

## The complaint

Mr T is unhappy that a car supplied to him under a conditional sale agreement with Close Brothers Limited was of an unsatisfactory quality.

Mr T has been represented during the claim and complaint process by Dr C. For ease of reference, I will refer to any comments made, or any action taken, by either Mr T or Dr C as “Mr T” throughout the decision.

## What happened

In October 2021, Mr T was supplied with a used car through a conditional sale agreement with Close Brothers. He paid an advance payment of £500, and the agreement was for £5,585 over 46 months; with 45 monthly payments of £159.81 and a final payment of £169.81. At the time of supply, the car was almost nine years old, and (according to the information provided to Close Brothers by the supplying dealership) had done 25,191 miles.

In March 2022, Mr T complained to the dealership because he wasn't happy with the car. In this complaint he raised issues including that the driver's seat had collapsed and that the mileage had been clocked (the car had done more miles than what was indicated by the odometer). The dealership forwarded this complaint to Close Brothers on 17 March 2022.

Close Brothers issued their final response to this complaint on 9 May 2022. In this, they addressed the issue that the mileage had been tampered with, and that there was heavy wear on both the gearstick and clutch pedal. Close Brothers said they'd asked Mr T for evidence of the current mileage on the car *“as we wouldn't accept verbal confirmation that the mileage had been tampered with due to the seat collapsing.”* They also explained this was needed so they could arrange for the car to be independently inspected.

However, because Mr T hadn't provided this evidence, after a number of requests, Close Brothers said they were unable to uphold his complaint. They also explained that Mr T had six months from the date of their letter to raise the matter with the Financial Ombudsman Service, if he wasn't satisfied with their response, and that they did not give consent for this complaint to be considered by ourselves if Mr T didn't raise the matter with us in time i.e., by no later than 9 November 2022.

Mr T didn't raise this complaint with us, and, in June 2023, he raised a second complaint with Close Brothers. In this complaint he said that he'd tried to sell the car on 19 June 2023, but the buyer refused to go ahead with the transaction because there was evidence the car had previously been used as a taxi. Mr T said his complaint was that the car was mis-sold to him as it wasn't as described.

Mr T stopped making payments to Close Brothers following this complaint, and they eventually registered a default. Close Brothers responded to Mr T's second complaint on 19 September 2023, addressing Mr T's issues about the default, about how they'd dealt with his complaint, and about Mr T's belief that the mileage had been tampered with. In conclusion, Close Brothers explained *“I am unable to change the decision already made on your previous complaint.”*

In an email to Close Brothers on 20 September 2023, Mr T explained that he'd raised a complaint with them in 2022 about the mileage on the car being incorrect, but they'd closed this complaint without investigating it. However, this email also confirmed that Mr T was complaining that:

- *"on the balance of probability, [it] seemed likely that the mileage of 36,000 (approx) did not adhere to the condition of the car and the finding of a minicab antenna."*
- Close Brothers were *"unable to accept pictures of wear and tear on the gearstick [as] evidence that the mileage has been tampered with."*
- *"the dealership has confirmed that the mileage clock has not been tampered with",* but there's no evidence to support this; and
- *"the evidence of wear and tear ... can indicate evidence of odometer fraud if the severity of the wear and tear seems to contradict the mileage shown on the vehicle."*

Because of this, Mr T said that, on the balance of probability, the car had been subject to odometer fraud. Furthermore, in an email dated 10 November 2023, Mr T explained to us that, while his complaint is that the car wasn't as described as it had been used as a taxi, *"I did have other concerns about the car possibly showing incorrect mileage on the odometer before the taxi antenna was found."*

Mr T had already brought his complaint to the Financial Ombudsman Service for investigation. He raised both his 2022 and 2023 complaints to Close Brothers with us on 28 June 2023, and they were dealt with under separate reference numbers.

An investigator responded to Mr T on the 2022 complaint (about the mileage being clocked and the drivers seat collapsing) on 20 October 2023. The investigator explained that Mr T had raised this issue out of time (later than 9 November 2022) and that Close Brothers didn't consent to us investigating the matter. So, this wasn't something we were able to consider.

The investigator also explained that, if Mr T had any exceptional circumstances why he was unable to raise his complaint sooner, we could consider these. In response Mr T said that he'd only called Close Brothers in March 2022 because he'd *"[noticed] some wear and tear on the interior of the vehicle that was at odds with the odometer reading of a mere 26,500 miles (approx)."* He maintained that *"neither I nor Close Brothers entered into any written correspondence at the time"* and that he was just reassured that the interior of the car in no way constitutes any concerns about the mileage.

Mr T didn't provide any reasons why he couldn't raise the 2022 complaint with us sooner, and the investigator reiterated that the 2022 matter wasn't something we were able to consider. The investigator also said that the 2023 complaint would be considered separately.

A different investigator responded to Mr T's 2023 complaint on 2 December 2023. This investigator addressed both the car having previously been used as a taxi, and the mileage having been tampered with. They were satisfied the car had done more miles than the odometer suggested, a view which was supported by a report from the garage Mr T tried to sell the car to in June 2023. The investigator concluded the car's mileage wasn't as described, and this made the car of an unsatisfactory quality. So, she recommended that Mr T was allowed to reject the car and Close Brothers should end the agreement, paying Mr T compensation.

Close Brothers didn't agree with the investigator. They said the investigator's conclusions were based on the mileage being incorrect, and we'd already said this was something we weren't able to consider.

I issued a provisional decision on 11 January 2024, where I explained my intention not to uphold the complaint. In that decision I said:

*In considering this complaint I've had regard to the relevant law and regulations; any regulator's rules, guidance and standards, codes of practice, and (if appropriate) what I consider was good industry practice at the time. Mr T was supplied with a car under a conditional sale agreement. This is a regulated consumer credit agreement which means we're able to investigate complaints about it.*

*However, the Financial Ombudsman Service isn't able to consider every complaint that's brought to us. The rules in which we operate are set out by the Financial Conduct Authority and are known as the DISP rules. DISP 2.8 says:*

*2.8.2 The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:*

*(1) more than six months after the date on which the respondent sent the complainant its final response, redress determination or summary resolution communication; ...*

*unless:*

*(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 ... was as the result of exceptional circumstances.*

*While I've noted Mr T told the first investigator that he didn't raise a formal complaint about the mileage in 2022, and there was no written correspondence between them about this matter at the time; this is contradicted by both the evidence I've seen about this complaint and the written correspondence in 2022, and by what Mr T said in his email to Close Brothers on 20 September 2023. Given this, I'm satisfied that Mr T raised a complaint about the mileage being tampered with in March 2022.*

*I've seen Close Brothers reply to this complaint, and they clearly state Mr T had six months to raise the matter with ourselves, otherwise they wouldn't consent to us investigating the matter. So, while Mr T had until 9 November 2022 to contact us, he didn't do so until 28 June 2023. I'm therefore satisfied this complaint is out of time for us to consider.*

*I've then considered whether there are any exceptional circumstances that prevented Mr T from bringing the complaint to us sooner. It's important to note that the bar to meet the criteria of an exceptional circumstance is a high one. For me to agree there are qualifying exceptional circumstances, I'd need to be satisfied that Mr T's situation meant there was no reasonable way for him to contact us until 28 June 2023. For example, if Mr T had been hospitalised and had no reasonable way of contacting us for an extended period of time. And I don't think I've seen any on this occasion.*

*I say this because, when Mr T was asked if there were any exceptional circumstances that prevented him from contacting us, he didn't say there were. And, at no point during the complaint process for the second complaint – the one I'm considering – has he raised any exceptional circumstances.*

*As such, I'm satisfied that we're unable to consider any alleged mileage tampering as part of this complaint.*

*I've now gone on to consider DISP 3.3. DISP 3.3.4 A says:*

*The Ombudsman may dismiss a complaint referred to the Financial Ombudsman Service on or after 9 July 2015 without considering its merits if the Ombudsman considers that ... (5) dealing with such a type of complaint would otherwise seriously impair the effective operation of the Financial Ombudsman Service.*

*DISP 3.3.4 B gives examples of the types of complaint that would impair the effective operation of this service. And these examples include:*

*(3) Where the subject matter of the complaint has previously been considered or excluded under the Financial Ombudsman Service (unless material new evidence which the Ombudsman considers likely to affect the outcome has subsequently become available to the complainant).*

*So, what I now need to consider is whether the complaint Mr T raised in 2023 about the car not being as advertised is substantially the same complaint that he raised in March 2022 about the mileage. And, if it is, whether the failed sale is material new evidence likely to affect the outcome.*

*In 2023, Mr T raised a complaint about the car not being as advertised. While, on the face of it, this was because the car had been used as a taxi, when looking at Mr T's correspondence about this matter it's clear that the underlying issue is actually the mileage – Mr T keeps bringing the matter back to the mileage having being tampered with and the condition of the interior of the car not being consistent with a nine year old car that had only done 25,000 miles when it was supplied to him. Given this, I'm satisfied that the complaint Mr T is raising is substantially the same complaint as he raised with Close Brothers in March 2022, albeit with the additional information about the car having been used as a taxi.*

*Mr T has provided a report from the garage who were looking to buy the car. This is undated but explains their decision and reasons not to purchase when Mr T offered it for sale on 19 June 2023. The first reason given was that "it stated 35000 on the clock and the steering wheel was severely worn out like it had done over 135000 miles." While the other reasons given touch on excessive wear, and the indication the car had been previously used as a taxi, the garage concluded by saying:*

*"with 20 years of car selling experience, it was apparent that the vehicle mileage was incorrect and it must have been clocked so we decided not to buy it."*

*Based on this report, I'm satisfied the reason Mr T was unable to sell the car to this particular garage was not because it had been previously used as a taxi, but because they weren't satisfied the mileage showing on the odometer was correct.*

*As such, as this remains a matter about the mileage, and Mr T already had knowledge (or at the very least was extremely suspicious) about the mileage likely not being correct in March 2022, I'm unable to agree that this report is material new evidence that is likely to affect the outcome of the complaint. And it's for all the reasons stated that I intend to say this isn't a complaint we're able to consider.*

*However, for completeness, I've also considered if I'm wrong about this being the same complaint, and this is something we can look at. As I've explained the issue of the mileage isn't something that can be considered and, as such, the only point that can be considered is whether Mr T was told how a previous owner of the car had used it i.e., there was a mis-sale.*

*When considering a mis-sale there needs to be a false statement of fact, and that false statement of fact needs to have induced Mr T to choose the car in question. While the car's advert doesn't mention it was used as a taxi, I haven't seen anything that shows me the dealership were aware how the car had been used by a previous owner. And at no point has Mr T ever said that he specifically asked the dealership if the car had previously been used as a taxi, and he was told it hadn't been. What's more, I wouldn't expect how a previous owner had used a car to be detailed in an advert, so the dealership wasn't excluding something any reasonable person would expect to see by not declaring this information.*

*Given this, I'm not convinced there was a false statement of fact. As such, I'm not satisfied there was any mis-sale.*

*So, even if I were able to consider this matter (which as I've said I intend to say I'm not), based on the evidence I've seen it's more likely than not I would've concluded there was no mis-sale and that Close Brothers don't need to take any further action.*

*So, this just leaves the complaint about the default. And, as this isn't something that relates to the mileage or is in anyway linked to the complaint Mr T made in March 2022, it is something we're able to consider.*

*It's not disputed that Mr T stopped making payments to Close Brothers after his failed attempt to sell the car. In their view of 2 December 2023, the second investigator explained they didn't think Close Brothers had done anything wrong by issuing default notices. This was because missed payments would be classed as arrears, even though Mr T considered that he had good reasons for not making the payments. And, given the increasing arrears, the investigator thought Close Brothers had acted reasonably by issuing a default.*

*I've seen the agreement between Mr T and Close Brothers. Under the heading "**Missing Payments**" the agreement clearly says "missing payments could have severe consequences and affect your credit rating making obtaining credit more difficult. It may also lead to legal proceedings being brought against you." Furthermore, under the heading "**Default**" the agreement explains that failure to maintain payments would be classed as a default event and Close Brothers would be entitled to terminate the agreement "after following the statutory requirements."*

*The statutory requirements in this instance are Close Brothers issuing a Notice of Default, detailing the arrears, giving Mr T a fixed period (usually 28 days) to bring the account up to date, and explaining the consequences if this isn't done. It's not disputed that Close Brothers did this.*

*As such, I'm in agreement with the investigator, and I'm satisfied that Close Brothers acted in line with the agreement when issuing the default notices due to the continued non-payment. As such, I don't intend to ask them to remove the arrears and any default from Mr T's credit file.*

## **Responses**

Close Brothers didn't respond to my provisional decision. So, as they haven't said anything to the contrary, I'm taking their lack of comments to mean they don't object to my provisional decision.

Mr T said my provisional decision was contradictory to the investigator's view that the car had been subject to odometer fraud, that it had been mis-sold, and that he should be released from the agreement with Close Brothers.

Mr T didn't agree that the majority of this matter was out of time for us to consider because, when he first raised the matter with Close Brothers, *"I was not informed at that time that I could go to the Financial Ombudsman ... it is untrue that they wrote to me about this. They did not write to me at all."* Mr T says that his concerns only became a complaint when he found out the car had previously been used as a taxi, and it was only at this stage that he complained to Close Brothers.

Mr T also said that discovering the car had been used as a taxi was material new evidence, as his concerns about the mileage had moved from just being a concern to being highly likely. He maintained that he didn't complain to Close Brothers about this before 2023, and that all that had happened was a verbal conversation about his concerns in 2022.

For these reasons, Mr T doesn't accept that the issue with the mileage is out of time for us to consider.

### **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.

Mr T's comments on my provisional decision are, essentially, that he didn't complain to Close Brothers in 2022, that they never responded to his concerns as a complaint (or advised him of his right to come to us about the matter), and that, even if we think this was the case, the discovery that the car had been used as a taxi is material new evidence that we need to consider.

Taking these points in order, the Financial Conduct Authority (FCA) define a complaint to be *"any oral or written expression of dissatisfaction."* Mr T doesn't dispute contacting Close Brothers in March 2022 about his concerns with the mileage. Given the FCA's definition, even though Mr T hadn't made a formal written complaint to them, I'm satisfied they were entitled to treat this matter as a complaint. Which is what they did.

While I've noted Mr T's comments that he never received any written correspondence from Close Brothers about the concern's he raised, I have seen a copy of the letter they sent to him on 9 May 2022. This was sent to Mr T by email, to the email address Mr T had provided a few months earlier when the agreement was taken out, and I haven't seen anything to show me this email 'bounced'. As such, I'm satisfied it's more likely than not Mr T received this email. And, while he may not have read this at the time, or later, it doesn't alter the fact that Close Brothers provided Mr T with a written reply.

As I've already explained in my provisional decision, Close Brothers advised Mr T on 9 May 2022 that he had six months to bring the issue of the mileage to ourselves – and our full contact details were provided in this letter – otherwise we weren't able to consider matters. And Mr T didn't do this.

Finally, I explained in my provisional decision why I didn't think the report from the garage was material new evidence that means we're now able to consider matters. While I've noted Mr T's comments about how this report firmed up his concerns about the mileage, these concerns existed in early 2022. So, his comments don't change my view on this matter.

As Mr T's comments don't change my mind, and while I appreciate it will come as a disappointment to Mr T, I see no compelling reason not to adopt my provisional decision as my final decision.

**My final decision**

For the reasons explained, I don't uphold Mr T's complaint about Close Brothers Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 12 March 2024.

Andrew Burford  
**Ombudsman**