

complaint

Mr E complains that Tesco Personal Finance PLC treated him unfairly by rejecting his claim under section 75 the Consumer Credit Act 1974 for a car that wasn't of satisfactory quality and which had been mis-represented to him by the dealership.

background

In August 2017 Mr E ordered a new vehicle from a dealership. He paid the £500 deposit on his Tesco credit card.

Mr E collected the car in January 2018. Mr E discovered that the offside rear passenger seat bracket wasn't flush to the floor meaning that two of the rear seats couldn't be used reducing the vehicle from being a seven seater to five seater. Mr E took the car to the manufacturer's main dealership for the problem to be looked at.

At the end of January 2018 Mr E wrote to the dealership that had provided the car asking to reject it but Tesco says in this letter that Mr E also said that he would be open to another resolution such as having the car repaired.

Mr E tried to have the matter resolved with the manufacturer but for some reason the car wasn't repaired. In March 2018 Mr E wrote a letter of complaint to the dealership. He said that the car wasn't new as had been advertised but had actually been registered to another company in December 2017 before then being supplied to him in the following January. He said he wasn't told that the car had been pre-registered when he'd ordered it.

Mr E also said the car wasn't of satisfactory quality and that although he'd been dealing with the manufacturer over the past six weeks it had been unable to inform either whether it would carry out the necessary repair or when it would do so. He said this was unreasonable.

Mr E also explained that as he'd been concerned about the potential safety of the car, and that the seat bracket fault was possibly due to a more serious issue with the chassis, he'd commissioned an independent inspection of the car. Mr E said this report had confirmed that while the car was safe to use there was a fault with the rear passenger seat.

Mr E requested by letter that the dealership replace the car under section 23 of the Consumer Rights Act 2015. Shortly after this letter Mr E further complained to the dealership that the car hadn't been provided to him with a full warranty as the warranty had actually commenced around three weeks prior to him acquiring the car which was when it'd been first registered. He said he was also unable to obtain a copy of the pre-delivery inspection report as he wasn't the registered owner at that time.

The dealership offered to take back the car and refund Mr E. Mr E rejected the offer as he said he wouldn't now be able to get the same car due to an increase in its price. The dealership said it then offered to cover the cost of the repairs to the passenger seat due to the slow response from the manufacturer.

Mr E made a claim to Tesco under section 75 of the Consumer Credit Act 1974. He requested that Tesco provide the remedy he'd requested from the dealership, namely a replacement vehicle.

Tesco declined Mr E's claim. It said that the aim of section 75 was to return the customer to the position they'd been in before they'd entered the contract and it didn't allow for the provision of funds for the purchase of a new more expensive vehicle. It said that the dealership had offered him two alternatives which were fair and reasonable solutions to the problems with the car, and both of these solutions were still open to him. Tesco said in these circumstances it was unable to progress his claim.

Mr E complained to Tesco about its decision. Tesco didn't change its view and so Mr E complained to this service.

Our investigator recommended that Mr E's complaint should be upheld but not with the outcome requested by Mr E of a replacement car being provided. The investigator noted that the dealership had now withdrawn its offers to resolve the matter and he said Tesco should've been aware that this change of mind could've arisen. The investigator said Tesco should've agreed to either affect the repairs or allowed Mr E to reject the vehicle.

The investigator also said that Tesco should've offered to cover the cost of the independent inspection as this had been used as evidence to confirm the fault with the vehicle's passenger seat and so would've been an expense met by Tesco if it had to investigate whether the problem had been there at the point of sale or not.

However, the investigator said that he didn't think the reduced warranty period and the car being pre-registered were sufficient in themselves to justify rejection of the van. This was because the warranty period was only shortened by a very limited period of time and was unlikely to have any impact if the car developed any faults. And the car, although pre-registered had never actually been used and due to the pre-registration there'd been a reduction in the price. The investigator said he appreciated that the resale value of car could be affected by it having more registered keepers but as Mr E had said he intended to keep the car for many years it wasn't possible to know whether that would actually be the case or not.

The investigator said he thought it would be fair for Tesco to affect the repairs to the passenger seat and if these were unsuccessful then it should accept rejection of the car. He said that as the dealership no longer had this particular make and model of car available at the discounted price then any replacement would have to be an updated and more expensive version this would be a disproportionate remedy. Under section 23 of the Consumer Rights Act 2015 a seller can't require a trader to replace goods if to do so would be "*disproportionate*" compared to other available remedies.

Mr E disagreed with the view of our investigator. He raised a number of points:

- Firstly that there was a fundamental difference between a new vehicle and a pre-registered one and that it was misleading to say a car was new in these circumstances. He also said that he'd complained to Trading Standards about the adverts used by the dealership which described vehicles as "new" when they were pre-registered. Following an investigation the dealership's website

had been altered with information now being provided about the registration process used for the vehicles being offered for sale.

- That he'd entered into a contract for a new vehicle and had never agreed to a lower price because the car had been pre-registered.
- That while he accepted that the car specified in the contract was now being marketed as a more expensive product following a relaunch this vehicle still conformed to the contract he'd entered into with dealership. He said that if he was offered the 2018 model he would have no grounds on which he could reject it. Mr E rejected that a replacement car would be "betterment". He said that he'd had to use a vehicle for the past few months that had two seats missing and so any betterment from a replacement vehicle would be "incidental".
- That under section 23 of the Consumer Rights Act 2015 a trader could seek to either repair or replace faulty goods and the trader had the right to choose which of the two options depending on the cost. The trader couldn't choose another remedy such as rejection of the goods as a more preferable outcome. And as the pre-registration of the vehicle wasn't something that was "repairable" then repair wasn't an option that the trader could pick meaning the provision for rejecting a replacement for being disproportionate couldn't be invoked.
- That the car had been marketed with a "full warranty" but this was not the case as this could only be provided with a new car. The reduction of the warranty again pointed to the contract being for a new vehicle and not a pre-registered one.
- That Tesco had been aware of the passenger seat bracket being faulty for the past nine months and under the Consumer Rights Act 2015 repairs should be affected within a "reasonable time." No repairs had been undertaken and due to the passage of time repairs would now be too late. Tesco was now obliged to replace the car because of the delay.

As the parties were unable to agree the complaint was passed to me. I issued a provisional decision along the following lines.

section 75 Consumer Credit Act 1974

Mr E's complaint was against Tesco following its rejection of his claim under section 75. Section 75 provides consumers with extra protection in certain circumstances. It means that a credit provider (in this case Tesco) takes the same responsibility as the trader if there was a breach of contract or if an item or service had been misrepresented.

was there a misrepresentation?

I'd seen that Mr E ordered a particular make and model of a car in August 2017. This form says that the "*Date of Reg will be in approx 20 weeks*" and that the mileage will be "*Delivery.*" There was nothing on the order form that referred to the vehicle being pre-registered. The invoice for the vehicle stated that it came with "New car warranty".

At the end of February 2018 Mr E received the V5 document for the car. This document showed there was a previous registered keeper and so Mr E became aware the car wasn't new as he'd believed and he felt the car had been misrepresented to him.

While I hadn't seen any direct evidence that the car was marketed as "new" I accepted this hadn't been disputed by the dealership or by Tesco. I'd also seen that Mr E made a complaint to the Advertising Standards Council and Trading Standards about the way the dealership had advertised pre-registered vehicles which directly led to the dealership now advertising them as "used" rather than new.

Mr E had also ordered this car many weeks in advance of its delivery so I thought it was reasonable to say that Mr E was expecting a new vehicle and that he would be the first registered owner, rather than a used or pre-registered one which would have been available much sooner.

So I was satisfied the car was advertised as new and Mr E hadn't been aware that it had been registered to another company before being placed in his name when it was delivered. And I could understand why Mr E felt the car wasn't "new" though it hadn't been used on the road when he acquired it. The only mileage was for delivery of the car to the dealership.

The next issue for me to consider is whether Mr E's belief that he would be the first registered keeper of the vehicle induced him into entering into the contract to buy it. Mr E said had he known about the pre-registering of the car he wouldn't have purchased it and that he was unaware of any reduction in the price. However, although I accepted that Mr E has concerns that the car being pre-registered means that the sell on price could be affected I'd also seen that he intended to keep the car for several years. So I thought it was likely this concern wouldn't have been a deciding factor in going ahead with buying the car. I'd also seen that he'd saved up, ordered the car he'd wanted and waited several weeks for its arrival. So taking that into account I think Mr E would've still gone ahead had he found out that the vehicle was pre-registered.

So looking at the evidence I didn't think Mr E's belief that he would be the first (and only) registered keeper was a key factor when he decided to buy the vehicle. He was still getting a vehicle with delivery mileage to the specification he required that hadn't been driven by anyone else.

remedy for misrepresentation

Because I've found that there was no misrepresentation. I didn't need to decide what an appropriate remedy would be. If I had found there'd been a misrepresentation then the remedy would usually be to put Mr E back in the position he would've been had there been no misrepresentation. That's not the same however as requiring that he be provided with a new car that hasn't been pre-registered.

was there a breach of contract?

Shortly after obtaining the car in January 2018 Mr E complained that the car was faulty. He arranged an independent report that has confirmed there was a problem with one of the passenger seats and that this had been present from the point of sale. So the goods weren't of satisfactory quality and there was a breach of contract.

I also thought it was arguable that there was a breach of the contract by the car being pre-registered as Mr E had expected to be the first registered keeper. There are some differences between a "new" car and a pre-registered one such as the length of the warranty. However, the car hadn't been used, the mileage only being what had been incurred in delivery and the warranty period could've been extended, so I thought it was equally arguable the car could be considered as "new".

remedy for breach of contract.

The law provides for a range of remedies where goods are faulty, including repair, rejection and replacement. The dealership said it had offered Mr E a repair as the manufacturer was taking too long to resolve the matter. Mr E said it hadn't offered the repair as he was asked to arrange the quote himself. However, I didn't think such a request was unusual or unfairly onerous so I thought it was reasonable to say that Mr E had decided not to proceed with this offer. That was his choice. And I understood why he may have had reservations about that repair given his experience of having just bought a new vehicle. But it seemed the dealer had offered something that might have addressed Mr E's concerns. I noted that the manufacturer hasn't completed a repair.

I accepted that the car being "pre-registered" was not something that can be repaired.

the law and my role

Mr E had raised section 23 of the Consumer Rights Act 2015 and he's also referenced case law concerning "betterment". I don't apply the law directly. But I have to take it into account in reaching what I consider to be a fair and reasonable outcome to Mr E's complaint against Tesco Bank.

remedy for this complaint

Mr E says that due to both the misrepresentation and the quality of the vehicle it was fair for him to have it replaced with a new one. But I didn't agree with this view. Mr E had agreed to buy a 2017 model however he couldn't have that now as it was not available. And I didn't think it was fair to get a newer model (2018 or 2019) for a 2017 price. Mr E said that it was too late for the car to be repaired in respect of the seat but I didn't think that it was too late to affect a repair as this opportunity hadn't yet been taken up. But I appreciated that repairing the seat wouldn't rectify the car being pre-registered. So I thought allowing Mr E to reject the vehicle was the fairest outcome for his complaint as it addresses his concerns about the seat and the car being pre-registered.

So I was intending to uphold Mr E's complaint and ask Tesco to arrange for the car to be collected at no cost to Mr E. I was aware that the value of the car would have now depreciated and that Mr E has had use of it since January 2018 (although I accepted he hasn't been able to use it as he'd wanted due to the seat issue). The car now had a mileage of around 10,250. It was usual that a deduction is made for usage from any repayment arising from a car being rejected. So in light of that I wasn't going to ask Tesco to reimburse the cost of the independent report, the costs of the road fund licence (£500) or any insurance costs incurred by Mr E.

I'd seen that the cost of the car was £24,412.63 plus a £500 deposit paid on Mr E's credit card. The starting point was that Tesco should refund the £24,412.63 together with interest but it's entitled to deduct from that amount any refurbishment costs that have arisen from Mr E's use of the car that was above what would be expected from fair wear and tear. The British Vehicle Rental and Leasing Association ("BVRLA") guidelines were to be applied. However, either Tesco or the dealership would have to cover the cost of the car's depreciation.

Tesco should also refund on to Mr E's credit card the £500 deposit he'd paid for the car together with interest.

Mr E disagreed with my provisional view. He said that he'd only ever wanted to buy a new car and didn't accept that he would've gone ahead with the purchase if he'd known the car was pre-registered. However, any misrepresentation of the car by the dealership was irrelevant to his complaint as the issue was one of breach of contract. He had agreed to buy a "new car" and that characteristic of the car was a contractual term. And that following case law "new" indicated no previous keepers.

Mr E disagreed that he had been offered a repair and there couldn't be an expectation or obligation on him to arrange or carry out the repair to the seat. Neither the trader nor Tesco had arranged for the car to be inspected or repaired. He said reimbursement didn't amount to offering a repair under Section 23(2) of the Consumer Rights Act 2015.

Mr E didn't accept that my provisional remedy to his complaint was fair. He said that a replacement vehicle was an appropriate remedy and didn't amount to betterment as that would be an incidental outcome. He said that when goods were replaced under the Consumer Rights Act 2015 this should be unaffected by any subsequent price rise. And that the specifications of his car's model and the newer one were more or less identical so there were no material differences between them. He said the contract had never specified the vehicle would be a 2017 model.

Tesco also disagreed with my provisional view. It said that it accepted it was likely the car had been faulty at the point of sale, but the offer by the trader to repair or give a full refund had been reasonable at the time. The merchant wasn't obliged under the Consumer Rights Act 2015 to provide a remedy that was disproportionate to the cost of repair or refund.

Tesco said that by offering a fair resolution to Mr E the trader had complied with the Consumer Rights Act and if a breach of contract takes place and a remedy is available then this rectifies the breach. However, Mr E had rejected the offer and continued to use the car. Tesco said that Mr E's continued use of the car constituted an acceptance of its current condition. It said the fairest outcome would be for the car to be repaired.

Tesco said it was concerned at my provisional remedy as it didn't allow for a deduction for usage which would be appropriate. Tesco said it didn't think the BVRLA guidelines applied as the car wasn't leased or rented.

Tesco further said that the invoice and order form for the car stated that vehicles came pre-registered to obtain a discount and so Mr E would've been aware this was a possibility for the car he'd ordered.

Finally Tesco said that replacement wasn't possible due to the cost and was a disproportionate outcome.

my findings

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

Mr E says that the main issue raised in his complaint was that there was a breach of contract as the car wasn't "new" but was "pre-registered". He says he's disappointed I haven't dealt with that point more fully in my decision. Tesco says that Mr E should've been aware that there was a possibility the car was pre-registered as this was raised in the dealership's paperwork.

As set out above I was satisfied that Mr E ordered a new car and I haven't changed my view on that. I've also seen that the order form states under the heading "*Vehicle Descriptions*" that "*If you have opted for the highest possible discount level we can offer on that specific product there maybe a short two week delay in receiving the V5 in your name back from DVLA as it may be first registered to ourselves*". However I haven't seen any evidence that Mr E took this option so I don't agree with Tesco that he should've been aware that the car might've been pre-registered.

Mr E says he ordered a "new" car and that this characteristic was part of the contract with the dealership. However I think it's arguable that Mr E received a "new" car if the description of new was that it came with delivery mileage, was in showroom condition and hadn't been "used" by anyone else.

Mr E says case law supports that new cars should not be registered to others first as this could amount to a false trade description. And I accept that there are differences between a new car and a pre-registered one such as the length of warranties and that resale prices can be impacted by the number of registered keepers. However the resale point didn't appear to be relevant to Mr E's plans for the car, and the warranty run out around three weeks earlier than if the car had only been registered to Mr E. So it's probable that these differences would have only had a minor impact on Mr E. In regards to the case law, as already explained above, I don't apply the law directly so although I take it into account I'm not bound to always follow it.

I don't think it's necessary for me to resolve whether there was a breach of contract or not as to whether the car was "new" or not. This is because that finding doesn't alter the remedies that are available. I accept Mr E was disappointed the car wasn't new and it wasn't what he'd wanted or expected.

I think it's clear that there was a breach of contract in regards to the condition of the car due to the faulty seat. Mr E says he accepts the dealership offered to reimburse him if he

arranged the repair himself at a local garage. He says this didn't amount to what is required by S 23(2) of the Consumer Rights Act 2015 and so he says it was only an informal offer to repair. Mr E says he made considerable efforts to have the car fixed including an independent inspection and hasn't been reimbursed for the costs that were incurred in doing so.

However, I think the dealership's offer to reimburse the repair costs was reasonable and not one that was unusual where these circumstances arise. So I think Mr E declined this offer but as set out above I understood why he may have chosen to do so.

Tesco says that by declining the two offers by the dealership of either reimbursing the costs of the repairs, or taking the car back and reimbursing what Mr E had paid, Mr E has "accepted the car". It says these remedies would've corrected the breach and so the fairest solution now would be for the car to be repaired. However, repairing the seat wouldn't address the issue that the car was "pre-registered" so I don't think repairing the car as a remedy is sufficient. And I don't think from the evidence that it would be fair to infer Mr E has accepted the car. He has been actively pursuing his complaint.

Mr E says the only fair remedy is for the car to be replaced and although this means he will receive a newer car at a higher cost this doesn't equate to "betterment". He says I haven't set out clearly why I considered this remedy unfair and unreasonable.

Mr E disputes the contract was for a 2017 model as this isn't specified in the order form. However the car being "new" also isn't specified but is taken from the way the car was advertised. I think looking at that order form that it's more likely than not that Mr E was expecting a late 2017 model. So I am satisfied the contract was for a 2017 model and that the current model has a different specification to this one.

Under the Consumer Rights Act 2015 if a consumer chooses not to exercise the right to reject goods then they will be entitled to claim a repair or replacement. However the consumer can't choose to repair or replace if the remedy is either impossible or disproportionate. Here I'm satisfied that replacing the car with a newer more expensive model is disproportionate and therefore an unfair outcome. I don't agree with Mr E that he wouldn't be put in a more advantageous position if a newer model was now provided. The car he was supplied with was a 2017 model and it simply isn't possible to replace that model. I'm satisfied that now receiving a 2018/9 model would amount to betterment.

Tesco says if the car is returned then an amount should be deducted for usage. This is usually the approach taken when a car is rejected and returned. I have considered whether an amount should be taken off the reimbursement to Mr E as he's had use of the car since January 2018 but I haven't changed my mind on this point. It's accepted that Mr E's car had faulty seats reducing the car from a seven seater to a five. This fault has persisted from the time he acquired it and has significantly limited his ability to use the car in the way he'd planned. I've also seen that the mileage is lower than average use. So in light of that I think it's fair for either Tesco or the dealership to cover the depreciation in its value even though I accept that some of that depreciation will be due to Mr E's use. However, I don't think it's fair to require Tesco to reimburse Mr E with any of the other expenses he's incurred such as obtaining the report, insuring and taxing the car.

So for the reasons given above I haven't changed my view and I'm upholding Mr E's complaint but I'm not asking Tesco to provide the remedy he's requested.

I'm asking Tesco to collect the car at no cost to Mr E and, as a starting point, refund him the £24,412.63 for the cost of the car together with interest. However Tesco is entitled to deduct from that amount any refurbishment costs that have arisen from Mr E's use of the car over the time he has had it that were above what would be expected from fair wear and tear. I'm still requiring that the BVRLA guidelines are applied. I accept that the car is neither leased nor rented but I think these guidelines, as they set the industry standard as to the condition of a used car, objectively and fairly assist as to whether there are any refurbishment costs that should be borne by Mr E.

Tesco must also refund on to Mr E's credit card the £500 deposit he'd paid for the car together with interest.

my final decision

For the reasons given above I'm upholding Mr E's complaint. I'm asking Tesco Personal Finance PLC to do the following:

- Collect the car at no cost to Mr E.
- Reimburse £500 to Mr E's credit card together with interest at the rate of 8% per year simple from the date of payment until the date of settlement.
- Reimburse Mr E the sum of £24,412.63, together with interest at the rate of 8% per year simple from the date of payment until the date of settlement. However this amount is subject to a deduction for any refurbishment costs that arise from Mr E's use of the car which are considered to be above fair wear and tear. The BVRLA guidelines are to be applied.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr E to accept or reject my decision before 27 September 2019.

Jocelyn Griffith
ombudsman