

complaint

Mr U is unhappy with a car purchased using his Tesco Personal Finance PLC ('Tesco') credit card.

background

Mr U bought a second-hand car in November 2018 using his Tesco credit card. He says that he was misled about its condition by the dealership ('the Supplier') and had no choice but to sell it for scrap due to faults.

Because he paid using his credit card Mr U approached Tesco to see if it was able to reimburse him for his financial loss. It considered the issue as a claim under section 75 of the Consumer Credit Act 1974 ('Section 75'). But Tesco did not agree to refund him.

Mr U complained about the outcome of his Section 75 claim but Tesco maintained that it would not refund him. In summary, it said there was no evidence of a breach of contract as the receipt for the purchase was clear about the condition of the car (and the discount which was applied to reflect this).

Our investigator upheld the complaint. In summary, he said the advertisement was misleading (and pointed out it was changed after the sale) and the service record has discrepancies. He was satisfied that had Mr U known about the true situation he wouldn't have bought the car. It was therefore fair and reasonable to refund him for it (less what he got for selling it on).

Tesco disagreed with this. In summary it said:

- Mr U had a chance to inspect the car and the invoice clearly states that the engine light was on and repairs were needed;
- the allegations about the service record are unsubstantiated;
- the advert could have been changed after the sale for genuine rather than malicious reasons; and
- there is no evidence the things wrong with the car were inherent defects rather than wear and tear - the car has since passed several MOTs and travelled several thousand miles since it was purchased which contradicts the claim it was sold for scrap metal

I issued a provisional decision on this case on 11 March 2021. In this I said:

I've considered all the available evidence and arguments received so far to provisionally decide what's fair and reasonable in the circumstances of this complaint.

Where things are unclear, I make my decision based on what I think is most likely to have happened.

Section 75 makes Tesco liable for a breach of contract or misrepresentation in respect of some things which Mr U pays for on his credit card. There are certain criteria that need to be met for a valid Section 75 claim. In this case Tesco has accepted that the criteria for a valid claim is in place. With that in mind and based on the information I have seen in this case I am satisfied the relevant criteria has been met too.

what I think the Supplier likely said about the warning light

Unfortunately it appears the Supplier is no longer trading. So it makes it more difficult to get to the bottom of what actually took place at the point of sale. However, I have looked at the documentation we have along with what Mr U has said and some of the circumstantial evidence, to try and get an idea of the most likely situation.

Mr U spoke to our investigator to describe his motivation for going to see this car with his wife. I have listened to the call and what Mr U says appears to be credible. He said they wanted a good reliable vehicle for family use, and also for his wife to commute back and forth to work. And from the advert this car looked to be just the type of car they were looking for – which is why they agreed to go and view it.

I have taken a look at the text of the original advert and a few things leap out at me in this regard:

- *'beautiful condition both inside and out'*
- *'stunning example'*
- *'1 former owner from brand new – full service history'*
- *'warrantied low mileage'*

The car was admittedly quite old and modestly priced. But it had relatively low mileage for the age and along with the somewhat glowing description makes me think it likely Mr U and his wife went to the Supplier neither wanting or expecting a 'fixer upper' or similar. I think this is an important point to make which I will come on to later.

Mr U arrives to view the car and says he notices a dashboard light on. He says the Supplier explains this is illuminated because the car needs a service and the light needs to be reset. Mr U says he liked the car so agreed to get it serviced himself for a discount. However, Tesco points out that the invoice refers to a discount of £175 due to an 'engine light' and 'repairs'. Which on the face of it would indicate wider problems than a simple service.

If I accept what Tesco is saying then it follows that Mr U bought a car in the full knowledge that it needed repairs in relation to underlying mechanical issues. However, based on the evidence available I don't think that is likely as it is inconsistent with Mr U's apparent motivation for the purchase and his subsequent actions.

I go back to what Mr U says he wanted from the start – to get a reliable car for use by the family, including his wife's commute to work. This is supported by the original advert which prior to the sale did not indicate any underlying problems with the car. In fact it said quite the opposite. Had Mr U been told that the car had some underlying mechanical problems I don't think it likely he would have bought it. In fact, had the advert been clear about this I don't think he would have gone to view it in the first place.

I also note that Mr U's subsequent actions are consistent with what he says the Supplier told him regarding the reason for the dashboard light. He says the car was not running smoothly and juddering and believed the service would resolve this (it looks like one was due at the time too – adding further credibility to the situation). I can see he took the car to get serviced very soon after the sale and the discount he negotiated with the Supplier is almost exactly what the service cost him. If the Supplier had in fact told him clearly the light was illuminated due to a potential underlying mechanical problem (and for a moment assuming Mr U was still willing to go ahead with the transaction) I expect he would not have simply taken the car for

a service and would likely have negotiated a more significant discount. Mr U is adamant he was led to believe it was a service light that was on, and what happened appears more consistent with what Mr U says took place.

Thirdly, it has been confirmed the Supplier altered the advert minutes after the sale to include the words 'Engine Warning Light On'. While Tesco has said that there could be other explanations for this, I think it is highly questionable why the Supplier would choose to do this retrospectively when the car had already been sold. Particularly if it was confident it had not potentially misinformed Mr U about the true condition of the car.

That still leaves the wording on the invoice to explain. Our investigator's call notes show that Mr U said he didn't notice the wording on the invoice at the time of sale as he was more focused on the price of the car. I also note that his wife signed the invoice when Mr U says he was the one who was negotiating with the Supplier. And while it does refer to 'engine light' and 'repairs' it is a bit vague and shorthand and not entirely inconsistent with a story that the car needs a service to get things back on track. I don't think in this case the note on the invoice is compelling enough to negate what I think it likely the Supplier told him about the reason for the dashboard light being illuminated.

To summarise, I think it is most likely the Supplier told Mr U that all the car needed was a service to reset the light. And in fact this formed part of the description of the car at the time of sale.

did the car just need a service or was there likely a more serious underlying issue?

Mr U has sent us the job sheets from the garage who he took to service the car. I can see they carried out a routine service but confirmed there were other issues– and it appears the fault code/warning light had not been cleared as expected.

Mr U said the garage told him there were serious problems with the engine and it appeared to have been submerged in water at some point. He says the garage said the car was likely to be uneconomical for him to repair.

Unfortunately the job sheets don't confirm all of what Mr U has said the garage told him. So it isn't clear exactly what was wrong with the car but it doesn't appear to be a minor fix– and I don't think Mr U would've felt he had to sell the car for scrap if it was straightforward to remedy. I appreciate that Tesco has pointed to the fact the car is still on the road. But I don't think that in itself means the car didn't have underlying and potentially significant issues at the time of sale. It would appear more likely he sold it to someone who could (based on the sale price) repair it and sell it more economically.

Tesco has also said the car travelled several thousand miles since original supply to Mr U. Firstly, it isn't clear what of that mileage has been done while the car was in Mr U's possession (he maintains it was very little). Secondly, I don't think the car juddering prevented him from using it – Mr U said he needed to make some essential trips so carried on using the car – in hindsight he says this was probably not the best thing to do. I have listened to Mr U talk on this subject and he comes across as credible.

Overall and on balance, I am not satisfied that a simple service was the answer to the underlying reason the dashboard light was illuminated and why the car was juddering. I think the evidence points to the likelihood of a wider underlying fault with the car which was present at the point of sale.

has there been a breach of contract or misrepresentation?

I take Tesco's point that the problems with the car could have been down to wear and tear and were not necessarily unrepairable (in fact this is shown by the fact the car was driven after Mr U sold it for scrap). This was after all a second-hand, older car. However, taking into account the provisions of the Consumer Rights Act 2015 I note that any assessment of satisfactory quality needs to take into account how the goods are described. In this case, considering the description of the car in the initial advert, and what I consider the Supplier most likely told Mr U about the reason for the warning light being on I think it is arguable that in the particular circumstances the problems that transpired with the car meant it was not of satisfactory quality.

In any event, essentially I think this is a case of Mr U being misled around a particular point which caused him to buy the car. It seems likely that the Supplier made a false statement about the reason for the illumination of the warning light which led Mr U to make a purchase he otherwise would not have done. I don't think it is particularly relevant if the Supplier made the statement around the light innocently or not – ultimately what it told Mr U, as the expert in the situation, was not true. I have already said that Mr U's actions are consistent with someone who didn't want a 'fixer upper' (especially as he disposed of the car in a relatively short period of time) so I don't think he would likely have still purchased the car had the true facts been known.

I note that Mr U thinks the service record has been tampered with and the car actually doesn't have a full-service history. I don't think there is persuasive evidence for me to say this is likely. But considering what I have said already along with the provisions of Section 75 I think it fair and reasonable that Tesco do something to put things right.

putting things right

A fair remedy would be to put Mr U back in the position he would be in had it not been for the misleading information he was given. However, that isn't straightforward as the car was sold.

I have considered whether Mr U acted reasonably in selling the car when he did. It appears he badly needed to replace it for his wife to commute to work and the proceeds would help him fund this. I also note that he did not sell this immediately but tried to resolve the issue through direct contact with the Supplier and Tesco. But when he wasn't getting anywhere he sold it. And although he sold the car at a low price for scrap – it appears this valuation was because of the condition it was originally sold to him in rather than his own decision to sell it off cheaply.

So I don't think the sale of the car fairly prevents Mr U receiving a refund here. But I do think the proceeds of the sale (£495 from the credible invoice I have seen) should be deducted from any refund.

The total contract price for the car was £3,100 (£2,650 paid on the Tesco card) so this should be refunded. I also note that Mr U has laid out for a service on a car that he really didn't get any notable benefit from. So I think he should get the cost of this back which I understand from the documentation provided is £165.60.

my provisional decision

I direct Tesco Personal Finance PLC to:

- *re-work the credit card as if the payment of £2,650 wasn't made, refunding any interest or charges in relation to this amount and refunding any resulting credit balance to Mr U including 8% simple yearly interest calculated from the date of said credit balance to the date of settlement;*
- *refund the £450 deposit/part exchange contribution including 8% simple yearly interest calculated from the date of payment to the date of settlement;*
- *refund the £165.60 service cost including 8% simple yearly interest calculated from the date of payment to the date of settlement; and*
- *deduct £495 from the amount of any refund due to Mr U because of the proceeds he received from the sale of the car*

I asked the parties for their comments.

Mr U said he had nothing more to add.

Tesco said that it would be fair to make a deduction from any money back to Mr U to reflect that he had use of the car for several months before it was sold. It also said that a service was necessary for him to use it so should not be included in any settlement.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

It appears that neither party are disputing the core findings of my provisional decision. So I don't see any reason for departing from them here.

However, Tesco wants Mr U to pay something for using the car during the time he had it. After considering this I am not persuaded that would be fair in the specific circumstances here. My starting point is what happened to Mr U was essentially a misrepresentation of goods – and in order to fairly remedy this the aim would be to broadly put him back in the position as if that misrepresentation had not occurred. Which would be paying him back the money contributed for the car as if he had not entered the contract.

In some circumstances I might consider a deduction from this contribution on a fair and reasonable basis. However, Mr U didn't have the car very long (around five months) – and during that whole time it appears he had significant problems with it which culminated in having to sell it for scrap. I have already said that from the records we have it is difficult to know exactly how much Mr U used the car before it was sold – but considering the nature of the issues he was having with it in relation to engine warnings and juddering problems I am willing to accept that he likely only made limited essential journeys (as he has said in his credible testimony). I think in the circumstances it is difficult to agree Mr U has come out benefiting from the goods in any notable way.

Had the misrepresentation not occurred Mr U would also not have paid out for a service for the car. And considering the issues he had with it (again, leading to him disposing of it in a relatively short time) I don't think he has had any notable benefit from the service he paid for. So he should still get this refunded.

All things considered, in order to remedy the misrepresentation in a fair way I don't think it would be reasonable to make a deduction from the money paid back to Mr U.

For the reasons specified in these findings and in my provisional decision (above) I uphold this complaint.

my final decision

I direct Tesco Personal Finance PLC to:

- re-work the credit card as if the payment of £2,650 wasn't made, refunding any interest or charges in relation to this amount and refunding any resulting credit balance to Mr U including 8% simple yearly interest calculated from the date of said credit balance to the date of settlement;
- refund the £450 deposit/part exchange contribution including 8% simple yearly interest calculated from the date of payment to the date of settlement;
- refund the £165.60 service cost including 8% simple yearly interest calculated from the date of payment to the date of settlement; and
- deduct £495 from the amount of any refund due to Mr U because of the proceeds he received from the sale of the car.

If Tesco considers that its required by HM Revenue & Customs to withhold income tax from the interest part of my award, it should tell Mr U how much it's taken off. It should also give Mr U a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr U to accept or reject my decision before 30 April 2021.

Mark Lancod
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