

complaint

Mr S1, represented by Mr S2, complains that the conditional sale agreement he entered into with Santander Consumer (UK) Plc was not what had been agreed with the dealer and that his previous finance agreement was not settled.

Mr S1 also complains that there were faults with the car.

background

Mr S1 entered into a conditional sale agreement with Santander to acquire a car. He says that when arranging the deal it was agreed his existing car would be part exchanged and the finance agreement on this would be settled. He says a part exchange value of £11,000 was agreed and that due to the settlement amount on his existing agreement being £13,912.96 this meant that there was negative equity of £2,912.96 which was included in the conditional sale agreement with Santander.

Mr S1 took delivery of the car on 5 April 2018. Shortly after Mr S2 contacted Santander to get details of the direct debit payments. He says the monthly payment amount was higher than had been agreed and so he asked for a copy of all the paperwork. Mr S1 says this contained a number of errors which he thought were fraudulent. Because of this he wanted the agreement cancelled. Mr S1 says he then also found out that his previous finance agreement had not been settled as had been agreed.

The car broke down in June 2018. Mr S1 says that he cannot afford to pay for two agreements at the same time as hire car costs.

Santander says that the car Mr S1 acquired through the conditional sale was presented to it as a three year old car. However it was later discovered the car was much older than this and so it said the car had been misrepresented. It says that Mr S2 had also raised issues with the quality of the car shortly after acquisition and about the agreement being fraudulent. It says that there was insufficient evidence to say that fraud had occurred.

Due to the misrepresentation Santander upheld Mr S1's complaint and offered for the car to be returned, the agreement unwound and the deposit refunded. It says the intention was for Mr S1 to receive back the car he had part exchanged as part of the transaction. However Mr S1 did not accept the return of the part exchanged car as he said it had been damaged.

Santander says that it tried to assist Mr S1 but Mr S1 kept changing his mind in regard to swapping the cars.

Our investigator noted the time that had passed dealing with this issue and the attempts that had been made to resolve it. He also noted that the return of the part exchanged car was not likely to be successful given previous attempts and that Mr S1 wanted to return his current car and have the agreement unwound.

Our investigator thought that in this case the fairest resolution was for a 'clean break'. He thought Santander should settle the third party finance in full and carry over the negative equity (giving rise to a debt between Mr S1 and Santander). However he thought the negative equity should be offset by other refunds namely the overpayments Mr S1 had made to the third party since April 2018 offset by the amount Mr S1 owed for use of the current car for which he wasn't making payments. He also said that the deposit of £1,000 paid to the

dealer should be refunded and that hire car costs from when the car broke down in June 2018 should also be refunded. He noted that the refunds were subject to interest at 8% annual simple.

Our investigator also said that arrangements should be made for the return of Mr S1's private number plate, Mr S1's credit file should be amended and Mr S1 should be paid £250 compensation for the trouble and upset he had been caused.

In regard to the warranty, our investigator said that he hadn't seen evidence that £500 was paid outside of the agreement and so he did not think further compensation was required for this. He did not think that the insurance costs or the £500 payment for a different car were required to be refunded by Santander.

Mr S2 said that what should happen is the original finance be settled at the amount of £13,912.96 along with a refund of £500 for the loss of a deposit on a replacement car which was only paid as Mr S1 was told his previous car would be returned and that it was in perfect working order. Mr S1 also wanted the insurance refunded from the date when the car was deemed not road worthy. Mr S1 agreed with our investigator's other proposals but reiterated the upset this issue had caused.

In an email dated 1 September 2018, Mr S2 says that hire car costs totalled £739.91 and that a replacement car had now been acquired. He also said that insurance on the car subject to his complaint had been stopped on 1 September 2018 and that the car was awaiting collection.

Santander had previously accepted the car could be returned, the agreement cancelled and the deposit refunded. It said it would require evidence of the overpayments Mr S1 had made on his previous agreement since April 2018 and would look to deduct these from the outstanding negative equity. It did not accept that hire car costs since 27 June 2018 (when the car broke down) should be refunded as it said it had tried on several occasions to resolve Mr S1's complaint before this occurred. It agreed to pay Mr S1 £250 for the distress and inconvenience he had been caused.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

There are a number of parts to this complaint and a number of attempts have been made to resolve it. My role is to consider each case based on its individual merits. I take relevant regulations (about the credit arrangement) into account but my decision is based on what I consider fair and reasonable given the unique circumstances of each complaint.

Mr S1 first raised concerns about the payment amount on the agreement. Mr S2 has provided information about the discussions that took place and says the final agreed monthly payment amount was £413. However the agreement records monthly payment amounts of £424. When this was discovered Mr S2 asked for all the documents and said that he found a number of discrepancies and he thought that fraud had occurred.

I can understand Mr S2 was concerned by what he saw as possible fraudulent activity. It is not my role to say whether a fraud has occurred and I note that Mr S2 has raised this issue with the police and other bodies. What I have considered is whether there was a breach of

contract or if a misrepresentation occurred. If this was the case then under the regulations (covering the credit arrangements), Santander could be held liable.

Santander has explained that when the conditional sale agreement was being set up it was told that the car was first registered in 2015. I can see this is recorded on the agreement. However this is not correct and the car was first registered in 2006. Because of this I agree with Santander that a misrepresentation occurred.

It is also clear from the vehicle order form that Mr S1's previous car finance agreement was expected to be settled as part of the new agreement. This did not happen, and although there were then attempts to unwind the agreement I find that by not settling Mr S1's previous agreement there was a breach of contract.

Where a misrepresentation or breach of contract has occurred then it is reasonable for the consumer to be put back in the position they would have been in had this not happened. In this case Santander offered to have the car returned, the conditional sale agreement cancelled and the deposit refunded. This addresses a number of points but the issue regarding Mr S1's part exchanged vehicle and the settlement of his previous finance agreement also needs to be addressed.

The vehicle order form sets out the part exchange amount agreed for Mr S1's previous car was £11,000. The settlement amount on his previous finance agreement is recorded as £13,912.96; this leaves a negative equity amount of £2,912.96. I note Mr S2's comments about this amount but I find that the numbers recorded in the vehicle order form are supported by the initial information provided on this complaint and so I accept that there was negative equity of £2,912.96 which was added to Mr S1's conditional sale agreement.

When Mr S1's issues regarding the agreement were first raised he also raised issues about the quality of the car. At this time it was agreed the conditional sale agreement would be unwound and Mr S1 would swap the car back for his previously part exchanged car. Unfortunately this didn't happen due to issues being raised about the quality of the part exchanged car.

Given the failed attempts to resolve this issue through the return of the part exchanged car, I find that the only reasonable outcome is now for the car to be returned without being swapped for an alternative. In regard to the previously part exchanged car, the outstanding finance relating to this car should be settled.

The negative equity on the part exchanged vehicle should still be the liability of Mr S1. I say this because this was an amount he owed in relation to his previous car and so it is not reasonable that it should be cancelled as part of the cancellation of the conditional sale agreement.

That said there are a number of items that can be offset against the outstanding negative equity amount. First, it has been agreed that the deposit should be refunded. Also, Mr S1 continued to make payments towards his previous agreement after the date that it should have been settled (that is when the conditional sale agreement became live). These payments will have reduced the amount owing under the previous agreement. I find that as well as settling Mr S1's previous agreement, Santander should refund him all payments he made after the conditional sale date.

While Mr S1 continued to make payments under his previous agreement for a period of time, he did not make payments under the conditional sale agreement. Therefore any refund should be offset by the payments due under Mr S1's conditional sale agreement up to 27 June 2018.

On 27 June 2018 the car broke down. As Mr S1 had raised concerns about the car shortly after acquisition and the car then broke down within the first four months, this suggests the car was not of satisfactory quality at the point of supply. As the remedy has already been agreed in regard to misrepresentation I do not find I need to consider this further. However I do accept that Mr S1 did not have use of the car from 27 June 2018 and so he should not be liable for any payments due from this date.

Our investigator recommended that Mr S1's hire car costs should be refunded from 27 June 2018. However as I do not find that Mr S1 should be held liable for payments from this date I find it reasonable that he was required to fund any alternative transport. I appreciate the comments that have been made but I also accept that attempts to resolve this issue were made before the car broke down and had these been successful Mr S1 would not have needed to hire a car.

Mr S2 has also mentioned the cost of the warranty. However, as our investigator has explained this appears to be included in the vehicle order form and as no further evidence has been provided I do not find I can say a further amount is required to be refunded for this.

I also do not find that any amounts Mr S1 paid to reserve other vehicles following discussions with the dealer should be refunded by Santander. I say this as Santander is only responsible for the actions of the dealer in regard to the setting out of the finance agreement and the representations regarding the car at that point. It is not responsible for the ongoing actions of the dealer.

I do however agree that as Mr S1 did not have use of the car from 27 June 2018, any insurance costs he incurred from this time (evidence to be provided) should be refunded.

Because my suggested redress differed from our investigator's I provided my thoughts to both parties. Santander said that the previous finance agreement was not settled because of the discussions about returning the part exchanged car. It noted that by settling the previous agreement this would give rise to the negative equity payment and it would need to contact Mr S1. It said that its relationship with him has broken down. It also reiterated that Mr S1 hadn't made any payments towards the current agreement. It said the dealer still has the part exchanged car which has a MOT until July 2019 and its preferred outcome would be to return this to Mr S1 and cancel the current agreement.

Mr S2 said that Santander had said that usage charges would not be applied and so he didn't accept that these were part of the proposed resolution. He agreed that a clean break was required given the previous failed attempts to return the part exchanged car but did not accept that there was a negative equity liability. He noted the sales invoice and other information in support of this point. Mr S2 also challenged why hire car costs were not being included as he said he had no choice but to do this. Mr S2 also reiterated his comments about the loss in regard to a deposit for another vehicle and the need for his personal registration plate to be returned.

I have considered all the points raised in response to my provisional redress. While I understand Santander's concerns about the break down in relationship, given the previous

failed attempts at returning the part exchanged vehicle I don't think this is an option. Because of this I find it reasonable that the originally intended approach of the finance on the part exchanged vehicle being settled should take place.

I note Mr S2's comments about the negative equity and the reference he has made to the sales invoice. However, the vehicle order form and the original email sent in regard to this complaint set out the negative equity and I accept this was included as part of the new agreement.

I understand Mr S2's comments about Santander saying Mr S1 would not be responsible for the usage of the vehicle but this was part of an agreement between Mr S1 and Santander that didn't then materialise. I have looked again at the whole case and in order to be fair to both parties I find it reasonable that Mr S1 is responsible for the payments due for the period he had use of the car.

I agree that Mr S1's private number plate should be returned and his credit file amended.

my final decision

My final decision is that I uphold this complaint. I understand the car has been collected and so now Santander Consumer (UK) Plc should:

- cancel Mr S1's conditional sale agreement; and
- settle Mr S1's previous finance agreement with the third party.

Mr S1 is liable for the negative equity payment that arose from the part exchange of his car (£2,912.96) and also the payments that were due under the conditional sale agreement up to when the car failed on 27 June 2018. This amount should be reduced by the following:

1. refund of the £1,000 deposit;
2. the overpayments made to the third party (that is all payment made from the date the third party agreement should have been settled, that is the conditional sale agreement date);
3. the cost of insurance on the car from 27 June 2018 onwards (evidence provided).

Items 1,2 and 3 are subject to 8% simple interest from the date of payment to the date of settlement.

Santander Consumer (UK) Plc should also arrange the return of the personal number plate and cover any costs; pay Mr S1 £250 compensation for the trouble and upset he has been caused; and remove any adverse information regarding the agreement from Mr S1's credit file.

If Santander considers that it's required by HM Revenue & Customs to withhold income tax from that interest, it should tell Mr S1 how much it's taken off. It should also give Mr S1 a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S1 to accept or reject my decision before 26 April 2019.

Jane Archer
ombudsman