

## **complaint**

Mrs E has complained that her car, which she paid for using a hire purchase agreement with Black Horse Limited, wasn't fit for purpose, so was misrepresented to her, and/or wasn't of satisfactory quality at the point of sale.

## **background**

### facts

Mrs E took out a hire purchase agreement with Black Horse on 17 October 2016. It was for a car that was just over a year and a half old, and had covered 31,456 miles. She's explained that when she went to the supplying dealership to choose it, she told the representative it needed to be able to withstand rural, rudimentary roads. She says the car she opted for wasn't her first choice, but she was assured it would meet her needs.

Unfortunately, Mrs E soon experienced problems. She wasn't happy with how the car was handling, so the dealership took a look at it. This was on 7 November, so within the first three weeks of having the car. The dealership carried out repairs to the brakes at this point. Then, on 11 and 31 January 2017, further repairs were carried out, to the suspension and gearbox.

But Mrs E was still worried about how the car was handling, so contacted Black Horse. This is because, as the finance provider, it is responsible for the quality of the car when the agreement was entered into, and any misrepresentations by the credit broker (here, the dealership).

Black Horse didn't think it would be fair for Mrs E to be allowed to reject the car (*ie* return it). This was because, although it accepted there had been problems with the car at the beginning, it was satisfied they'd been put right. But it did offer her £200 compensation, plus £46.30 in recognition of Mrs E not having the car when it was in for repairs. As Mrs E didn't agree with this, she brought her complaint to our service.

One of our investigators looked at what had happened. She thought that when Black Horse had looked into Mrs E's concerns, there had been continuing problems. This was because Mrs E provided an invoice from later on - 21 February - showing further repairs had needed to be carried out to the suspension. On this basis, the investigator agreed that Mrs E should be able to reject the car.

Mrs E's complaint was then allocated to another investigator at our service. He initially thought there wasn't enough evidence that the car was faulty. So an independent inspection of the car was carried out. On the basis of its findings, he also thought Mrs E should be allowed to reject the car. But this was for different reasons. He felt the car had an inherent fault with the suspension at the beginning. But he also felt the car had been misrepresented to Mrs E by the dealership, as it wasn't fit for the purpose she'd said she needed it for - *ie* for the types of roads she'd be driving on. He thought the dealership had been very eager that she take this particular car. He referred to two visits to sort out the deposit, carrying the negative equity over, and reducing the car's price as supporting this.

Black Horse disagreed, and asked that the complaint be passed to an ombudsman.

my provisional decision

I was minded to uphold the complaint. But this was for somewhat different reasons than those given by our investigators. So I wanted to explain my reasoning in more depth. Because of this, I issued a provisional decision, to give both parties the opportunity to submit anything further they'd like me to look at.

In my provisional decision, I said the following.

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When considering complaints, I need to take into account the law and relevant industry guidance. Having done so, I then decide what I think's fair and reasonable in all the circumstances of the complaint.

There are two pieces of legislation that apply here. One is section 56 of the Consumer Credit Act 1974. The other is the Consumer Rights Act 2015. I'll discuss these in turn, explaining how I think they apply to Mrs E's complaint.

*section 56 of the Consumer Credit Act 1974*

Section 56 makes finance providers jointly and severally liable for what is said by the credit broker in 'antecedent negotiations'. What this means here, is that Black Horse can be held liable for what was said to Mrs E by the dealership about the car.

Our second investigator thought the dealership had misrepresented the car to Mrs E. This was because it said it was suitable for her needs, but he didn't think it was. He thought it said this as it was keen for her to take this particular car. As I said above, he referred to two visits to sort out the deposit, carrying the negative equity over, and reducing the car's price as supporting this.

I disagree with our investigator on this point. I accept the dealership may well have wanted to 'push the deal through' reasonably swiftly. But I've seen nothing to suggest there was anything untoward about that, or that the car was misrepresented. I know how important this is to Mrs E, so I'd like to explain why I think this.

It's very normal for dealerships to reduce prices, arrange deposits, and carry negative equity over. All of these are usually of benefit to a consumer. A deposit means the amount repayable, and therefore that the person is being charged interest on, is lower. But in any event, there was no 'deposit' as such. Rather, it was applied to the existing negative equity. Customers need to pay off negative equity, and there's nothing wrong with how the dealership arranged this. Further, a reduced price means of course there's less to pay, and is a standard part of negotiations. None of this causes me any concern.

I've also looked at whether there was any misrepresentation about whether the car was suitable for the type of road Mrs E would be driving on - a rural area with sometimes rudimentary roads. I note here that 'fit for purpose' generally means: (i) fit for the purpose for which goods of that type are usually supplied; and (ii) fit for any particular purpose that the consumer has explained. But there's no duty to check 'suitability'.

I think it probable that Mrs E would have told the dealership about the type of roads she'd be driving on. She said this to the expert who carried out the report, and I've no reason to disbelieve her. And I'm also aware that the expert report says *"the unsuitability of the car for these bumpy rural roads would have been obvious to those expert in such matters, prior to sale"*.

But despite this, I don't think it would have been unreasonable for the dealership to think the car would perform to an acceptable standard in rural road conditions, where a good suspension is desirable (or indeed necessary). And as I've said, there's no duty to check suitability. But in any event,

I think the car does perform to an acceptable standard - so isn't unsuitable. I say this even though the car does sometimes 'kick out' when cornering. This is for two reasons. First, I've not seen anything to suggest this is unsafe, even though I know it may well be quite unnerving if a driver isn't expecting it, or isn't used to it. Second, I can't see that the car is being damaged by being driven on bumpy rural roads, which strongly suggests to me it's a car that can withstand these conditions. It may well be that there are better options out there. But I don't think this car was an inappropriate option. While the car may perform and handle differently to other cars, I don't think it's so different that I'd expect the dealership to explain in any detail the difference.

This means I don't think it's unfit for purpose, including Mrs E's specified purpose. So I don't think it was misrepresented.

I'm also mindful that Mrs E's husband was present when she chose the car. He has a job that means he has motor expertise. And so I don't think Mrs E would have been in a position where she was without an educated or informed view about the car she was choosing.

Mrs E has also said the car isn't achieving the miles per gallon ('MPG') the dealership said it was capable of. I'm not aware of what the dealership said about this. But in any event, a car's published MPG is in test conditions, and for new cars. Mrs E is driving on bumpy rural roads. So I don't think any MPG she's achieving can be equated to test conditions. Also, her car wasn't new when she entered into the agreement. MPG depends on a number of factors, including the road surface, speeds achieved, and driver style. So I don't think there was any misrepresentation about this either.

### *Consumer Rights Act 2015*

The Consumer Rights Act, which came into force on 1 October 2015, gives consumers specific rights about what should happen when goods (or services) aren't what they should be.

Section 10 of the Act requires goods to be fit for the particular purpose a person needs them for - if he or she makes that purpose known (expressly or by implication). But as I explained above, I don't think this applies here, as I'm satisfied the car was fit for Mrs E's purposes. But it also requires goods to be of satisfactory quality. This is set out in section 9 of the Act. Cars are of satisfactory quality if they're what a reasonable person would expect, taking into account all of the relevant circumstances. For a brand new car, the expectation would be higher than for a used car. For example, a used car may have some wear and tear, which is to be expected. The age, mileage and price paid for the car need to be considered too.

In this case, I don't think there's any dispute that there were problems at the beginning, which Mrs E reported within the first three weeks of having the car. In the first few months, repairs were carried out to the suspension, brakes and gearbox. I think these go beyond wear and tear, and were sufficiently serious that they shouldn't have been present in an 18 month old car, that had done just over 30,000 miles. Nor can I see that there was any price reduction to take these issues into account.

Under the Act, faults found in the first thirty days mean Mrs E could reject the car. There's also a legal right to reject later on, if repairs haven't sorted things out. I've considered the requirements of the Act, but I don't agree that it would necessarily be appropriate - on a fair and reasonable basis - for Mrs E to reject the car, if things had been put right. While I must take the law into account, I ultimately need to make a decision based on what I think's fair and reasonable in all the circumstances of a specific complaint.

That means I've looked at whether I am persuaded any problems have been put right, and what I think would be fair to happen next. And looking at the report, I don't think the problems have been put right - or certainly not in their entirety. The report concludes:

*"A suspension issue was present at the point of sale. In addition, it is most likely that either another latent issue continues to affect the car (such as defective dampers or tired springs)..."*

I have no evidence to persuade me that the report is wrong. Or in other words, that there aren't persisting issues. I also note there have been a number of repairs carried out already. Because of this, it seems to me that rejection of the car is a reasonable solution in these circumstances.

*redress*

I think Black Horse should accept rejection of the car, and collect it at no cost to Mrs E. The finance should be cancelled, also at no cost to her. By this I mean, no more monthly repayments are due (unless Mrs E is in arrears, in which case Black Horse would be entitled to request this sum. I'm not aware that she is). But if there are any charges that may be due under the agreement, such as excess mileage, on a pro rata basis, or damage (which mustn't relate to the previous or current potential problems). Black Horse would reasonably be allowed to charge for these. So I'm referring to damage such as any accident damage, scrapes, etc.

As no deposit was paid as such, there would be no money to return for this. The deposit was used to cover previous negative equity. This always needed to be paid off. This is what happened, so Mrs E wasn't disadvantaged by it.

As I understand it, the repairs were carried out under warranty. But I'm unsure if this was the case for the repairs in February of this year. If Mrs E paid for these herself. Black Horse should reimburse her, adding 8% simple interest from the date she paid for them, to the date of settlement.

Mrs E paid for the independent report. So she should be reimbursed for this, again adding 8% simple interest from the date she paid for it, to the date of settlement.

Mrs E will also need to cancel or transfer her car insurance. I think it fair that Black Horse reimburses any admin fee charged by her insurer for doing so.

Mrs E's credit file should reflect that the agreement has been settled, and if there are any negative entries (I'm not aware there are), these should be removed. But if any money is owing for damage or excess mileage. Black Horse may wait to record the agreement as settled, until these have been paid. That said, no negative entries should be recorded.

Finally, I've considered both loss of use (while repairs were being carried out) and loss of enjoyment due to the persisting problems. Regarding loss of enjoyment, I don't think the 'kicking out' necessarily relates to any kind of fault. It may be connected to a problem with the suspension, but I don't feel I have enough information to be persuaded this is the case. Also, it only happens in very specific circumstances. So although it may be unnerving, I don't feel, overall, that an award is due for any loss of enjoyment caused by it. As regards loss of use though, and general inconvenience since Mrs E complained to Black Horse, I've taken Black Horse's previous offer of £246.30 as a starting point. This was made a few months ago, so I think it fair it be increased to £500.

*responses to my provisional decision*

Black Horse said that the report doesn't show there is a continuing "latent issue". Rather, it says there may be, but it's equally likely it's that the configuration is specifically tuned for high performance on smooth roads.

Mrs E also responded to say she has a cherished plate, and she'll need to pay to transfer it to another car. She also noted she has a service plan with a third party, which she won't now have the benefit of. However, she thinks she can get a refund from the third party when she cancels it.

## **my findings**

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

I note that my provisional decision forms part of this final decision, and is to be read alongside it.

I've looked carefully at everything the parties have submitted, including their responses to my provisional decision. Having done so, I still feel my provisional decision is fair. But I'll also address the further points.

First, I've considered Black Horse's point that the report isn't conclusive. Rather, it's 'either/or'. So there may be a continuing latent issue – but it may also simply be a characteristic of the car.

I accept what Black Horse has said about the report not establishing for sure whether there's a fault or not. But where a consumer considers there to be a fault, or faults, with her car, which she raises within the first six months, our approach is that the onus is on the business to show there isn't a fault. Mrs E complained within the first six months, and I don't think Black Horse has shown, on balance, that there isn't a fault. And it's certainly quite possible there is a fault - this wasn't noted as being a lesser likelihood in the report.

Because of this, I still think the complaint should be upheld.

I turn now to the issue of the cherished plate. As I'm upholding the complaint, the cost of transferring it will be a consequential loss for Mrs E. She wouldn't need to transfer it, and incur the cost, had the car been of satisfactory quality. And as I've explained, I'm not satisfied it is. So I think Black Horse should refund this cost, subject to her providing reasonable evidence of it.

I've also thought about the cost of the service plan. Again, this would be a consequential loss. And Mrs E hasn't had the opportunity to benefit from the plan. That said, it seems she's able to cancel it, so not have any further repayments, and obtain a refund of those already made. So I think she should fairly make reasonable efforts to do so. But if she can't obtain a full refund, or is still liable for any sums under the plan, I think Black Horse should refund her (including any potential cancellation/admin fee). I'm not adding 8% interest to this, as it would be very difficult to attribute any loss to specific payments – should there be any. And I think the £500 compensation for distress and inconvenience (plus the time the car was being repaired) is enough to absorb this.

## **my final decision**

For the reasons given above, it's my final decision to uphold this complaint. I require Black Horse Limited to:

- accept rejection of the car, collect it, and cancel the finance agreement - without cost to Mrs E for doing these things;
- record the agreement as settled on Mrs E's credit file (subject to her paying any excess mileage charges which may reasonably be due on a pro rata basis, and any reasonable charges for damage, as set out above);
- ensure there are no negative entries on her credit file regarding this agreement;
- reimburse Mrs E for the February 2017 repairs, if she paid for these herself, adding 8% simple interest a year, from the date she paid for them, to the date of settlement;
- reimburse Mrs E for the cost of the independent report, adding 8% simple interest from the date she paid for it, to the date of settlement;
- pay Mrs E the insurer's admin fee for cancelling or transferring her car insurance, upon it receiving reasonable proof of her incurring this cost;
- pay Mrs E the cost of transferring her cherished plate, upon it receiving reasonable proof of her incurring this cost;
- refund any sums Mrs E is unable to get a refund for, or remains liable to pay (including any cancellation/admin fee), in respect of her service plan – subject to Mrs E making reasonable efforts to cancel the plan and get a refund; and
- pay her £500 to take into account loss of use, and trouble and upset caused since she made her complaint to it.

As regards the £500, if this isn't paid within 28 calendar days of Mrs E accepting my decision (should she chose to do so), interest of 8% simple a year will accrue from the date of my final decision until the date of settlement.

If Black Horse Limited considers that it's required by HM Revenue & Customs (HMRC) to withhold income tax from those parts of the award constituting the 8% interest, it should tell Mrs E how much it's taken off. It should also give her a tax deduction certificate if she asks for one, so she can reclaim the tax from HMRC if appropriate.

Mrs E should refer back to Black Horse Limited if she's unsure of the approach it has taken, and both parties should contact HMRC if they want to know more about the tax treatment of this portion of the award.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs E to accept or reject my decision before 7 September 2017.

Elspeth Wood  
**ombudsman**