

## **The complaint**

Mr B complains about the management and administration, by Santander Consumer (UK) Plc trading as Volvo Car Financial Services ("VCFS"), of his hire agreement.

## **What happened**

In June 2021 Mr B entered into a hire agreement with VCFS for a new car. Under the terms of the hire agreement, everything else being equal, Mr B undertook to make an advance payment of £2,233.44 followed by 35 monthly payments of £372.24.

In late July 2022 VCFS sent Mr B an early termination quote. Mr B was looking to return the car (and early terminate the hire agreement) because he was moving from the UK to the USA.

In late August 2022 the car was collected from Mr B.

In late August 2022 VCFS sent Mr B an early termination invoice for £4,451.38 to his UK address.

In early September 2022 Mr B advised VCFS of his USA address and that he was waiting on an early termination invoice from it.

Mr B was passed VCFS' early termination invoice (sent to his UK address) by his tenant 'opened'. On receipt of this Mr B understood that the payment of £4,451.38 would be collected by VCFS, in due course, by direct debit. This didn't happen.

In March 2023 VCFS sent Mr B an email chasing payment of £4,451.38.

In April 2023, and after various correspondence had been exchanged, Mr B complained to VCFS about its management and administration of his hire agreement, the sending of correspondence to an address that he no longer resided at and the fact that he was able, via an 'app', to view the personal details of the new owner of the car. Mr B says as a resolution to his complaint he was looking for the sum of £4,451.38 to be written off.

In May 2023 VCFS sent Mr B a final response letter ("FRL"). Under cover of this FRL VCFS said that by way of resolution to Mr B's complaint it had reduced the sum it was seeking the recovery of by £75.00 to £4,376.58.

In July 2023, and unhappy with VCFS' FRL, Mr B complained to our service.

Mr B's complaint was considered by one of our investigators who came to the view that to fairly and reasonably compensate Mr B VCFS should 'pay' him a further £75.00.

VCFS accepted the investigator's view but Mr B didn't. And because Mr B didn't accept the investigator's view his complaint was passed to me for review and decision.

In December 2023 I issued a provisional decision. In summary I said:

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

I'm very aware that I've summarised this complaint above in far less detail than it may merit. No discourtesy is intended by this. Instead, I've focussed on what I think are the key issues here. Our rules allow me to do this. This simply reflects the informal nature of our service as a free alternative to the courts. If there's something I've not mentioned, it isn't because I've ignored it. I haven't. I'm satisfied I don't need to comment on every individual argument to be able to reach what I think is the right outcome. I will, however, refer to those crucial aspects which impact my decision.

Secondly, I would add that where the information I've got is incomplete, unclear or contradictory I've to base my decision on the balance of probabilities. And although I need to have regard to the law I'm not bound by it, and I can come to a different outcome to what a court might come to.

Before I address Mr B's complaints, I think it would be useful to address the charge itself. And, in doing so, I've considered the following:

#### Consumer Credit Act 1974 ("CCA")

Section 101 of the CCA refers to a consumer's right to terminate a hire agreement by giving notice. It states:

*"Right to terminate hire agreement:*

*(1) The hirer under a regulated consumer hire agreement is entitled to terminate the agreement by giving notice to any person entitled or authorised to receive the sums payable under the agreement.*

*(2) Termination of an agreement under subsection (1) does not affect any liability under the agreement which has accrued before the termination ...*

*(7) This section does not apply to—*

*(a) any agreement which provides for the making by the hirer of payments which in total (and without breach of the agreement) exceed £1,500 in any year..."*

Section 132 of the CCA enables the court to grant relief to a hirer where the owner has recovered possession of the goods otherwise than by action. It states:

*"Financial relief for hirer:*

*(1) Where the owner under a regulated consumer hire agreement recovers possession of goods to which the agreement relates otherwise than by action, the hirer may apply to the court for an order that—*

*(a) the whole or part of any sum paid by the hirer to the owner in respect of the goods shall be repaid, and*

*(b) the obligation to pay the whole or part of any sum owed by the hirer to the owner in respect of the goods shall cease, and if it appears to the court just to do so, having regard to the extent of the enjoyment of the goods by the hirer, the court shall grant the application in full or in part.*

*(2) Where in proceedings relating to a regulated consumer hire agreement the court makes an order for the delivery to the owner of goods to which the agreement relates the court may include in the order the like provision as may be made in an order under subsection (1)."*

## Consumer Rights Act 2015 ("CRA")

The CRA sets out a schedule of non-exhaustive examples which might be considered to be unfair. The effect of this section is that terms used in contracts and notices will only be binding upon the consumer if they are fair. It defines 'unfair' terms as those which put the consumer at a disadvantage, by limiting the consumer's rights or disproportionately increasing their obligations as compared to the trader's rights and obligations.

*"Part 2: Unfair Terms..... What are the general rules about fairness of contract terms and notices?"*

*62. (1) An unfair term of a consumer contract is not binding on the consumer ....*

*(4) A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer."*

The CRA provides guidance on the expected clarity of wording within a contract, and the potential impact that any ambiguity within the contract would have:

*"68: Requirement for transparency*

*(1) A trader must ensure that a written term of a consumer contract, or a consumer notice in writing, is transparent ...*

*(4) A term is unfair if, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.*

*69: Contract terms that may have different meanings*

*(1) If a term in a consumer contract, or a consumer notice, could have different meanings, the meaning that is most favourable to the consumer is to prevail."*

The CRA then goes on to list examples of terms that might be considered unfair:

*"Schedule 2: Consumer contract terms which may be regarded as unfair.*

*Part 1 list of terms ...*

*(4) A term which has the object or effect of permitting the trader to retain sums paid by the consumer where the consumer decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the trader where the trader is the party cancelling the contract.*

*(5) A term which has the object or effect of requiring that, where the consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high sum in compensation or for services which have not been supplied.*

*(6) A term which has the object or effect of requiring a consumer who fails to fulfil his obligations under the contract to pay a disproportionately high sum in compensation."*

## The Financial Conduct Authority ("FCA")

The FCA Principles for Businesses (PRIN) also apply and are of relevance to this complaint. PRIN 6 says "A firm must pay due regard to the interests of its customers and treat them fairly."

## The Hire Agreement

The hire agreement sets out Mr B's contractual obligations. Regarding early termination, the hire agreement states:

### *"8. Breach*

#### *8.1. You will be treated as having breached this agreement if you:*

*8.1.1. have a petition presented, order made or resolution passed for your winding up, by the receiver, administrative receiver, liquidator or administrator appointed for the purposes of Section 123 of the Insolvency Act 1986 are deemed to be insolvent, have a petition for bankruptcy presented against you, have an application for interim order made against you or enter into an arrangement with or convene a meeting with your creditors; or*

*8.1.2. fail to pay any hire charge, services charge or other amount due on the due date under this agreement; or*

*8.1.3. break clause 5; or*

*8.1.4. break any other term of this agreement or if:*

*8.1.5. we consider that the vehicle may be in jeopardy or that our rights hereunder may be prejudiced; or*

*8.1.6. any other agreement between us (or any member of the group of companies of which we are a member) and you is terminated as a result of your breach; or*

*8.1.7. any of the above occurs in relation to any guarantor of your obligations.*

#### *8.2. If you are treated as having breached this agreement and fail to comply with the default notice that we send you:*

*8.2.1. we can terminate the agreement;*

*8.2.2. we will have the right to take back the vehicle; and*

*8.2.3. you will have to pay immediately all sums due under clause 9.*

#### *8.3. After termination of this agreement you will:*

*8.3.1. at your risk and cost return the vehicle to us or arrange collection with us, in good condition at an address that we will reasonably specify;*

*8.3.2. be solely responsible for ensuring the safekeeping, supervision and custody of the vehicle until it is returned or repossessed by us under clause 8.4; and*

*8.3.3. be provided with a vehicle condition report following our inspection of the vehicle upon collection.*

*8.4. If you fail to return the vehicle under clause 8.3 within 4 calendar days of being requested to do so, then we may immediately without notice retake possession of it. You shall be responsible for our costs of such repossession.*

*8.5. If you fail to return the vehicle as required by clause 8.3 and retain the vehicle (whether by agreement with us or not) for more than 4 calendar days following termination of this agreement, we may charge you a daily rental for each day you retain possession of the vehicle beyond this period. This daily rental will be a pro-rated daily amount of the total hire charges (including any advance payment) due under this agreement.*

## *9. Payments on termination*

*9.1. On termination of this agreement under clauses 8.2 or 10.1, during or at the end of the fixed period, you will immediately pay to us together with VAT:*

*9.1.1. all arrears of hire charges and services charges, administration fees (if any) and other sums due under this agreement together with interest;*

*9.1.2. any excess mileage charge calculated in accordance with clause 13 and charged up to the time you return the vehicle to us or when we or our agents repossess the vehicle;*

*9.1.3. our costs in respect of repossession, storage, and insurance of the vehicle;*

*9.1.4. our costs (or estimated costs) in respect of servicing, providing replacement parts and carrying out repairs which are needed to put the vehicle in good condition following its return or repossession or resulting from an accident or deliberate or negligent damage to the vehicle;*

*9.1.5. our costs in respect of selling the vehicle;*

*9.1.6. if, and only if we require it, you will pay us by way of liquidated damages and/or compensation for our loss an amount equal to all hire charges which had we not terminated this agreement were agreed to be paid by you to us until the end of the fixed period of hire less a discount for accelerated payment and early return of the vehicle at the rate of 50%.*

*9.2. Your obligations under clause 9.1 will be treated as if they had arisen immediately before termination.*

*9.3. Clause 9.4 will only apply if this agreement is terminated under clause 7.3 following a total loss of the vehicle.*

*9.4. On termination of this agreement under clause 7.3 you will immediately pay to us together with VAT:*

*9.4.1. all arrears of hire charges, services charges, administration fees (if any) and other sums due under this agreement together with interest;*

*9.4.2. any excess mileage charge calculated in accordance with clause 13 and charged up to the time the vehicle is declared a total loss;*

*9.4.3. the higher of (i) the retail vehicle value or, (ii) net book value; and*

*9.4.4. in the case of your insurance company not paying the sum required in full, you will be required to pay the shortfall.*

*9.5. Your obligations under clauses 9.3 and 9.4 above will be treated as if they had arisen immediately before termination.*

## *5. Your Obligations*

### *10. End of fixed period and return of vehicle*

*10.1. Unless terminated under clause 7.3 or 8.2 this agreement terminates automatically at the end of the fixed period and you will return the vehicle to us as required by clause 8.3.*

## *7. Insurance*

*7.3. This agreement will terminate immediately following a total loss of the vehicle (see clause 9.4) subject to those provisions of this agreement which are capable of surviving termination.*

The first point I need to consider is whether these charges are legally enforceable on early termination. Unlike a hire purchase agreement, the hire agreement Mr B entered into doesn't have the same rights in legislation to terminate an agreement early. And, while section 101 of the CCA gives consumers the right to terminate a hire agreement, this doesn't apply to agreements where the hirer is required to make payments exceeding £1,500 a year. Which Mr B was. So, I'm satisfied that section 101 of the CCA doesn't apply.

So, as the charges, on the face of it, aren't unenforceable, I've also considered if what Mr B is being asked to pay is fair and reasonable in the circumstances.

Based on what I've seen, I'm satisfied that both parties agreed to terminate the hire agreement early. And, as a result, VCFS charged an early termination charge.

Clauses 8 and 9 of the hire agreement provide for an early termination charge. However, these clauses don't include the circumstances applicable here – where early termination was mutually agreed between the parties. So, it's not clear whether these clauses actually apply.

Taking everything into consideration, I think it's fair to presume that VCFS are charging the early termination charge to compensate itself for Mr B not paying all the originally agreed contractual payments. But the fact that the car potentially has a different (higher) value on early termination, as opposed to the value at the end of the hire agreement, also needs to be considered.

As the hire agreement doesn't provide a transparent and fair way of calculating this compensation, and so ensuring that VCFS aren't overcompensated to the extent that it wouldn't be fair and proportionate to their actual loss, I'm satisfied that PRIN 6 should be applied to the circumstances. Which would also involve the need for VCFS to be both clear and transparent about what they're charging; and not charging more than it's fair and reasonable to do so.

In my view what I need to do in this case is to look at the difference between the position VCFS found itself in on early termination compared to the position it would be in had the hire agreement run its full term (and the car having done no more than the total allowable mileage) and having consideration to the value of the car at both stages.

When Mr B returned the car, there were 21 months left on the hire agreement, and had the hire agreement ran its full term, Mr B would've paid an additional £7,817.04. As it was, he was invoiced an early termination charge of £4,451.38.

So, had the hire agreement run its full term, VCFS would've received £7,817.04 in payments from Mr B, and the car (according to VCFS) would've been valued at £18,251.67 (assuming the total allowable mileage hadn't been exceeded). So, VCFS would be receiving goods and payments to the value of £26,068.71.

However, as the hire agreement was terminated early, Mr B was charged a total of £4,451.38 in charges, and the car was sold for £33,856.00. So, VCFS received goods and payments to the value of £38,307.38. As such, charging what it did on early termination, VCFS received £12,238.67 more than it otherwise would've done if the hire agreement had run its full term and based on a car valuation (at the full term end) of £18,251.67. I also think it's worth pointing out that for VCFS to be deemed worse off as a result of the agreement being terminated early the car would need to have been valued (at the full term end) in excess of £30,000.00.

I've not seen anything to show me that Mr B was made aware that VCFS was benefitting from terminating the agreement early, rather than letting it run its full course, and I don't think it's likely he would've been otherwise aware of this. And, if he had been aware, there is the possibility he wouldn't have terminated the agreement early.

Having considered section 132 of the CCA, and the significant amount by which VCFS benefitted from the agreement ending how it did, I think it's likely that a court would consider it reasonable to grant Mr B some relief on the grounds the early termination fee resulted in a situation where VCFS has been overcompensated.

So, and whether or not a court would grant Mr B any relief under the CCA, I'm satisfied that VCFS didn't comply with PRIN 6 by requiring Mr B to pay a disproportionate charge. As such, I'm satisfied that VCFS need to take action to remedy the situation by waiving the early termination charge.

However, this isn't the end of matters. Having considered everything the parties have said and submitted I'm satisfied that VCFS' handling of matters since August 2022 (including, but not restricted to, sending correspondence to an address that it was aware Mr B wasn't residing at) was poor and caused Mr B both distress and inconvenience for which he should be fairly compensated £300.00.

I note that Mr B says he has been able to view personal details, via an 'app', of the new owner of the car. However, and for the sake of completeness, I would add that I'm not persuaded that this, in itself, warrants compensation. I say this because there is no suggestion that this has caused Mr B a loss, that any of his personal details have been made available to one or more third parties and given that Mr B, as I understand it, can simply delete the 'app' from his devices.

Mr B responded to my provisional findings to say that he accepted them and to provide me with further background and commentary.

VCFS responded to my provisional findings to say that it accepted them.

### **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.

As both parties have confirmed they accept my provisional findings I can confirm I see no reason to depart from them and I now confirm them as final.

### **My final decision**

My final decision is that Santander Consumer (UK) Plc trading as Volvo Car Financial Services must:

- waive the early termination charge it's currently seeking payment of from Mr B
- pay Mr B £300 for the distress and inconvenience this whole matter has caused him
- remove any adverse information recorded with credit reference agencies in respect of the early termination charge

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 30 January 2024.

Peter Cook  
**Ombudsman**