

The complaint

Mrs E complains that Creation Consumer Finance Ltd (“Creation”) has treated her unfairly in relation to a purchase she made using finance provided by it.

What happened

Mrs E purchased brand-new goods online from a third party retailer I will refer to as “C”. Mrs E used finance provided by Creation to pay for the goods.

Once Mrs E received the goods she found that the goods were not working as they should. Therefore Mrs E called the manufacturer of the goods. She spent 45 minutes on the phone with the manufacturer trying to sort out the problem with the goods. Eventually, the manufacturer checked the details of the goods and told her not only were the goods second-hand they were also out of warranty. Shocked Mrs E complained to C.

C accepted that the goods had been sold to Mrs E as brand-new it also appeared to accept that the goods were second-hand, so it agreed to refund the full amount Mrs E paid, (as far as I am aware Mrs E has already received this refund).

However, Mrs E would have preferred a like-for-like replacement, but C could not provide this (the goods were out of stock on its site, at that point). C did however offer to cover the difference in price between the original goods and any replacement, provided the replacement cost no more than a certain amount, but this was not acceptable to Mrs E.

Mrs E ended up buying a replacement for the goods (the replacement was a higher spec than the goods). The replacement goods cost around £70 more than the original goods. As a result, Mrs E wanted C to compensate her for the difference in price. She also wanted C to pay her £50 for distress and inconvenience. Mrs E’s reasoning was that she would not have had to spend £70 extra if C provided the goods it was supposed to have done. So she’d made a loss which C ought to be responsible for. Moreover, Mrs E spent 45 fruitless minutes on the phone with the manufacturer of the goods. This call had only been necessary because of C’s mistakes. And she’d been let down by C who she’d trusted. All of which caused her upset which she ought to be compensated for. C declined Mrs E’s request.

Dissatisfied with the response from C, Mrs E turned to Creation to put things right. In coming to Creation Mrs E relied on the rights she believes she has against Creation because of the type of credit she used to make the purchase. Specifically, Mrs E relied on Section 75 of the Consumer Credit Act 1974 (“Section 75”). The general effect of Section 75 is that if Mrs E has a claim for misrepresentation or breach of contract against the supplier of the goods (here that is C) she can also bring a like claim against Creation provided certain conditions are met.

Creation took a look at Mrs E’s complaint. It agreed that the contract between Mrs E and C had been both misrepresented and breached. But it considered that since C refunded the money Mrs E paid for the goods C had put things right already. However, even though it did not think there was anything further it needed to do Creation offered but apparently did not pay Mrs E £30 as a goodwill gesture. It explained that it thought this amount was appropriate as, at first, it wasn’t aware that C had sold Mrs E second-hand items and it only became aware when she told it about this.

Mrs E did not agree that Creation's goodwill gesture went far enough and rejected it, and she came to our service.

Once Mrs E's complaint was with us Mrs E reiterated that she considered she was £70 out of pocket because the contract was misrepresented and breached. Mrs E also complained that her credit rating had been negatively impacted due to having the account with Creation on her credit file. She also complained about having to take out new finance with a third party to buy the replacement goods which she considered had caused her to experience a further loss.

One of our investigators looked at what had happened. Our investigator did not recommend that Creation had to do more than it had already offered to do.

Creation accepted our investigator's recommendation Mrs E did not. Mrs E repeated her previous stance and asked that an ombudsman review her complaint.

Having considered the available evidence, I was minded to uphold Mrs E's complaint in part, but I thought it was fair to let the parties see my provisional findings and make further submissions (if they wanted to) before I made my final decision. Therefore, I issued a provisional decision and I've set out below what I decided provisionally - and why. This forms part of my final decision.

"What I've decided and why

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.

New matters

Mrs E has now also raised a question about the negative impact on her credit rating due to the agreement with Creation showing on her credit file. She has also raised the issue of the loss she says she made because she had to take out new credit to buy the replacement goods. These appear to be a new matters that have not been considered by Creation in its final response to Mrs E nor investigated as part of this complaint. Under the rules I must follow all this would have needed to have happened already in order for me to look at these issues too. It follows that I am unable to look at these new matters in this decision.

What I can look at in this decision

Mrs E and Creation agree that C misrepresented and breached its contract (as the goods were not brand-new and were not of satisfactory quality). Further, they both agree that Mrs E can ask Creation to put things right in these circumstances when the effect of Section 75 and the Consumer Rights Act 2015 (CRA 2015) are taken into account.

Where they disagree is about whether Mrs E has experienced a loss in relation to the extra money she paid for the replacement goods. And whether Creation is responsible for this. Also they disagree about whether an award for distress and inconvenience is merited. I say this because Mrs E says Creation ought to make a payment to her for distress and inconvenience because of what has gone wrong that it is responsible for. Whereas, Creation has offered (but not yet paid) £30, as a gesture of goodwill. A gesture of goodwill means Creation does not think it is at fault but makes an offer anyway. So in other words Creation is saying Mrs E isn't entitled to a payment for distress and inconvenience per se. I'll look at both issues in turn

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.

In considering what is fair and reasonable, I need to have regard to the relevant regulations, law, regulators' rules, guidance and standards, codes of practice and (where appropriate) what I consider to have been good industry practice at the relevant time. Here relevant law and regulations include but are not limited to Section 75 and the CRA 2015.

Has Mrs E made a loss that Creation ought to be responsible for?

I think this is a simple issue. Mrs E did not end up paying more for the replacement goods because of what C did wrong. Rather, she ended up in this situation because other retailers happened to be selling the goods at a higher price than C or other retailers did not have the goods in stock. C was responsible for selling her the goods it promised to sell her. And if it could not do this then it was fair and reasonable for it or by extension Creation, to refund the purchase price, which is what has happened. There is nothing in law to say Creation has to compensate Mrs E because other retailers chose to sell the goods at a higher price or did not have the goods available when she wanted to buy them. Neither is it fair or reasonable to say Creation needs to do this. It follows I don't uphold this part of Mrs E's complaint.

Distress and inconvenience

Mrs E bought brand-new goods from a well-known retailer she was entitled to expect she'd get those goods, but she didn't. Rather, the goods she received were both misrepresented and not of satisfactory quality, so there was a breach of contract. As a result Mrs E spent 45, no doubt frustrating minutes, on the phone, trying to get the goods to work. Only to find that C, an established and well-known retailer had misled her and breached their contract. I can well imagine that came as an unwelcome surprise.

Moreover, Mrs E was unable to use the goods immediately as she clearly intended. Looking at the information I have on the file what jumps off the page is that her sense of anticipation about the goods turned rapidly to disappointment.

I don't doubt that all of this caused Mrs E distress and inconvenience. I think it is fair and reasonable that Creation ought to be responsible for this.

Creation as a goodwill gesture has offered Mrs E £30. It explains the amount of the goodwill gesture and the fact that it is a goodwill gesture not an admission of fault, on the basis that it didn't know that C had sold second-hand goods to Mrs E. That's irrelevant. I say this because Creation is responsible for the misrepresentation and the breach of contract, its lack of knowledge about the wrongdoing is not the point. Therefore it is also responsible for the distress and inconvenience that were caused by the misrepresentation and breach of contract.

In all the circumstances, I don't agree that £30 takes account of the impact on Mrs E I think £150 is a more appropriate award in the circumstances.

Credit file

Mrs E has shown that the account with Creation is still showing on her credit file. Creation indicated that the account was now closed. I note that the account only seems to have had this one transaction on it and that Mrs E doesn't want the account anymore. In the circumstances therefore, it is fair and reasonable that Creation must ask the credit reference agencies to remove any information it has asked them to register about the credit agreement on Mrs E's credit file.

My provisional decision

My provisional decision is that Creation Consumer Finance Ltd must:

- *Pay Mrs E £150 for distress and inconvenience.*

- *Ask the credit reference agencies to remove any information it has asked them to register about the credit agreement on Mrs E's credit file.*

It must pay the £150 within 28 days of the date on which Mrs E accepts my final decision. If it pays later than this it must also pay interest on the £150 from the date of the final decision until the date of payment at the rate of 8% simple per year.

If it considers it is legally required to deduct income tax from that interest, it must send a tax deduction certificate with the payment so that Mrs E can reclaim the tax if she is entitled to do so."

Mrs E should refer back to Creation if she is unsure of the approach it has taken and both parties should contact HM Revenue & Customs if they want to know more about the tax treatment of this portion of the compensation. "

As far as I am aware only Mrs E responded to my provisional decision. Mrs E responded to say she accepted my provisional decision.

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 thank Mrs E for her response to my provisional decision. Ideally I would have received a response from Creation too. However, I think it has been given a fair opportunity to respond should it have wished to.

I've reviewed the file again and revisited my provisional decision. I have received no new information or reasoning in response to my provisional decision. It follows in this final decision I have reached the same conclusions for the same reasons as I did in my provisional decision.

My final decision

My final decision is that Creation Consumer Finance Ltd must:

- Pay Mrs E £150 for distress and inconvenience.
- Ask the credit reference agencies to remove any information it has asked them to register about the credit agreement on Mrs E's credit file.

It must pay the £150 within 28 days of the date on which Mrs E accepts my final decision. If it pays later than this it must also pay interest on the £150 from the date of the final decision until the date of payment at the rate of 8% simple per year.

If it considers it is legally required to deduct income tax from that interest, it must, if it is able to send a tax deduction certificate with the payment so that Mrs E can reclaim the tax if she is entitled to do so.

Mrs E should refer back to Creation if she is unsure of the approach it has taken and both parties should contact HM Revenue & Customs if they want to know more about the tax treatment of this portion of the compensation.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs E to accept or reject my decision before 1 August 2023.

Joyce Gordon
Ombudsman