PUBLISHED ARTICLE

Sellers Beware!

This article was originally published in Motor Finance and was co-authored by Greg Standing and David Bowden, senior litigation lawyer at Black Horse.

Satisfactory quality

The Sale of Goods Act (SOGA) implies certain terms into all sale contracts. One such term is that goods will be of satisfactory quality. Under s14(2A) SOGA, the test is objective: goods must meet the standard which a reasonable person would regard as satisfactory, taking into account any description, the price and 'all other relevant circumstances'.

Under s14(2B) the quality of goods is said to include their state and condition and that the following are aspects of quality: fitness for purpose supplied; appearance and finish; freedom from minor defects; safety; durability.

Under s14(2C) the implied term does not apply to any matter drawn to the buyer's attention before the purchase; or where a prior examination ought to have revealed the defect.

The Court of Appeal in Rogers v Parish said that in relation to a car it is not simply a case of it being driven from A to B but doing so with the appropriate degree of comfort, ease of handling and pride in the car's inward and outward appearance.

Where vehicles are supplied on finance the only contract of sale is that between dealer and finance company (which will contain the implied terms). The finance agreement is not a contract of sale. Therefore s10 Supply of Goods (Implied Terms) Act 1973 incorporates the implied terms as to satisfactory quality into HP agreements; and s9 Supply of Goods and Services Act 1982 incorporates it into lease agreements.

The finance customer is therefore in the same position as if he was a buyer under a sale contract, albeit his contract is with the finance company. Therefore, in the event of a problem, his right of redress is with the finance company. In turn, the finance company has a right of redress against the dealer.

This is why customers, dealers and finance companies can very easily find themselves caught up in three way litigation. In such cases, the cumulative costs can quickly become disproportionate to the issues in hand - and so it is important that early and appropriate is action is taken to nip issues in the bud.

If the customer is not happy with the vehicle, he will very often return the vehicle to the supplying dealer. We would encourage dealers to act promptly to resolve issues.

The right to reject

If the customer remains unsatisfied, it may seek to reject the vehicle, terminate the finance agreement and claim the instalments back together with damages for loss and inconvenience. Such a rejection must be directed to the finance company, reflecting the contractual position outlined above. The right to reject the vehicle may be lost if the customer is deemed to have affirmed the finance agreement by electing to continue with the agreement in the full knowledge of its right to reject and all the relevant facts.

The principle of rejection is best demonstrated by the Court of Appeal case of Clegg v Andersson (2003). Clegg bought a yacht for £236,000 but was told on delivery that the keel was too heavy. Clegg sailed it for eight days. Following six months of discussions with the dealer, Clegg was advised that some lead needed to be shaved off the keel to remedy the defect at a cost of a relatively mere £2,000.

After considering his position for 20 days, Clegg rejected it. The Court of Appeal confirmed Clegg was entitled to do so, stating that the question is not whether the rejection was reasonable, but whether the right to reject had been lost. Time does not start running until a customer has all the information he reasonably requires to make an informed decision on whether he wants to keep the goods.

This principle should be borne in mind when dealing with vehicles with undiagnosed intermittent faults that require the vehicle to be returned on several occasions to the dealer. Although many months and years can pass by, and many miles can be clocked up in between, a customer is unlikely to have affirmed his finance agreement until the issue is diagnosed and he can make an informed decision on whether he wishes the repair to be carried out.

Indeed, in one County Court decision, a customer was entitled to reject a car five years after delivery because of a consistently leaking roof. Following Clegg, where the vehicle is supplied new, the fact that the repair may in fact only be very minor and inexpensive (and perhaps covered by a warranty) will be irrelevant. In most cases where a fault is established, the customer is not obliged to have the repair done and may reject. Clegg changed the law and over-ruled old authorities and dealers and finance companies have generally been slow in recognising this and acting accordingly.

Satisfactory quality - compare and contrast

Whether a vehicle is of satisfactory quality will depend on the price paid and all relevant circumstances. The merest blemish on a new Rolls Royce may make it unsatisfactory, but it might not do so on a more humble car. The issue is rarely black and white and outcomes of litigated cases may depend on getting a good judge on a good day. This is another reason why dealers and finance companies should collaborate early to resolve cases rather than take their chances in the lottery that can be the County Court. To demonstrate the point, compare and contrast the following two cases.

In Egan v Motor Services (Bath), Egan acquired an Audi TT which he rejected on the basis that it veered to the left on roads with a left hand camber. The dealer argued and evidenced that the car was within the manufacturer's tolerances and specification. The Court of Appeal held the sensitivity to the camber of the road was normal in this type of car and was a feature of it, rather than a defect rendering it of unsatisfactory quality.

In Garside v Black Horse, Garside rejected an Aston Martin Vanquish S he had purchased new on finance for £170,000 on the basis that the view through the rear windscreen was distorted. The dealer and finance company argued that although the curvature of the glass of the rear windscreen, which was necessary to achieve the Aston's distinctive and desirable shape, did cause some distortion, that this was a characteristic of the car and not a defect. However, having taken the vehicle out for a test drive at trial to see for himself, the Judge decided that it did render the car of unsatisfactory quality. He remarked that the price paid was "...a huge sum of money which would buy a three bedroom house" and as such Mr Garside was entitled to expect it to be nearly perfect.

Prior to purchase, Garside had sat in an identical vehicle and it was argued that he ought to have noticed the distortion. The judge dismissed this argument on the basis that he did not inspect the very vehicle the subject of the finance agreement. If that is right, it is submitted the s14(2C) exclusion could never apply to any pre-ordered new car unless an issue is specifically drawn to the attention of the buyer beforehand - food for thought for dealers.

There is no doubt that where a high quality vehicle is purchased new, the courts are very willing to find in favour of the customer even for the slightest of problems. In Lamarra v Capital Bank, a new Range Rover had several minor defects upon delivery including the front wheels being incorrectly balanced, road noise speed emanating from the drive system, a scratch on the ashtray cover, a misaligned glove box and some paint work blemishes. The dealer offered to resolve all complaints at its own cost (and argued in any event the repairs were covered by warranty). On appeal, the court found that appearance and freedom from minor defects were central to the definition of quality and that Lamarra was entitled to receive a car without any defects given the amount of money he paid for it.

On the other hand, where the same vehicle is supplied second hand, the level of expectation is not so high. For example, in Ansher v Capital Bank, an unreported County Court decision in which Wragge & Co acted for the finance company, a second hand Range Rover purchased on finance had a number of minor problems and an intermittent fault that was eventually diagnosed as a faulty body control unit.

A claim that the vehicle was of unsatisfactory quality failed on the basis that the body control unit was easily and cheaply repairable with the result that the defect would be cured immediately. It was also held that the vehicle had not been validly rejected on the basis that it took place some 15 months after delivery and that the Anshers had driven another 9,000 miles after the purported rejection, thereby affirming the finance agreement.

Some guiding principles

Although the outcome of cases can clearly never be guaranteed, there are some clear themes that emerge from case law that should be used as guiding principles by dealers and finance companies alike.

It is important that dealers, in particular, understand that where vehicles are supplied new, the customer is entitled to a car that is perfect or nearly so. Even if there are minor issues, the customer will most likely be entitled to reject it, even if that seems unreasonable.

Dealers often act quickly and sensibly to ensure that minor defects are remedied quickly, thereby retaining the good will of the customer, but that is not always the case. In many cases we see the

dealer has lost sight of the fact that the customer has a legal entitlement to reject the vehicle and is often not obliged to accept a repair. If such instances are dealt with properly, there remains a good chance of supplying an alternative vehicle and retaining the customer - a 'win win' situation for all parties.

Dealers also tend to lose sight of the fact that the finance company is entitled to claim an indemnity from it for all losses suffered by the finance company as a result of a rejection (including legal costs). What starts life as a simple issue to remedy can quickly turn into an expensive lesson for a dealer and there is a clear incentive for dealers to resolve issues before solicitors are instructed.

Likewise, finance companies, perhaps also conscious of treating customers fairly obligations, should ensure that they have demonstrably taken reasonable steps to resolve complaints before a complaint is escalated to the Financial Ombudsman or the courts. Mediation should also be considered. Very often providing a forum for customers to vent their frustrations can unlock a settlement.

In borderline cases, all three parties should consider instructing a joint expert as early as possible to obtain expert guidance on whether the vehicle meets the standard to be reasonably expected; and possibly to agree to abide by its findings. There is often little point in fighting cases where the expert evidence supports the customer.