DRN-4560207

The complaint

Mr B complains Clydesdale Bank Plc trading as Virgin Money ("Virgin") has not dealt fairly with a claim he made under section 75 of the Consumer Credit Act ("CCA").

What happened

All parties to the complaint should by now be well-familiar with the background, so I will not set this out in detail. However, in summary:

- Mr B booked a hire car from an operator in the USA, in May 2022. A deposit of £104.78 was required at this time, which was paid by his fiancée. On arrival at the rental company, Mr B paid the balance of £751.49 on his Virgin credit card.

- Mr B says he ended up having to return the first two cars the rental company supplied him with because they had faults. This all happened within the first three of days of the rental term. The third car was more or less in working order and Mr B was able to use it for the rest of his holiday.

- Problems arose when Mr B came to return the third car. He says he was told by the rental company that he needed to pay for repairs to the second car, because (it alleged) he had put diesel in it instead of petrol and this had been the cause of the faults. Mr B said he disagreed with this but the prospect of missing his flight due to needing to get the police involved if he continued to dispute it, meant he paid under protest. The payment was made on his fiancée's card, and came to £1,101.52.

- On return to the UK, Mr B's fiancée attempted to claim back the £1,101.52 from her card issuer. This was unsuccessful due to her not having been a party to the rental contract, meaning section 75 of the CCA hadn't applied to the payment.

- Mr B then made a section 75 claim against Virgin in July 2023, but he didn't receive a response to his claim in a timely manner. Virgin offered £50 compensation in respect of its delays and lack of contact with Mr B, but still did not answer his claim. Mr B was dissatisfied with this response and referred the matter to the Financial Ombudsman Service for an independent assessment.

One of our investigators looked into Mr B's case. He came to the conclusion that it should be upheld. I could summarise his key findings as follows:

- Section 75 of the CCA allowed Mr B to make a claim against Virgin for breaches of contract or misrepresentations by the car rental company, in certain circumstances.

- Mr B was the person who had entered a rental contract with the rental company, he'd made a payment toward the contract with his Virgin credit card, and the contract had been for an amount over £100, so the conditions for a section 75 claim were in place.

- The evidence the car hire company had relied on to press its allegation that Mr B had put the wrong fuel in the rental car, was lacking in detail and strangely-dated. It didn't

contain any detail of any diagnostic procedures used to establish that car had been mis-fuelled or say how or when it had been mis-fuelled. It simply said it had been brought in with diesel in the fuel tank. It was dated almost two weeks after the second car had been returned by Mr B.

- On the other hand, there was evidence to suggest that it was unlikely Mr B had mis-fuelled the car. Firstly, he denied having done this. There were photos showing the car had been provided to Mr B with a full tank of fuel. It had broken down shortly after pick-up, and it was unlikely Mr B would have added any fuel at this point. It was also known that it was difficult to accidentally put diesel in a petrol car, because the nozzle would be too wide to fit.

- Our investigator also noted that the car rental company appeared to have a poor reputation with customers, with many complaints about sharp practices. Concluding, our investigator thought that if the car had been mis-fuelled, this had likely occurred before Mr B had picked it up and he was not responsible for this.

To put things right, our investigator recommended Virgin pay Mr B £1,101.52 – the amount he was charged but which had been paid by his fiancée.

Mr B accepted this recommendation, but Virgin failed to respond, meaning the case has been passed to me to decide. I've learned this week that Virgin has sent Mr B a letter saying that it will be paying him £1,101.52[1], however I understand Mr B would like a decision in any event.

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.

At its heart this complaint is about alleged failings by Virgin to deal fairly with a claim Mr B has brought under section 75 of the CCA. It seems based on the letter that Virgin has belatedly sent to Mr B, that it may now accept that he had a valid claim. I also think Mr B had a valid claim, and I'll explain why.

Section 75 of the CCA allows a consumer to claim against their credit card issuer, so long as certain conditions are met, in respect of any breach of contract or misrepresentation by a supplier of goods or services they have made a purchase from using the card. The two most important conditions are that there needs to be a debtor-creditor-supplier ("DCS") agreement in place, and the claim must relate to an item with a price over £100 and no more than £30,000. The second of these conditions is self-explanatory but the first requires a little more explanation.

While the reality is often more complicated, for there to be a DCS agreement in place, the person who owns the credit card account needs to have used their credit card to pay a company in relation to a contract for goods or services, and they need to have a claim against that company in relation to that contract, for breach of contract or misrepresentation.

The contract the claim relates to in this case is a short-term car rental contract. It was a contract for services. Mr B used his Virgin credit card to pay the rental company directly when he arrived in the USA. This payment was $835.05[2], which converted to £751.49 when

[1] Virgin has not informed the Financial Ombudsman Service that it is taking this action.
[2] According to the rental contract, this was for the car rental, taxes, and additional charges such as a pre-paid toll allowance and insurance.

charged to Mr B's card. Mr B's potential claim is against the rental company he paid. In light of this, I conclude there was a valid DCS agreement in place and the item to which the section 75 claim relates falls within the range of monetary values set in the legislation. However, it is still necessary to consider whether there has been a breach of contract or misrepresentation by the car rental company.

It's not been alleged that the company misrepresented anything to Mr B before he entered the contract, so I have focused this decision on the question of breach of contract. A breach of contract occurs when one party to a contract fails to discharge its obligations to the other under its terms. Terms can be express terms – written into the contract itself – or they can be implied. Terms can be implied into contracts by statute for example, or in order to make commercial sense of the contract.

The car rental contract said that Mr B's responsibility for physical damage to the vehicle was limited to $10,000, but the contract did not say *how* it would be determined if physical damage was Mr B's responsibility. Where there is a gap in the express terms of a contract, but it is so obvious that a certain term ought to be included that it would go without saying (sometimes known as the "officious bystander" test), this term may be treated as being implied. In this case I think it goes without saying that Mr B would not be responsible for damage which occurred prior to him picking up the car, and that the car rental company would therefore not charge Mr B for such damage. And so I think it's reasonable to consider the contract contained implied terms to this effect.

Like our investigator, I think the evidence points towards any damage to the second car being pre-existing. Mr B says all the cars were provided with a full tank of fuel and he didn't put any fuel in the second car prior to it breaking down. The booking form for the car rental appears to confirm that the rental company's fuel policy was "full to full", meaning it would supply any rental vehicles with a full tank of fuel.

Mr B has provided time-stamped photos. One, taken on 4 October 2022 at 1:51PM (the second day of the rental – after returning the first car), appears to show the dashboard of a car with a full tank of fuel and 61,315 miles on the odometer. Mr B says this photo was emailed to him by the car rental company – and this hasn't been challenged. The second photo shows what seems to be the same car at 4:42PM the same day, with the "check engine light" illuminated and 61,330 miles on the odometer. The fuel gauge is full in this photo as well. I think it's very unlikely that Mr B would have put any fuel in the car in the 15 miles prior to the check engine light illuminating – he would have no reason to do so because the tank was already full. Ultimately, I don't think Mr B put any fuel in the second car, and it follows that if the car did have the wrong fuel in the tank then this was pre-existing and not a problem Mr B was responsible for under the rental contract. By finding Mr B responsible, and charging him for the damage caused by the alleged misfuelling, I think the rental company acted in breach of contract.

I think our investigator's other points tend to strengthen the conclusion that it is unlikely Mr B put the wrong fuel in the second car. As our investigator noted, it would generally be quite difficult to accidentally put diesel in a petrol-fuelled car due to the nozzle being too wide for the filler neck. It also does appear that Mr B is not the only person who has had a poor experience with this particular rental company, with evidence of numerous complaints online about alleged overcharging. And the invoice for repairs does not evidence that Mr B mis-fuelled the car. It was dated almost two weeks after Mr B returned the car, did not contain basic details like the mileage at the point it was brought in for repairs, nor provide any opinion on who was responsible for the alleged mis-fuelling or when it had occurred.

There is a potential question over whether Mr B has been caused a loss by the rental company's breach of contract. After all, it was not he who paid for the damage charges, it

was his fiancée. However, I think it's reasonable to assume based on their sharing of the rental costs that Mr B and his fiancée are financially interdependent and the financial burden of paying the charges was effectively coming out of their shared resources. I note Mr B's fiancée was unsuccessful in claiming back any of the charges from her own card issuer, so there is no risk of the couple recovering the same loss twice if I direct Virgin to reimburse Mr B.

Having considered the evidence, I think Mr B had a valid claim against Virgin under section 75 of the CCA, which Virgin should have honoured. In failing to do so (at least within a reasonable time) it did not treat him fairly or reasonably and therefore his complaint should be upheld. I referred above to the fact that Virgin offered Mr B £50 compensation for delays and poor communication in dealing with his claim. It isn't clear if this was paid. It doesn't seem like an unreasonable amount to reflect the impact of these issues at the point Mr B brought his complaint to this service, so I see no reason to increase this compensation in my decision.

Putting things right

I note Virgin has now told Mr B that it will be paying him £1,101.52. This is how much I would have directed Virgin to pay Mr B, as it represents the loss caused by the rental company's breach of contract for which Mr B could hold Virgin liable under section 75 of the CCA.

However, I would also have directed Virgin to pay compensatory interest on this amount, so they have not quite gone far enough in putting things right. Virgin must do the following:

A) Pay Mr B £1,101.52 to the extent it hasn't already done so.

B) To the amount in A), add 8% simple interest per year*, calculated from the date of its final response letter, to the date the amount in A) is (or was – if this has already happened) paid to Mr B.

C) Pay Mr B the £50 compensation it has already offered in respect of delays in dealing with his claim, to the extent it hasn't already done so.

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

My final decision

For the reasons explained above, I uphold Mr B's complaint and direct Clydesdale Bank Plc trading as Virgin Money to take the actions listed in the "putting things right" section of this final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 10 April 2024.

Will Culley
Ombudsman