DRN-4628086

The complaint

Mr T has complained about the quality of a car he bought using a fixed sum loan agreement from The Energy Saving Trust Limited (EST).

What happened

EST provided Mr T with £35,000 credit under a fixed sum loan agreement for him to put towards a new plug-in hybrid car. The base price of the car was £39,075. He took out optional extras totalling £5,090 and received a special allowance discount of £3,972.91. The total price of the car was therefore £40,192.09 and Mr T had to make up the difference when buying it in October 2019.

The optional extras included a technology package (£1,900); comfort package (£990); piano black (£300); driving assistant professional (£1,250); and parking assistant plus (£650).

The way the loan worked was that EST paid Mr T the funds as long as he satisfied certain conditions under clause 3.2 of the agreement. The clause says the loan won't be paid unless and until:

- Mr T signed two copies of the agreement and returned one.
- The conditions of the Electric Vehicle Loan scheme set out in schedule part 2 had been met.
- The car was purchased within the timeframe specified.
- Mr T had returned a loan claim form, direct debit mandate, invoice.

The agreement was to be repaid with 72 monthly repayments of around £500.

Straight after collecting the car Mr T wrote to the supplying dealer to say the digital key wasn't working. He also complained that he wasn't able to activate the manufacturer complimentary seven-day insurance. Mr T also had other questions around certain functions of the car, but he was otherwise happy with it. It looks like the supplying dealer responded to Mr T's queries.

In February 2020 Mr T wrote to the dealer to say a voice activated assistant wasn't working and he wanted certain login details for the onboard WiFi system. He also explained he had problems logging in with his connected drive account.

Mr T and the dealer liaised with each other over the next few months. In July 2020, in addition to the problems with the digital key; the log in details and the voice assistant he also said he experienced other issues:

- Screen wash level sensors weren't working correctly.
- When the engine was cold the exhaust becomes unusually loud.
- Stitching coming loose from the front passenger seat.
- Kangaroo jumping of the car when the driving mode was set to sport and Mr T turned left at a very low speed.

The dealer said the car should be booked in for inspection. It was inspected but Mr T said issues were still present that weren't addressed in relation to the digital key; the voice assistant; exhaust and log in details. He also said a previously occurring, but already rectified fault in relation to a metallic cling had reappeared when depressing the brake pedal. The dealer offered to retest the car which Mr T accepted.

The dealer responded to say the digital key service had expired on the car. It said the exhaust noise was normal; it couldn't detect the clinking noise; the only way the WiFi log in details could be obtained would be by removing the roof liner so that it could read the number on the part, but this would be chargeable. It also responded to a query about the electric range and said the range will get lower as the car uses other components. And it updated the software on the car.

Mr T wasn't happy. He said the key should be active until 29 December 2020. And that the issue wasn't new – it had been happening since delivery of the car. He paid for an independent report in July 2021. At this point the car had covered around 22,000 miles. The report said:

In our opinion based on the visible evidence we would conclude that the vehicle is suffering from an evident fault in regards to its digital key system.

The report said the phone didn't connect. It highlighted the car had been returned to the dealer on several occasions and that it's been in the workshop when repairs were carried out. In summary the report said the car had a fault with the digital key which required further investigation.

Mr R sought legal advice and asked for a £15,000 price reduction from the dealer. The dealer said the reason the digital key didn't work was because Mr T changed his mobile device which wasn't supported by the manufacturer platform. It also referred to a decision from another Alternative Dispute Resolution (ADR) scheme about the complaint, which Mr T didn't want to accept. Mr T sent a letter before action saying there'd been a breach of contract because the goods were either not of satisfactory quality, fit for their particular purpose, or as described. Mr T requested a replacement car and in addition £2,000 compensation for the inconvenience of the digital key not working for a year. In addition, he asked for a payment of £60 per day for days he was without the car, and £30 per day for days he had a courtesy car. For days where the courtesy car was the same or higher standard he asked for £10. He said at the time of sending the claim the amount requested for this part was £1,380.

As things didn't get resolved, Mr T referred his complaint to our service, and also to EST. He put in a claim under section 75A of the Consumer Credit Act 1974 (CCA). To resolve the complaint, Mr T requested a replacement car that conformed. Or compensation in the form of damages/price reduction calculated as the cost of a new car of the same specification less the current residual value of the car in his possession which was around £18,000 at the time of raising the complaint.

EST responded to say it wasn't able to provide any remedy under the Consumer Rights Act 2015 (CRA). It said it wasn't the supplier of the car and that Mr T had agreed to certain disclaimers under section 13 of the fixed sum loan agreement. It highlighted terms that said EST isn't responsible or liable for the performance of the car and that it was Mr T's responsibility to carry out his own checks to make sure the car was satisfactory.

Mr T didn't agree. EST responded further to say the loan agreement is a regulated consumer credit agreement, but it is not a debtor creditor supplier agreement in terms of section 12 of the CCA. EST said although the agreement relates to credit for the purchase of a particular model of car it is not:

-Credit for a transaction between the borrower and EST – accordingly it is not a restricted-use credit agreement which falls within section 11(1)(a):

- Credit for a transaction between the borrower and the vehicle supplier made by EST under pre-existing arrangements, or in contemplation of future arrangements, between EST and the vehicle supplier – accordingly it is not a restricted-use credit agreement which falls within section 11(1)(b); or

- Credit for a transaction between the vehicle supplier and EST made by EST under pre-existing arrangements between EST and the vehicle supplier – accordingly it is not an unrestricted-use credit agreement which falls within section 11(1)(c);

Moreover, EST argued the loan agreement was not a linked credit agreement for the purposes of section 75A. And that the loan funds were not exclusive to the purchase of a specific car with a specific supplier, but rather to allow the purchase of any particular car of that make and model from any supplier. It also didn't think it had received sufficient evidence all the requirements for a valid claim to be considered under section 75A had been established in any event.

One of our investigators looked into things and decided to uphold the complaint. In summary they said they thought the fixed sum loan was a linked credit agreement for the purposes of section 75A and that there had been a breach of contract. Our investigator said Mr T should be able to exercise his right to a price reduction or final right to reject as per the CRA. Our investigator said EST should essentially arrange a price reduction of £990 – the cost of a 'comfort package' that included the digital key feature. He said alternatively Mr T could seek rejection, but EST could make a deduction for the use of the car by way of keeping the monthly repayments (less the value of the comfort package).

Neither Mr T nor EST agreed. Mr T didn't think it would be fair or reasonable to award anything less than what would have been available to him as a remedy at the time he tried to reject the goods, and he was within the period he could exercise his short term right to reject. And that even if that's not right, the most he could be charged for usage was between 19 October 2019 to 19 October 2020. Mr T said he is entitled to claim damages.

In addition to previous submissions, EST also wanted to point out that the loan was solely allocated to the base cost of the electric vehicle – and not any optional add-ons. It referred to point six of the eligibility criteria that Mr T accepted that said the loan couldn't be used to cover the cost of any optional extras, modifications or other non-standard changes to the car, (whether during or after manufacturer).

I issued a provisional decision that said:

EST entered into a fixed sum loan agreement with Mr T and our service is able to consider complaints relating to these sorts of agreements.

Section 75A

I take into account the relevant law. Given the fixed sum loan was for £35,000 I need to consider whether section 75A applies to the transaction because I don't think there'd be grounds to uphold the complaint if it didn't. Section 75A says:

> *(1)If the debtor under a linked credit agreement has a claim against the supplier in respect of a breach of contract the debtor may pursue that claim against the creditor where any of the conditions in subsection (2) are met.*
>
> *(2)The conditions in subsection (1) are—*
>
> *(a)that the supplier cannot be traced,*
>
> *(b)that the debtor has contacted the supplier but the supplier has not responded,*
>
> *(c)that the supplier is insolvent, or*
>
> *(d)that the debtor has taken reasonable steps to pursue his claim against the supplier but has not obtained satisfaction for his claim.*
>
> *…*
>
> *(5)In this section "linked credit agreement" means a regulated consumer credit agreement which serves exclusively to finance an agreement for the supply of specific goods or the provision of a specific service and where—*
>
> *(a)the creditor uses the services of the supplier in connection with the preparation or making of the credit agreement, or*
>
> *(b)the specific goods or provision of a specific service are explicitly specified in the credit agreement.*
>
> *(6)This section does not apply where—*
>
> *(a)the cash value of the goods or service is £30,000 or less,*
>
> *(b)the linked credit agreement is for credit which exceeds £60,260…, or*
>
> *(c)the linked credit agreement is entered into by the debtor wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by him.*
>
> *…*

I don't think the fact that funds were paid direct to Mr T, rather than the supplier, is a barrier to the application of section 75A.

Section 75A says the debtor under a linked credit agreement may pursue a claim against the creditor when certain conditions are met. The wording of the EU Consumer Credit Directive 2008/48/EEC, which section 75A was inserted in order to implement, goes some way to clarify this. Article 3(n)(ii) of that Directive provides:

> *(n) "linked credit agreement" means a credit agreement where*
>
> *(i) the credit in question serves exclusively to finance an agreement for the supply of specific goods or the provision of a specific service, and*
>
> *(ii) those two agreements form, from an objective point of view, a commercial unit; a commercial unit shall be deemed to exist where the supplier or service provider himself finances the credit for the consumer or, if it is financed by a third party, where the creditor uses the services of the supplier or service provider in connection with the conclusion or preparation of the credit agreement, or where the specific goods or the provision of a specific service are explicitly specified in the credit agreement.'*

So the key concern is whether there is a "commercial unit" existing between Mr T, EST and supplier of the goods. If there is adequate specificity in the credit agreement, from what I've seen, there is no specific route by which EST must provide the credit funds.

There's no further explanation of 'specific goods' within the CCA. But, in this particular case, I don't think a number plate is required for the car to meet the specific goods description. Cars are fungible in that a car of a particular make and model is interchangeable with one of another make and model (save for colour perhaps, or if additional extras are ordered). It would seem impractical for an agreement to need to be so specific as to have the number plate because it would require the relevant supplier to have the exact physical goods already lined up at the time of drafting the agreement, rather than merely being an agreement to fund the purchase of a specified fungible good. So in this case I think having the make and model of the car on Part 1 of the Schedule of the agreement is specific enough to satisfy the terms of section 75A.

<u>The issues with the car</u>

EST has said the agreement sets out it isn't liable for the performance of the car. It's not totally clear if the agreement is intending to say EST is not liable for any issues with regards to satisfactory quality or if this is, for example, to deal with things like the savings a customer will make through buying an electric vehicle. Given there'd be a strong suspicion the term would be considered unfair if it sought to limit Mr T's legal rights, I'm intending to say it should not be read to mean that EST isn't liable for dealing with a breach of contract claim in respect of the quality of the car.

I've therefore thought about what the CRA says. The CRA implies terms into the contract that goods supplied will be of satisfactory quality. The CRA also sets out what remedies are available to consumers if statutory rights under a goods (or services) contract are not met.

It's important to note I'm not considering a complaint against the supplier. I'm considering a complaint against EST. So I have to consider EST's obligations as a provider of financial services – in this case its liability for breach of contract under section 75A.

EST only agreed to cover the base price of the car. The fixed sum loan agreement (and eligibility criteria Mr T agreed to) precludes the loan from being used for the purchase of any optional extras, and therefore I don't think the additional extras of the technology package; the comfort package, the piano black; driving assistant professional; and parking assistant plus are covered by any loan agreement which could be a 'linked agreement' under section 75A.

Moreover, as the optional extras weren't specified within the fixed sum loan agreement, I think it fails the specificity requirement ("specific goods…in the credit agreement"). Therefore, I don't think that section 75A CCA can be used to bring a claim against EST in respect of a breach of contract in relation to the optional extras.

After the car was initially seen for inspection Mr T said he was still having issues with the digital key; the voice assistant; exhaust and log in details. But, from what I've seen, the outstanding issue is in relation to the digital key. And I think there's sufficient evidence there's an issue with it, which I understand is part of the optional extras. This is in line with the findings of the independent report that was carried out.

Therefore, having considered everything, I think that any breach of contract in relation to the base car that was financed by EST appear to have been resolved. I would point out that, based on what I've seen, I don't think I have evidence relating to any outstanding problems with the base car that would amount to a breach of contract. If there were issues present, I think Mr T would have asked the independent expert to comment on them. It's also important to note, I don't have sufficient evidence, such as job cards, for any issues in relation to the base car that might've been repaired. If that's not right, Mr T should let us know, with evidence, in response to this provisional decision. Similarly, on a different note, I don't have any evidence of the issues relating to the 7-day insurance Mr T said there was a problem with. Again, if Mr T has something to show how he's lost out, and that it was part of the deal he agreed to, he should let us know with evidence in response to this provisional decision.

To summarise, I sympathise with Mr T that he says there's an issue with the digital key, but I don't find I have the grounds to say that EST is liable to put things right for him, because it didn't provide the credit for it. I'm therefore not intending to direct EST to take any action.

EST had nothing further to add. Mr T responded to say he was pleased I'd said section 75A applied. But he didn't agree with other things I'd said. Mr T said, in summary:

- Considering the complaint against the supplier is vital because of the joint liability of EST under section 75A.
- EST may assess the base price and cost of optional extras when calculating the loan amount, but this appears to be an accounting exercise that doesn't have a bearing on the legal relationship.
- There's nothing in the contract that excludes 'optional extras' it only defines the vehicle.
- Before entering into the agreement and having funds released, he needed to provide a specification/quote to EST, and so everything on this should be deemed part of the car.
- The schedule talks about the car as a whole and does not exclude or limit it to the base price.
- The Financial Conduct Authority (FCA) gives clear guidance that the liability of the creditor extends beyond the amount loaned.
- There's nothing in the fixed sum loan that would explicitly preclude the use of the loan to purchase optional extras.
- The agreement states that it, along with the two-part schedule make up the entire agreement. So he doesn't think EST can rely on the eligibility criteria.

- The agreement sets out the loan must be used to purchase the car described, which is what happened.
- He doesn't think the price of the transaction can be considered an 'other cost'. He thinks the restriction is used to prevent costs related to the purchase of the car (such as first registration fees) but not for parts of the order or specification. He says even if that was the intention, this wasn't made clear. And if terms are unclear, they should be read in favour of the consumer.
- It's not true to say the optional extras weren't specified in the loan agreement because the agreement refers to 'vehicle' and in no way splits the otherwise inseparable item. It's not practical, or possible to purchase them separately. The cost of the whole car should be treated as one. And that if he'd ordered another model, the digital key function would have been part of the base model.
- EST required the specification of the car prior to releasing funds. The specification it was supplied included the 'optional extras'.
- The FCA sets out that the type of credit Mr T used is to finance a transaction between the borrower and supplier. He says EST part financed the transaction of the purchase of the car. And whether it was wholly or in part doesn't change its liability.
- His claim is not for a broken digital key as such, but for a feature of the car which isn't working properly. He says there's an argument the car isn't compliant for the purposes of the CRA and EST is responsible to provide redress.
- He paid part of his deposit using his credit card, but he understands from reading other cases a section 75 claim would be rejected because the total value of the goods exceeds £30,000. He doesn't think it's fair he's precluded from section 75 or section 75A based on different viewpoints. The car should be seen as a sum of parts.
- Even putting the above to one side, the actions taken by the supplier show the issue is with the base model. The supplier had tried an electrical component from another car with a digital key in Mr T's car, but this didn't fix the issue. This suggests the issue is with the base model.

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.

I want to thank Mr T for putting together his detailed response, which I've thought about when deciding this complaint.

While I've set out that I'm considering EST's obligations as a provider of financial services, I agree there could be aspects of the alleged breach of contract where I need to consider what the supplier has done.

I appreciate why Mr T is saying the car should be taken as a whole. This is how I would normally consider a vehicle. Under section 75 it's quite common for customers to only use credit for part of the transaction, but then have claims relating to the whole purchase price. The present case is just such a partial-finance case, where the loan taken by Mr T covered only part of the price of the car (the loan was lower than the base price, even prior to adding on any optional extras.) However, there is no clear answer to the question of whether section 75A can apply to credit agreements which only partially finance a given purchase. According to recital 10 of the EU Consumer Credit Directive 2008/48/EEC, which section 75A was inserted in order to implement, member states are free to expand the scope of linked credit agreements to include partial finance agreements. However, the UK has not explicitly done so.

Mr T has referred to the FCA's Review of retained provisions of the Consumer Credit Act and highlighted section 58 of Annex 5 where the review is looking at connected lender liability. Section 58 says:

In response to the argument that a finance provider should only be liable up to the amount of any loan, the report noted that if the sale of faulty goods leads to a disaster, the seller would be financially liable in full and its liability would not be limited to the cash price of the goods. There is no logic in applying a different principle if creditors are to have joint liability. This is also likely to ensure that finance providers attend to complaints, to avoid litigation.

I note section 52 sets out that, for section 75 *paying any part of the price of the goods or services triggers liability for the whole amount, and liability can be far in excess of the amount of credit if the damage caused by the defect or failure to perform is greater than the price of the goods.* However, it doesn't include section 75A in this section.

I also note sections 53 and 54 are specifically for section 75A and those sections say it differs from section 75 in that a claim can only be made in certain circumstances. And that *section 75A provides for 'second-in-line' liability rather than joint and several liability as under section 75.* It also sets out *section 75A applies only to a linked credit agreement which exclusively finances the transaction. As such*, *it does not apply to credit cards, for example. It is also limited to breach of contract.*

I don't think EST has the sort of joint liability Mr T has referred to in section 58 of the FCA review.

For these reasons I am not satisfied that section 75A would necessarily apply to the partial finance of a car as in the present case where the loan only covered part of the base price of the car. However, even if I thought that section 75A did cover partial finance of vehicles (which, as noted above, is in doubt but is arguable), the fact that the complained-of defects related almost wholly to optional extras means that section 75A would not apply in the present case because the loan explicitly excluded those optional extras, even if it would have covered the rest of the car despite partial finance.

Part 2 of the schedule for the loan agreement says, amongst other things, *The Loan cannot be used to cover any other costs related to the purchase of the Vehicle, such as the first registration fees.* I take Mr T's point that the agreement could have been clearer in setting out the loan wouldn't cover 'optional extras', and that the agreement refers to the 'vehicle' throughout. The car described in part 1 of the schedule simply sets out the make, model and total cost of it.

But I'm also mindful the eligibility for the loan says:

> *Loans are only available, and can only be used, to cover the cost of purchasing the basic, standard-specification model vehicle itself. Loans cannot be used to cover the costs of any optional extras, modifications or other non-standard changes made to the vehicle (whether during or after manufacture) or any additional costs associated with the vehicle, including, without limitation, first registration fees. If the new vehicle in respect of which you are applying for a loan includes any optional extras, modifications or other non-standard changes made to the vehicle, then these must be clearly identified in a written quote for the purchase cost of the vehicle (on the relevant dealership's headed paper).*

EST has said Mr T had to download and accept the eligibility criteria agreeing to what I've set out above. The amount of credit it provided didn't cover the optional extras.

I appreciate Mr T's objection that the fixed sum loan agreement says that it, along with its schedules, makes up the entire agreement. Indeed, term 1.3 of the terms and conditions of the fixed sum loan agreement says that:

> '*This Agreement constitutes the entire agreement and understanding between you and us and supersedes any previous agreement between you and us relating to the subject matter of this Agreement*.'

However, clause 12.6 says (my emphasis added):

> '*This Agreement* ***together with the application form and supporting documents submitted to the Energy Saving Trust by you*** *shall constitute the entire agreement and understanding, and shall supersede any previous agreement(s), between you and us in connection with the subject matter of this Agreement*.'

I understand the eligibility criteria needed to be accepted as part of the application process by ticking a box to say Mr T had read it. I don't think Mr T could have proceeded with the application without doing so. I therefore think that the eligibility criteria document forms part of the application form or supporting documents, so I think it's fair to say it's incorporated into the agreement by clause 12.6.

Taking all that into account, I think Mr T was made adequately aware the credit agreement wouldn't cover the optional extras. Therefore, even if section 75A could in principle apply to partial finance cases, in this particular case the loan explicitly did not cover the optional extras so section 75A cannot be applied as a result of any defect in those extras.

Further or alternatively, Mr T is prevented from relying on section 75A with respect to the optional extras by the specificity requirement of section 75A(5). Section 75A(5)(b) requires that the "*specific goods*" being financed must be "*explicitly specified in the credit agreement*" in order for the credit agreement made in respect of them to be a 'linked credit agreement' to which section 75A applies. Taking into account what I've said about the eligibility criteria, the optional extras were not explicitly specified in the credit agreement - the schedule merely stated the vehicle make and model.

Mr T has also said there's an argument the base car isn't compliant for the purposes of the CRA. He's said the supplier tried an electrical component from another car with a digital key, but this didn't fix the issue. But I've simply not been supplied sufficient evidence, such as a job card or report showing there's an issue with the base car that EST provided the credit for. I don't find there are grounds to uphold the complaint on this basis.

Mr T also highlighted he paid part of his deposit using his credit card and says he thinks this claim would be rejected because the value of the goods exceeds £30,000. As I'm sure he'll appreciate, the complaint I'm considering is against EST. I need to consider its liability rather than what would happen with a complaint raised against a credit card company.

In summary, I'm sorry to hear Mr T is unhappy with the car. But for the reasons given above, I'm not persuaded I have the grounds to say there's been a breach of contract that EST is liable for. I think EST only supplied the partial finance for the base model of the car. I've not seen enough to demonstrate there's a problem with the base model. So I make no directions.

My final decision

My final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 22 March 2024.

Simon Wingfield
Ombudsman