concluded its investigation. TCFC concluded that the debt was owed, and I cannot challenge that conclusion except by considering the matters which I have already said are more suitable for a court to examine.

my final decision

My decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 11 April 2021.

Richard Wood
ombudsman

[3] I originally described these issues as "whether the car was repaired once or twice, and … whether Mr D told the garage that he could not afford to pay for the second repair," but I think these all relate to the same broad topic.