

The complaint

Mr C complains that Virgin Media Mobile Finance Limited (“VM”) has treated him unfairly in relation to goods he purchased with finance provided by it.

What happened

I will summarise the background to this complaint in less detail than the parties have done. There are several reasons for this. The history of this complaint is well known to both Mr C and VM. Moreover, the history of this complaint, has also been set out in detail in correspondence on the file, and in the investigator’s first view. Both Mr C and VM have both been sent a copy of that view, so there is no need for me to repeat the details here. In addition, our decisions are published, so it’s important I don’t include any information that might lead to Mr C being identified. So for all these reasons, I will keep my summary of what happened quite brief.

In October 2018 Mr C entered into a contract with VM to supply finance for the purchase of a phone. Mr C became dissatisfied with the performance of the phone, therefore he sent it to VM to examine it in October 2019. VM assessed the phone and whilst they found the phone did have faults it did not agree it had any responsibility to correct the faults. Specifically, VM did not agree that the faults were covered by the warranty for the phone. VM returned the phone to Mr C.

Mr C remained dissatisfied with the phone. He spoke to VM. According to Mr C, VM’s employee said to him *“you can return the phone and we will have a look. I made it clear to her that I’m not returning it for it to be looked at but returning it as it is not working, and I won’t be needing it any longer as they have refused to repair it”*. VM stance is that it did not agree to Mr C returning the phone.

Mr C tells us he posted the phone back to VM. VM tells us it never received the phone. Mr C complained to VM about all of this, and VM declined to uphold Mr C’s complaint. Mr C’s stance is that VM must now write-off the loan and stop pursuing him for the debt.

Dissatisfied with VM’s response Mr C complained to this service.

One of our investigators looked at what had happened. Our investigator did not recommend that Mr C’s complaint ought to be upheld. Our investigator issued two separate views to explain why he’d made this recommendation.

VM accepted this recommendation, Mr C did not. In summary, he indicated he did not think he’d been treated fairly by us or that we’d taken account of the points he thought were important. Mr C reiterated his position that he’d returned the phone. He also told us we needed to ask VM for the evidence that he thinks is relevant. Mr C told us that the phone was still under warranty and therefore should have been repaired by VM. Mr C did not agree that the fact that the phone is now missing had any significance when it came to making a decision about his complaint.

Mr C indicated that he wanted an ombudsman to review his complaint.

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.

First, I'm very aware that I've summarised this complaint in far less detail than the parties and I've done so using my own words. I'm not going to respond to every single point made by all the parties involved. 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. Rather, 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 recognise Mr C has strong views about how we should investigate his complaint. However, this service is independent of both consumers and the businesses they are complaining about. This means that we don't act for consumers or businesses, nor do we take instructions either from consumers or businesses or allow either party to direct the course of our investigations; were we to do so, it would totally compromise our independence and impartiality. That means it's up to us to determine what evidence we need in order to investigate a complaint. So although I've noted Mr C's directions in relation to how he thinks we should investigate this complaint, following his directions is not something that I'm able to do.

The finance agreement, that is the fixed sum loan agreement, in this case, is a regulated consumer credit agreement. As such this service is able to consider complaints relating to it.

In considering what is fair and reasonable, I need to have regard to the relevant law and regulations, regulator's rules, guidance and standards and codes of practice and (where appropriate) what I consider to have been good industry practice at the time.

Mr C complains about the quality of the phone. VM did not sell the phone to Mr C, the retailer did. In general, it is the retailer of goods who is responsible for the quality of goods that are sold to a consumer. However, under relevant law, because of the type of finance Mr C used to purchase the phone he potentially has a claim against VM for the quality of the phone.

In this complaint, I consider relevant law to include the Consumer Credit Act 1974 and in particular Section 75 of that Act ("Section 75"), and the Consumer Rights Act 2015 ("CRA 2015").

The general effect of Section 75 is that if Mr C has a claim for misrepresentation or breach of contract against the supplier of the phone, he can also bring a like claim against VM provided certain conditions are met.

The CRA 2015 says that under a contract to supply goods, there is an implied term that "*the quality of the goods is satisfactory*". And if they are not then this is a breach of contract.

It follows that If I find that the phone was not of satisfactory quality, this would be a breach of contract which I could hold VM responsible for, on a fair and reasonable basis.

Mr C suggests the phone was not of satisfactory quality. VM suggests that it was. So the parties are miles apart about this fundamental point. Where the evidence is incomplete, inconclusive, or contradictory (as some of it is here), I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances.

The difficulty for Mr C is that the phone is missing. Therefore it is not available to be examined. The information that I do have about the faults that were found before the phone went missing, do not provide sufficient information about whether most likely those faults were there at the time the phone was supplied. In other words there is nothing to show that

the phone was not of satisfactory quality when supplied. Therefore I cannot make a finding that there has been a breach of contract. Therefore Mr C's complaint falls at this first hurdle and I've no proper basis for asking VM to do anything further.

For completeness, I'll also look at the return of the phone and at the warranty point.

Mr C's rights against VM are limited, if Mr C has a claim for misrepresentation or breach of contract against the supplier of the phone, he can also bring a like claim against VM, as I mentioned before.

Mr C decided to send the phone back to VM, that was his choice to make. But the fact that the phone then got lost in the post and cannot be traced (Mr C has no proof of postage, neither did he choose to send the phone using a method that would have allowed him to track the phone), is neither a misrepresentation nor a breach of contract. Neither would Mr C have any claim for this against the supplier. So I can't hold VM responsible for this. If VM had agreed to be responsible for the return of the phone and the phone could be shown to have gone missing once VM received it, then I might have looked at matters differently. But that is not what happened here.

Moreover, that fact that Mr C unilaterally decided by returning the phone he no longer had responsibility for it, does not mean VM becomes responsible instead and must write off his debt. That was not what was agreed by both parties, and I have no fair or reasonable basis to say VM must accept Mr C's decision.

For the purposes of this complaint, VM is only responsible for misrepresentation and breaches of contract in relation to the contract of sale which was financed by credit provided by it. I've not seen the warranty, but I don't need to do so, it is an ancillary contract. That means it a contract that was not funded by the credit supplied by VM, therefore I've no power to hold VM to account for any breaches of that warranty. And to be clear I am making no finding about whether the warranty was breached or not, in any event.

For all of these reasons, I find I have no proper basis to require VM to do anything further in relation to this complaint.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 17 August 2023.

Joyce Gordon
Ombudsman