

complaint

Mr F complains that Creative Finance Corp Ltd (trading as MotorKitty) has treated him unfairly by repossessing his motor vehicle. He says the correct procedures weren't followed before the repossession, that Creative has failed to pay him the true value of the vehicle, and that he is still receiving penalty notices due to the change of ownership not being notified to the DVLA.

background

The background to this complaint was set out in the provisional decision I issued in September 2020. An extract from this is attached and forms part of this final decision, so I will not repeat that information here.

In my provisional decision I set out why I was minded to uphold part of the complaint. I invited both parties to let me have any further comments and evidence. Both Creative and Mr F have provided us with some comments. Although I am only summarising here what both parties have said, I have considered their entire responses carefully before writing this decision.

Mr F has questioned whether Creative acted in accordance with the agreement he signed when it repossessed his vehicle. He has again said the Default Sums Notice was only issued on 10 May, and so Creative should have waited 14 days from then before repossessing his vehicle.

Creative doesn't agree with my provisional findings. In particular it says;

- Creative has never said that Mr F should liaise directly with the auction house however he is within his rights to liaise with the DVLA which once the vehicle was recovered he could have contacted to inform them he was no longer in possession of the vehicle.
- DVLA refuse to liaise with Creative as it is not the registered keeper of the vehicle, only Mr F can tell DVLA that he is no longer in possession of the vehicle. Furthermore Mr F did not require the V5 document to liaise with the DVLA. Regardless, had Mr F required any further information from the V5 Creative would have happily provided this including the option to do a 3 way call with the DVLA should this have been requested.
- Mr F at no point tried to contact the DVLA to tell them he is no longer in possession of the vehicle or / has not provided any evidence of trying to contact the DVLA.
- Creative has no control or say in the sales process the auction house uses to sell a vehicle. It further has no visibility on the purchaser of the vehicle as this process is governed entirely by the auction house end to end.
- Creative has notified the debt recovery company however that company will not deal with Creative without Mr F's express authority.
- Creative thinks it is clear from Mr F's payment behaviour that he had no intention of paying the loan back. Creative incurred additional costs as a result including the underwriting process, agent fees during underwriting the loan, document sworn fees and also the cost of borrowing which Creative incurs through a debt fund. With all this in mind and considering the opportunity cost of lending elsewhere the company is at a big loss on this account.
- Creative questions why a compensation payment of £150 is appropriate, bearing in mind the loss the company has encountered on underwriting a loan in good faith to a customer who refused to pay it back.

my findings

I've once more considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so I'm not persuaded that I should change the conclusions I reached in my provisional decision.

As I explained in my provisional decision the original default notice was issued on 26 April. The notice that Mr F has referred to, the Default Sums Notice, was issued when additional charges were added to his account – it increased the amount of his defaulted balance. But I still think that notice supplemented, rather than replaced, the default notice issued on 26 April. It was that notice that started the 14 day period, and so Creative acted fairly in repossessing Mr F's car on 10 May.

I have thought carefully about what Creative has said in regard to the re-registration of the keeper of the vehicle it repossessed. But I remain of the opinion that activity wasn't the responsibility of Mr F. Creative held the V5 document. And once it had activated the bill of sale it became the legal owner of the vehicle. So once the vehicle had been repossessed Mr F had no responsibility for the vehicle. I don't think it was for him to notify those changes to the DVLA – that was something that Creative needed to do. Although Mr F could have told the DVLA he was no longer responsible, he would also have needed to provide the details of the new keeper. That wasn't information he had, or had any rights to have under the relevant data protection regulations. So it is unreasonable to expect him to notify the DVLA of the change of keeper.

Ultimately the auction house acted on behalf of Creative. It seems to me that it falls between those two parties to ensure that the sale of the vehicle was correctly recorded and notified to the DVLA. And that is what I require Creative to do in accordance with this final decision. If any information or authority is required by the DVLA from Mr F either Creative or the DVLA can approach Mr F for his assistance.

I understand that since my provisional decision was issued Mr F has continued to be chased by the debt recovery company for payment relating to the penalty charge incurred by his vehicle after it had been repossessed by Creative. I can appreciate how distressing that must be for Mr F. I understand that the debt recovery company requires Mr F's authority to deal with Creative about this debt. Creative should liaise with the debt recovery company to understand how it wants that authority to be given and provide Mr F with the appropriate means of doing so.

I haven't found that Creative had any reason to doubt that Mr F would be able to repay the loan in a sustainable manner. But for the same reasons I don't think Creative can reasonably say that Mr F had no intention of repaying the loan from the outset. He gave Creative security on the loan in the form of his motor vehicle – and I think it likely that the value of that vehicle to Mr F outweighed the simple monetary value that Creative realised by selling it at auction.

But the compensation I am asking Creative to pay has no relation to the act of giving the loan to Mr F, or his failure to make a repayment. Nor does it relate to what I have found to be the reasonable decision that Creative made to repossess Mr F's vehicle. But Creative failed to ensure that the repossession of the vehicle ended Mr F's liability for any penalty charges that the vehicle incurred in the future. And as a result Mr F has faced debt collectors visiting him at his home. It is for the trouble and upset that this has caused him that I am directing Creative to pay Mr F the sum of £150.

So, in summary, for the reasons given above and in my attached provisional decision;

- I think it was reasonable for Creative to repossess Mr F's vehicle on 10 May 2018.
- The evidence I have seen suggests Creative has accounted fairly for the proceeds of the sale of Mr F's vehicle.
- I don't think Creative treated Mr F fairly in regard to making the changes needed to the registered keeper of the vehicle after it had been sold at auction.
- Creative didn't lend to Mr F in an irresponsible manner.

putting things right

As explained in my provisional decision, I don't think Creative has treated Mr F fairly in the way the sale of his vehicle was notified to the DVLA. So Creative should;

- Continue to liaise with the debt recovery company so as to take responsibility for the debt currently owed by Mr F in relation to the penalty charge issued after the sale of the vehicle.
- Arrange for the registered keeper to be correctly recorded at the DVLA
- Pay Mr F £150 for the trouble and upset he's been caused.

my final decision

My final decision is that I uphold Mr F's complaint and direct Creative Finance Corp Ltd to put things right as detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 18 December 2020.

Paul Reilly
ombudsman

EXTRACT FROM PROVISIONAL DECISION

complaint

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background

The repossession that Mr F is complaining about took place very shortly after the loan was agreed. So in addition to Mr F's complaint above I think it appropriate that I also consider whether it was reasonable for Creative to agree the loan in the first place. Given the proximity of the two events I think the granting of the loan has a direct bearing on the complaint that Mr F made.

Mr F was given a loan of £1,500 by Creative in February 2018. The loan was due to be repaid in twelve monthly instalments and was secured against Mr F's motor vehicle. Mr F found it difficult to repay the loan. His first repayment was made eight days late. And he then failed to make any subsequent repayments. As a result Creative defaulted the loan, and took possession of Mr F's motor vehicle on 10 May 2018.

Mr F's motor vehicle was sold at auction. The proceeds of that sale were insufficient to cover the outstanding balance on Mr F's loan and so no proceeds from the sale were returned to Mr F.

Since the vehicle was repossessed and sold Mr F has received a penalty notice for a traffic offence. That offence occurred in June 2018 so shouldn't be the responsibility of Mr F. But it appears that the sale of the vehicle was not notified to the DVLA and so Mr F remained the registered keeper.

Mr F's complaint has been assessed by one of our adjudicators. She didn't think Creative had done anything wrong in repossessing Mr F's vehicle, or in accounting for its sale. But she thought it was Creative's responsibility to ensure that the sale of the vehicle was correctly notified to the DVLA. So she asked Creative to ensure that notification was completed correctly, and said it should pay Mr F £150 for the trouble and upset he'd been caused.

Creative didn't agree with that assessment. So, as the complaint hasn't been resolved informally, it has been passed to me, an ombudsman, to decide.

my provisional findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. I've also taken into account the law, any relevant regulatory rules and good industry practice from the time.

I think there are four matters for me to decide in this complaint;

- Was it reasonable for Creative to repossess Mr F's vehicle?
- Has Creative fairly accounted for the sale proceeds of the vehicle?
- Should Creative have done more to ensure the registered keeper of the vehicle was updated?
- Did Creative lend to Mr F in an irresponsible manner?

I will deal with each of these matters in turn.

Was it reasonable for Creative to repossess Mr F's vehicle?

When he took the loan, Mr F signed a Bill of Sale relating to his vehicle as security for the loan. That document meant that, should Mr F default on his loan repayments, Creative was entitled to take possession of the vehicle.

I can see that Mr F was late making his first repayment in March 2018. He then failed to make any subsequent repayments. This resulted in Creative starting the process of placing Mr F in default later that month. Creative has shown us that it sent the following letters;

08 April – Payment reminder letter
15 April – Demand for payment letter
19 April – Notice of Sums in Arrears letter
26 April – Default Notice
03 May – Default Notice reminder
10 May – Default Sum Notice

I think it was reasonable for Creative to issue a default notice to Mr F on 26 April. By then his payment was more than two weeks late, and it doesn't seem he had made any contact with Creative to explain why his repayment hadn't been made despite the reminder letters he'd been sent. Those letters had been sent to the address where Mr F still resides, and from where his car was repossessed.

The agreement that Mr F had signed allowed Creative to take steps to repossess the vehicle no earlier than 14 days after the default had been issued. So it was reasonable for Creative to have instructed that repossession to take place on 10 May. I have noted that Mr F has said he received the Default Sum Notice on the same day. But that notice was only issued since charges had increased the amount of his default balance. It supplemented, rather than replaced, the default notice that had been issued on 26 April.

So taking all the evidence into consideration I don't think Creative acted unreasonably by repossessing Mr F's vehicle on 10 May 2018.

Has Creative fairly accounted for the sale proceeds of the vehicle?

Creative sold Mr F's vehicle using an auction company. From my experience that is the usual way that repossessed vehicles are disposed of. So I don't think it was unreasonable of Creative to sell Mr F's vehicle by that method.

Creative has provided us with a copy of the sale information it received from the auction company. That showed that the amount it received for the vehicle, after the auction company's costs had been taken, was £1,625. That was less than the balance outstanding on Mr F's loan and so I think it was reasonable that Creative didn't return any proceeds of the sale to Mr F.

Should Creative have done more to ensure the registered keeper of the vehicle was updated?

When Creative repossessed Mr F's vehicle it assumed ownership of the car. It already held the V5 registration document. That document would be needed to advise the DVLA that the vehicle had been sold and so had a new registered keeper. So there was no reasonable way for Mr F to advise the DVLA that he was no longer the registered keeper of the vehicle.

Creative has said that it was not its responsibility to contact the DVLA – it says it was the responsibility of the auction house and Mr F should liaise with the auction house to ensure the necessary registration changes are notified.

But I disagree. Mr F had no relationship whatsoever with the auction company. The auction house was acting on behalf of Creative. And whilst I can see that there might be some dispute about where the DVLA notification responsibility falls, I can say with confidence that it should not fall on Mr F.

I understand that Mr F has been sent a penalty notice in relation to a traffic offence committed in the vehicle after it had been repossessed and sold by the auction company. And at this stage the penalty charge has been passed to a debt collection company for recovery. Our adjudicator will send a copy of the latest notification to Creative who should contact the debt recovery company and take responsibility for the debt on behalf of Mr F until the sale of the vehicle has been correctly registered with the DVLA.

Creative should liaise with the auction company to ensure that the registered keeper of the vehicle is correctly recorded to reflect the sale. It should ensure that the change of registered keeper correctly reflects the date on which the vehicle was sold.

I have no doubts that this matter has caused trouble and upset to Mr F at a time when his finances were under pressure, and he had lost the use of his vehicle. So I intend to direct Creative to pay Mr F the sum of £150 to reflect that inconvenience.

Did Creative lend to Mr F in an irresponsible manner

We've set out our approach to unaffordable/irresponsible lending complaints on our website and I've kept this in mind while deciding this part of Mr F's complaint.

The rules and regulations at the time Creative gave this loan to Mr F required it to carry out a reasonable and proportionate assessment of whether he could afford to repay what he owed in a sustainable manner. This assessment is sometimes referred to as an "affordability assessment" or "affordability check".

The checks had to be "borrower" focused – so Creative had to think about whether repaying the credit sustainably would cause difficulties or adverse consequences for Mr F. In practice this meant that Creative had to ensure that making the repayments wouldn't cause Mr F undue difficulty or adverse consequences. In other words, it wasn't enough for Creative to simply think about the likelihood of it getting its money back, it had to consider the impact of any repayments on Mr F.

Checks also had to be "proportionate" to the specific circumstances of the loan application. In general, what constitutes a proportionate affordability check will be dependent upon a number of factors including – but not limited to – the particular circumstances of the consumer (e.g. their financial history, current situation and outlook, and any indications of vulnerability or financial difficulty) and the amount / type / cost of credit they are seeking.

In light of this, I think that a reasonable and proportionate check ought generally to have been *more* thorough:

- the *lower* a customer's income (reflecting that it could be more difficult to make any repayments to credit from a lower level of income);
- the *higher* the amount due to be repaid (reflecting that it could be more difficult to meet higher repayments from a particular level of income);
- the *longer* the period of time a borrower will be indebted for (reflecting the fact that the total cost of the credit is likely to be greater and the customer is required to make repayments for an extended period).

There may also be other factors which could influence how detailed a proportionate check should've been for a given application – including (but not limited to) any indications of borrower vulnerability and any foreseeable changes in future circumstances. I've kept all of this in mind when thinking about whether Creative did what it needed to before agreeing to lend to Mr F.

We asked Creative for details of the checks it did before lending to Mr F. It hasn't provided us with an overview of its checks, but it has sent us copies of Mr F's payslips, showing his income, for the three months before the loan. And it holds copies of Mr F's bank statements covering the period from mid-September until the middle of December 2017.

Mr F was entering into a significant commitment with Creative. He would need to make monthly repayments for a year on a loan that was secured on his car. So I would expect that Creative would want to gather, and independently check, some detailed information about Mr F's financial circumstances before it agreed to lend to him. I think that by asking Mr F for copies of his bank statements it would have been able to form a reasonable picture of his finances. So I think the checks Creative did here were proportionate.

But simply performing proportionate checks isn't enough. A lender also needs to react appropriately to the information shown by those checks.

I've carefully considered the information shown on Mr F's bank statements around the time that he borrowed from Creative. Mr F's bank statements don't show any clear evidence that he would be unlikely to be able to repay this lending in a sustainable manner. His bank statements don't show any evidence of serious financial problems such as excessive use of an overdraft, multiple other credit repayments, or regular unpaid transactions. I think it would have been reasonable for Creative to conclude that the loan would be sustainably affordable for Mr F.

So I don't currently think Creative was irresponsible to agree to give this loan to Mr F.