

The complaint

Mr M is unhappy that Mitsubishi HC Capital UK Plc trading as Hitachi Capital Vehicle Solutions ("MHCC") terminated his hire agreement.

Mr M has been represented. For clarity, I've only referred to Mr M throughout this decision.

What happened

In January 2020, Mr M agreed to be supplied with a car from a dealership I'll refer to as "D". Due to the impact of the Covid-19 pandemic, there was a delay in the car being supplied to Mr M. In June 2020, Mr M entered into a hire agreement with MHCC to acquire the car. Under the agreement, Mr M was required to make an advance payment of £3,063.17, followed by 35 payments of £510.53. The car was supplied to Mr M in July 2020.

In September 2020, MHCC issued a notice of sum in arrears to Mr M as the advance payment and subsequent monthly rentals hadn't been received by MHCC. In October 2020, a Direct Debit was set up with Mr M to collect future repayments. MHCC issued a default notice to Mr M in December 2020.

Mr M let MHCC know that he had been financially impacted by the Covid-19 pandemic as he hadn't been working since March 2020. MHCC agreed a repayment plan with Mr M under which he would make four additional payments of £1,000 to repay the outstanding arrears. Mr M didn't make all the agreed payments under the repayment plan. Following ongoing communication, Mr M told MHCC he wouldn't be able to return to work until October 2021 due to an unfortunate accident. As a result of this, MHCC terminated Mr M's agreement in September 2021.

Mr M complained to MHCC and said that MHCC had failed to take the payments owed under the agreement for three months, but he had the funds available at the time. He said he offered to pay the arrears of around £2,000 to MHCC following receipt of the termination notice, but he said it wouldn't accept this amount as a responsible lender. Instead, he said MHCC terminated his agreement and told him he would need to pay an additional £7,500 on top of the arrears. Mr M said this wasn't the actions of a responsible lender.

In September 2021, MHCC issued its response to Mr M's complaint. It said the invoice it sent Mr M clearly stated payment was due to be made by BACS. It said it sent Mr M notices of arrears when monthly rentals weren't received from him. It said when the repayment plan was broken due to Mr M suffering an accident, he was unable to return to work for a number of months. And so, Mr M was unable to make payments towards his arrears and this led to MHCC terminating the agreement.

MHCC also noted that Mr M entered into the agreement in June 2020 and listed himself as employed, but subsequently he told MHCC he hadn't been working since March 2020. It said had it known this, it wouldn't have progressed with the application.

Unhappy with this, Mr M referred his complaint to this service. He reiterated his complaint and said the car was collected by MHCC without prior notice. To put things right, Mr M said he wanted MHCC to stop pursuing him for the additional £7,500 and to pay him compensation for the distress and inconvenience caused.

Following this, MHCC issued a further response to Mr M's complaint in October 2021. But this was the same as the previous response it issued in September 2021.

Our investigator looked into the complaint but didn't think MHCC had acted unfairly. He said he didn't think MHCC was responsible for the missed payments and he thought MHCC had treated Mr M with forbearance and due consideration when he let it know about his financial circumstances. He also said MHCC had terminated the agreement fairly.

Mr M disagreed. He said as a result of the Covid-19 pandemic he didn't scrutinise his bank account as close as he normally would have. And so, he said he didn't notice a payment hadn't been taken from his bank account for the initial rental. He also said he thought this would be paid by Direct Debit, as his previous two agreements with D had. He said he had an accident and so, he couldn't return to work.

As Mr M remains in disagreement, the complaint was passed to me to decide.

I issued a provisional decision on 2 May 2023 in which I said:

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

Where evidence is incomplete, inconsistent or contradictory, I reach my view on the balance of probabilities – in other words, what I consider most likely to have happened in light of the available evidence and wider circumstances.

I've read and considered the whole file and acknowledge that Mr M has raised a number of different complaint points. I've concentrated on what I think is relevant. If I don't comment on any specific point it's not because I've failed to take it on board and think about it – but because I don't think I need to comment on it in order to reach what I think is the right outcome. The rules of this service allow me to do this.

Mr M was supplied with a car under a hire agreement. This is a regulated consumer credit agreement which means our service is able to consider complaints about it.

Did MHCC unfairly terminate Mr M's hire agreement?

What I need to decide in this case is whether MHCC acted fairly when it terminated Mr M's agreement. If I think MHCC acted unfairly, I'll need to think about what, if anything, is fair to put things right.

The terms and conditions of Mr M's agreement say, "6.1 We may treat any of the following events as repudiation of this Agreement and may, by written notice to you, terminate the hiring under this Agreement with immediate effect... (b) you fail to make any of the payments due under this Agreement punctually..".

This means that MHCC were entitled to terminate Mr M's agreement if he breached it, or if he missed payments due under the agreement. Mr M didn't pay the advance rental and following this, he missed three consecutive payments under the agreement.

Following MHCC issuing a default notice to Mr M in December 2020, Mr M contacted MHCC and explained he had been out of work since March 2020. He said he would soon be receiving support. Given Mr M had explained why he hadn't made any payments, MHCC was obliged to treat Mr M with forbearance and due consideration. So I've considered whether it did this.

During the call in January 2021, MHCC's system notes show that it carried out an income and expenditure with Mr M to ensure he could afford to make repayments for the arrears. Despite this showing Mr M only had a disposable income of £50, Mr M said he would make the arrears payments from his savings. I'm satisfied that MHCC acted with forbearance and due consideration when it agreed to the repayment plan that Mr M had suggested. However, MHCC didn't receive two payments due under this payment plan and so, Mr M's agreement remained in arrears.

In June 2021, MHCC contacted Mr M to discuss the arrears. He was told Mr M was due to return to work in October 2020 but he had been in an accident and so, he hadn't returned to

work. MHCC agreed to consider a payment plan which would have meant Mr M would be repaying a lower amount for six months. However Mr M told MHCC he couldn't make repayments until he returned to work. In September 2021, Mr M made an offer to repay the agreement at £100 a month until he returned to work. And following termination of the agreement, Mr M told MHCC he had returned to work and had borrowed the money to pay the arrears from a family member.

Having carefully considered this, Mr M missed a number of payments under the agreement and he didn't keep to the payment plan he had agreed. It was also unclear when Mr M would be returning to work. I note that Mr M said he borrowed funds from a family member to repay the agreement. However, given the arrears at the time, it would have been irresponsible for MHCC to allow Mr M to continue getting into further arrears, not knowing when he would be returning to work. So as per the terms and conditions, MHCC was entitled to terminate the agreement and repossess the car from Mr M.

In addition, the terms and conditions of Mr M's agreement also say, "You should carefully consider your ability to meet the repayments without undue difficulty during your agreement. You should take into account factors such as your income, your other financial commitments (both existing and in the future) and the impact of a future change in your personal circumstances. Contract hire is not suitable for you if you will not be able to make the repayments out of income and/or available savings (without having to borrow further or sell assets to meet the repayments). If after applying for credit, you become aware of a change or a possible change in your financial circumstances before you take out your Hire Agreement with us, or there is any other information (for example relating to your health) that you think may be relevant to our consideration of your credit application, please contact us." And "Any breach of the Hire agreement may lead us to terminating it".

MHCC said it terminated the agreement as Mr M had declared he was in salaried employment and had been for a number of years at the time he entered into the agreement. But he later told MHCC that he hadn't been employed at the time he entered into the agreement, or since then and MHCC found that Mr M had a limited company instead of working for an employer. MHCC said the details Mr M had provided it were incorrect and so he was in breach of the agreement.

Mr M said a third party had told him to declare he was an employee and he had declared a salary as he was financially stable at the time and anticipated he would be back at work soon.

Having considered this carefully, I'm persuaded that Mr M provided incorrect details to MHCC at the time he made his application. I appreciate that Mr M says some of these details were provided on the instruction of a third party, who isn't connected to D or MHCC. However, Mr M was aware he wasn't in salaried employment at the time he entered into the agreement. And so, he provided incorrect information to MHCC which impacted its decision to lend and to supply the car to him. The terms and conditions of the hire agreement allow MHCC to terminate the agreement when there has been a breach of the agreement. In this case, I'm satisfied Mr M breached the agreement by providing incorrect details to MHCC at the time of making his application and so, MHCC was entitled to terminate Mr M's agreement.

Did MHCC act unfairly or unreasonably in any other way?

The hire agreement Mr M entered into confirms that the initial rental will be collected by MHCC by Direct Debit following delivery of the car. MHCC has now confirmed that it made an admin error by setting Mr M's account payment to BACS rather than Direct Debit. Mr M's Direct Debit was only set up to start taking repayments in November 2020 by MHCC.

Mr M says that his agreement wouldn't have fallen into arrears had MHCC taken the advance rental and the three following monthly payments by Direct Debit, as he had the

funds available at the time. He says he had savings in his account and had no reason to suspect that payments weren't being paid to MHCC.

I've thought about whether Mr M has been caused a loss as a result of the error by MHCC. Having done so, I'm not persuaded it has. I'll explain why.

I can see that Mr M's advance rental invoice was sent to him on 27 July 2020. This stated that the payment method was BACS and provided the details so Mr M could make this payment to MHCC. However, no payment was made to MHCC and so, it sent Mr M arrears notices in September and October 2020 and finally a default notice in December 2020.

Whilst Mr M says he didn't scrutinise his bank statements at the time, I consider that the invoice and the arrears letters would have put Mr M on notice that his payments hadn't been made. Mr M hasn't disputed that he didn't receive the letters from MHCC and he appears to have received the default notice, as this led to him making his complaint. So I think it would have been reasonable for Mr M to have queried the advance payment invoice and the subsequent arrears notices.

In addition, had MHCC not made this error and Mr M paid the advance payment and the three subsequent monthly payments, I think it's likely Mr M's agreement would still have defaulted given his personal and financial circumstances at the time. And even if I'm wrong about this, I still consider that Mr M was in breach of his agreement due to the declarations he made about his salary and employment at the time he entered into the agreement. And so, I don't think it was unfair for MHCC to terminate Mr M's agreement.

My provisional decision

My provisional decision is that I do not intend to uphold Mr M's complaint."

Responses to my provisional decision

Mr M responded. He reiterated his complaint and also said that he wasn't told by MHCC to reconsider whether he needed the car bearing in mind the impact of the Covid-19 pandemic. He said in May 2022, he suffered from a sudden unexpected medical emergency. This resulted in an expected recovery time of one year. Mr M provided medical evidence to support this. He also said that he continued to make all his other regular payments, including payments to his other car lease, and so it's speculation whether he would have still defaulted or not.

MHCC didn't respond to my provisional decision.

Further correspondence following the provisional decision

I reviewed the comments made by Mr M in light of my provisional decision. The medical evidence provided confirms the extent and the impact of Mr M's sudden unexpected emergency. I'm sorry to hear that this happened to Mr M.

In light of this, I wrote to both Mr M and MHCC. I explained that I'd reviewed the further information supplied in response to my provisional decision and having done so, I was minded to depart from my provisional decision and uphold Mr M's complaint.

I explained I was minded to do this because Mr M had two medical incidents after he entered into the agreement. One was an injury shortly after the agreement was taken out and since then he suffered a medical emergency in May 2022. Both these medical incidents, alongside Mr M being out of work due to Covid-19, contributed to Mr M being unable to work for a significant period of time whilst he had the agreement. However, despite this, Mr M maintained all his repayments under the agreement between November 2020 and September 2021. The only arrears Mr M was unable to fully pay were unpaid as a result of an error made by MHCC in setting Mr M's agreement up to collect payments by BACS instead of Direct Debit. Mr M managed to reduce these arrears from £4,600 to less than £2,000.

I explained that the Financial Conduct Authority (“FCA”) issued rules and guidance in its Consumer Credit Sourcebook (“CONC”) which said:

7.3.4, “A firm must treat customers in default or in arrears difficulties with forbearance and due consideration”. And says examples of this could be (3) “accepting token payments for a reasonable period of time in order to allow a customer to recover from an unexpected income shock”.

I explained that I didn’t think it was correct that MHCC ended the agreement early to prevent arrears building up as Mr M had already paid around £2,800 towards his arrears, maintained his monthly repayments for a number of months and had less than £2,000 to pay at the point MHCC terminated the agreement. This was despite Mr M being out of work due to the issues I’ve already mentioned. In addition, Mr M didn’t intentionally decide not to pay his advance rental or the three subsequent monthly payments. These remained unpaid due to the error made by MHCC in the way it set his repayments up. I explained that had MHCC collected these by Direct Debit as it was supposed to, rather than BACS, on balance, I don’t think Mr M’s agreement would have been in arrears but even if it had, it wouldn’t have been in arrears so early on into the agreement as Mr M was able to maintain all his payments for a significant amount of time after these initial few missed payments.

I noted that Mr M also made an offer to repay £100 a month towards the arrears until he was back at work following his second injury. He was clearly suffering from an unexpected income shock as he was intending to be back at work following Covid-19 and then his accident. This wasn’t a self-inflicted injury and appears to have occurred through no fault of his own.

So given the principles set out in CONC 7, I said I didn’t think MHCC had acted with forbearance and due consideration by pursuing Mr M for the termination balance. Mr M made a fair offer to repay the arrears before the agreement was terminated and MHCC didn’t accept this. In addition, in terminating the agreement, Mr M has been left with around £7,500 more to pay rather less than £2,000 of arrears and his monthly repayments – which he had no difficulty in paying. And so, I didn’t think MHCC had treated Mr M fairly with forbearance and due consideration.

In terminating the agreement, MHCC left Mr M with a termination balance of around £7,500. Upon review, given Mr M’s personal circumstances at the time of termination and the fact that it’s unlikely Mr M would have been in arrears for long, or at all, had MHCC collected the initial payments by Direct Debit, I said I thought it was unfair for MHCC to pursue Mr M for the whole termination balance. I said I thought MHCC should only pursue Mr M for the outstanding arrears which accrued before the agreement was terminated and I thought it should remove any adverse information from Mr M’s credit file about this agreement.

Mr M agreed. But MHCC responded and said it was unaware of Mr M’s health issues before he took the agreement out and was only made aware of these in June 2021. It said at the time it terminated the agreement, Mr M still had part of the advance rental outstanding, August – October 2020 rentals outstanding and the September 2021 rental outstanding. This amounted to around £2,500. It said it sent Mr M an invoice for the outstanding rentals and said this was due to be paid by BACS and sent him other letters to confirm his agreement was in arrears.

It also said that it offered forbearance on numerous occasions over a prolonged period of time. It said it attempted to assist Mr M in clearing the arrears but his promises to pay didn’t materialise. It said it could have terminated the agreement in January 2021 when it was made aware that Mr M was unemployed. It said Mr M had between June 2020 and September 2021 to clear the arrears. It said Mr M made offers to pay whilst the agreement was active but these didn’t result in payment of any amount. It said it accepted all the offers but Mr M didn’t make them. It said the final offer of payment was made after the Notice of Termination. It also said Mr M could have made token repayments to clear the arrears, but

he didn't do this. It also apologised for the error it made at the outset of the agreement and accepted this was a contributing factor to the arrears accruing, but it said Mr M should have been aware it hadn't taken a payment.

MHCC remains in disagreement, so I've reviewed Mr M's complaint in light of the new information provided and the information provided by both parties.

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.

Both parties have provided a good deal of evidence, so I've had to summarise things in this decision. The rules of our service allow me to do this, but I want to assure the parties, if I don't mention every single point that's been raised, it's not because I haven't thought about it. I have considered everything that's been said and sent to us. However, I'm going to concentrate here on what I consider is key to reaching a fair and reasonable outcome overall.

I've reviewed all the comments made in response to my provisional decision and the further comments received once I let both Mr M and MHCC know that I intended to depart from my provisional decision and why.

Having done so, I'm satisfied that Mr M's complaint should be upheld. This is mainly for the reasons set out in my further communication with MHCC. I'll explain further.

There's no dispute that MHCC made the error with setting up the payment incorrectly. MHCC accepts this. This resulted in Mr M missing the advance rental and three subsequent payments. MHCC says it sent Mr M arrears notices and an invoice saying payment would be taken by BACS. Mr M says he was unaware he had missed payments as he had funds available at the time. When Mr M received the default notice in January 2021, he contacted MHCC. During this call, he set up a repayment and told MHCC he had savings to pay this, despite an income and expenditure showing he had a low disposable income. He also told MHCC he hadn't worked since March 2020.

This suggests that Mr M had funds available at the time and before this as he told MHCC he had access to savings. Mr M has also told us he had funds in his account and so he didn't think to check whether the payments had been made. I think it would have been reasonable for Mr M to check, but if MHCC had taken the payments owed under the agreement correctly in the first place, I think it's more likely than not that Mr M wouldn't have gotten into arrears so soon after entering into the agreement.

In January 2021, Mr M agreed to a repayment plan with MHCC in which he would pay £1,000 extra for around four months to clear the arrears. Mr M only paid two £1,000 payments however. In June 2021, MHCC was made aware that Mr M was due to go back to work in October 2020 following the Covid-19 pandemic. However, Mr M told MHCC that due to an accident, he couldn't and he was due to return to work in a few weeks. MHCC agreed to look at a payment plan option for Mr M to pay a lower amount for six months.

In July 2021, Mr M told MHCC he would need a further medical procedure. He said he couldn't make any further payments at the time towards the arrears but he should be returning to work in August 2021. In September 2021, Mr M told MHCC he would need a further medical procedure and he couldn't pay anything until the following month. Mr M said he couldn't make a payment towards the arrears, but after MHCC said it would have to take full payment of the arrears, Mr M said he would need a few days to collect the arrears funds. Mr M then called a couple of days later and offered to pay £100 a month towards the arrears until he was back at work. He said although he was waiting for a procedure, this wouldn't stop him working. MHCC said it would review this and then made a decision to terminate the agreement.

Having thought about all of this carefully, I don't think MHCC acted with forbearance and due consideration in line with the guidance and rules set out in CONC 7. This is because MHCC was aware in June 2021 that Mr M had an accident which resulted in him being unable to work for a period of time and contributed to him being unable to clear his arrears quickly. Mr M made an offer to repay £100 towards the arrears, on top of the monthly repayments of £510.53, before MHCC terminated the agreement. MHCC's system notes that it has provided to this service confirm this.

CONC 7.3.8 states, *"An example of where a firm is likely to contravene Principle 6 and CONC 7.3.4 R is where the firm does not allow for alternative, affordable payment amounts to repay the debt due in full, where the customer is in default or arrears difficulties and the customer makes a reasonable proposal for repaying the debt or a debt counsellor or another person acting on the customer's behalf makes such a proposal."*

CONC 7.3.9 states, *"A firm must not operate a policy of refusing to negotiate with a customer who is developing a repayment plan."*

Principle 6 states, *"A firm must pay due regard to the interests of its customers and treat them fairly."*

I appreciate Mr M's agreement was in arrears since June 2020, but I think MHCC's error contributed to his agreement being in arrears so early on. I note that MHCC didn't ask Mr M to pay towards the arrears in June 2020 when it found out about Mr M's personal circumstances. However, it did say it would consider a six month repayment plan for the arrears in June 2021, but then terminated the agreement three months later in September 2021. MHCC was aware that Mr M was undergoing medical procedures and Mr M updated it about his circumstances.

Finally, when Mr M offered MHCC a repayment of £100 a month towards the arrears until he returned to work, I think this was a fair and reasonable proposal and I think when MHCC declined to accept this, this wasn't in line with CONC 7.3.8, 7.3.9 or Principle 6. This offer was made before MHCC terminated the agreement. And so, I think it was unfair for MHCC to terminate Mr M's agreement considering his circumstances and I don't think MHCC acted with forbearance and due consideration.

Overall, I see no reason to depart from my intended findings as explained to both parties in my follow up correspondence following the provisional decision. This is that Mr M should only be expected to pay the arrears that had accrued up until the point the agreement was terminated. I think this is fair and reasonable in all the circumstances of this complaint.

My final decision

I uphold Mr M's complaint and direct Mitsubishi HC Capital UK Plc trading as Hitachi Capital Vehicle Solutions to settle Mr M's complaint as follows:

- Reduce the outstanding amount owed by Mr M to only include the arrears that accrued up until the point the agreement was terminated;
- If the effect of reducing the outstanding amount owed means that Mr M has made an overpayment, any overpayments should be returned to Mr M along with 8% simple interest† on the overpayments from the date they were made (if they were) until the date of settlement.
- If Mr M has made any payments over this amount, MHCC should refund any overpayments and pay Mr M 8% simple interest on this overpayment from the date of each payment until the date of settlement;
- If an outstanding balance remains once these adjustments have been made MHCC should contact Mr M to arrange a suitable repayment plan, Mr M is encouraged to get

in contact with and cooperate with MHCC to reach a suitable agreement; and

- Amend any adverse information reported to the credit reference agencies about the termination of the agreement.

† HM Revenue & Customs requires MHCC to take off tax from this interest. MHCC must give Mr M a certificate showing how much tax it has taken off if he asks for one.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 28 July 2023.

Sonia Ahmed
Ombudsman