

The complaint

Ms H is unhappy with the car supplied under the hire purchase agreement with FCEE Bank Plc (FCEE).

When I refer to what Ms H and FCEE have said or did, it should also be taken to include things said or done on their behalf.

What happened

In April 2022 Ms H entered into a hire purchase agreement with FCEE to acquire a new car. The total Cash Price of the car was £20,688.84. The Total Deposit was £11,718.84 which left the Optional Final Payment of £7,670 due in May 2025.

Ms H said she ordered a new car from the supplying dealership in June 2021. In December 2021 she said she was told by the supplying dealership that the manufacturer was planning a mid-term update to the car model and that this would just be “a bit of a facelift”. Ms H said the supplying dealership failed to inform her some important features would be dropped from the model. Ms H said that it was only after taking delivery of the car she found out that the power folding wing mirrors feature, as well as the heated wing mirrors feature, had been dropped from the specification along with one or two other features. Ms H said that, had she been advised of these changes in December 2021 by the supplying dealership, she would have immediately cancelled her car order.

Ms H has said that when she complained to the supplying dealership, they conducted an internal investigation and informed her that the missing features could not be retrofitted. The supplying dealership wrote to Ms H in November 2022 and said, that due to the global semiconductor shortage and as part of the model year change, the manufacturer removed the power folding wing mirror feature. The dealership apologised that they failed to advise Ms H of this change, which they said was a genuine error on their part, but due to the wiring loom being incompatible, there was no option to retrospectively fit these wing mirrors. To put things right, Ms H was offered the option to return the car to them and receive a full refund, or, as an alternative, they offered Ms H a financial compensation to the sum of £750 by way of an apology for any inconvenience caused. This offer was still available to Ms H when they wrote to her in January 2023.

Ms H said she declined a full refund as this option was no longer economically or practically feasible for her, and instead she asked for financial compensation of £2,000 towards the financial losses she will suffer and due to the day-to-day practical issues she has to cope with as a result of their misrepresentation. As Ms H was not happy with the resolutions proposed, in April 2023 she complained to FCEE.

In May 2023, FCEE wrote to Ms H and said the rejection of the car offered by the supplying dealership was no longer available as the car had travelled more mileage since, but they said the £750 goodwill is still available. They also said that, having reviewed Ms H's agreement, they can confirm it has been fully signed and completed by her, confirming her acceptance to purchase the car on the terms set out in it.

Unhappy with the above Ms H referred her complaint to the Financial Ombudsman Service (Service).

Our investigator looked at Ms H's complaint and was of the opinion that the complaint should be upheld. The investigator believed FCEE should pay Ms H £2,068.88 which is a 10% reduction on the total price of the car. The investigator thought this would reflect the loss of functions Ms H was expecting of the car, and would have been built into the price of the car when it was purchased, in addition to the loss of enjoyment of the car. The investigator also thought that FCEE should pay Ms H £500 for the distress caused due to the amount of time the complaint resolution has been taking.

FCEE disagreed with the investigator. So, the complaint has been passed to me to decide.

After reviewing the case, I issued a provisional decision on 11 September 2024. In the provisional decision I said:

“What I’ve provisionally 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.

Where evidence is unclear or in dispute, I reach my findings on the balance of probabilities – which is to say, what I consider most likely to have happened based on the evidence available and the surrounding circumstances.

I am very aware I have summarised this complaint very briefly, in less detail than has been provided, and largely in my own words. No discourtesy is intended by this. If there is something I have not mentioned, I have not ignored it. I have not commented on every individual detail. But I have focussed on those that are central to me, reaching what I think is the right outcome. This reflects the informal nature of our service as a free alternative to the courts.

What I need to decide in this case is whether the car Ms H acquired was misrepresented to her by FCEE and/or their agents. To make a finding of misrepresentation, I would need to be satisfied that Ms H was told a false statement of fact that caused her to enter into a contract she would not have entered into otherwise. And if I am not satisfied there has been a misrepresentation, I still need to consider whether there has been a breach of contract because the goods might have been mis-described.

Ms H said that the supplying dealership failed to inform her some important features would be dropped from the car model she was purchasing. She said that, it was only after taking delivery of the car, she found out the heated and power folding wing mirrors’ feature had been dropped from the specification along with one or two other features. Ms H said the car she received also does not have the puddle lights, which would have been useful to her in poor lighting conditions due to her cataracts.

FCEE have told us the car brochure is subject to change, and they have no record of Ms H asking for the folding mirrors. They also told us that, after the car was ordered, the manufacturer have the ability to change the specifications, especially due to the semi-conductor delay. And that from the information they have, if Ms H made it paramount that a particular feature was required, they believe that the dealership would advise her in the handover process and they are sure Ms H would have checked to see if such an important deciding factor was present before accepting the car. They believe that she would not have signed the contract documents if she was not happy with the car. In addition, they felt they have dealt with Ms H’s complaint in a timely manner.

I was not present at the time of sale to hear everything discussed, but when things are unclear, I make my decision on the balance of probabilities. Ms H has provided credible and persuasive testimony to say that she was led to believe by the supplying dealership that the car would come with power folding wing mirrors. And I think most likely this was true. She has gone on in detail about how her garage is next to a partition wall and a few feet away from the end of a flower bed and a tree – which I have seen a picture of. Ms H explained how, due to the garage being narrow and there being little space, she needs to follow a specific process when parking her previous car inside. And that is why when she decided to change her car, she realised she needed to compare the car in question specifications in detail against the measurements of her garage. Ms H has explained that, when choosing to go with the car in question, she assessed that with the power folding mirrors' feature, she would be able to perform all the steps required to park her car inside the garage. She also explained that considering her age, and having osteoporosis and joint pain to contend with, she would not be able to climb over the hand brake into the passenger seat to fold and unfold the left mirror. As such she said the folding mirrors were an essential option for her to be able to drive the car in and out of her garage. So, when she did her test drive, prior to ordering the car, she said she even asked if she could use this opportunity to visit her home so she could line the car up with her garage entrance to check that the car would fit with the mirrors in the folded position.

I have also seen an email to the dealership, after she picked up the car, asking why the car's external mirrors are not automatically power folding when she switches off the engine and asking for direction how to activate this feature, as she was not provided with a full printed manual when she got the car. In this correspondence she said 'As you know, the only way I can get the car into my garage is with both mirrors folded down. When we spoke about this before I ordered the car you advised that there is also a facility to operate the power folding even when the engine is running. So I would be grateful if you could send me instructions on exactly how to do this.' That is why taking all of the above into consideration, I think most likely, Ms H would have discussed the importance of the power folding wing mirrors during the lead up to the sale – and that it would have been a key factor in her decision making. This is based on her credible testimony about the importance of this feature when parking in her garage.

I also disagree with FCEE when they say that there is no record of Ms H asking for the folding mirrors or that they believe that the dealership would have advised her in the handover process and they are sure Ms H would have checked to see if such an important deciding factor was present before accepting the car. I say this because, based on the correspondence from the supplying dealership, I can see they have apologised for failing to advise Ms H of the changes in the car model relating to the folding mirrors no longer being available, and agreed that it was their genuine error. To put things right they offered Ms H the option to return the car to them and receive a full refund or, as an alternative, they offered Ms H a financial compensation to the sum of £750, by way of an apology for any inconvenience caused. And, I think FCEE's point falls away that Ms H could have examined the goods before taking possession because she was placing reasonable reliance on what the supplying dealership told her. As such I do not see how she would have reasonably noticed the absence of this feature until she needed to use it.

A misrepresentation is a false statement of fact which induces a person into entering a contract when they would have acted differently, had they known the truth. I think the evidence here indicates that Ms H was told a false statement of fact about the features of the folding mirrors. I know that at the time the statement was made the supplying dealership was under the impression that this feature would be available in the car in question, and that the manufacturer later changed the specs of the car. But in a situation like this, the supplying dealership, a party that originally made a statement that is no longer true, had a duty to

update Ms H. And I think they could have done this when they made contact with her in December 2021, but they did not.

From all the evidence available I think most likely Ms H would not have purchased the car had she known the power folding mirrors option is not available on the new model. The remedy for misrepresentation is usually rescission of the contract to put the consumer back in the position they would have been in had it not been for the false statement. It is not to give the consumer the benefit of the false statement.

I know that rescission of the contract was an option proposed by the dealership around September 2022 and was still available to Ms H in January 2023. But due to passage of time FCEE said that the offer was no longer available because Ms H has been putting further miles on the car. Also Ms H said that when this option was offered to her in early September 2022, she said it was something for her to consider, but she wanted this to be put to her in writing, as she did not want to accept this proposal at face value based on a verbal conversation, due to what happened previously when she was not told about the car having power folding mirrors. She also thought that being without a car for several months, would be problematic to her because the alternative car she was looking at, from another manufacturer, would take more than six months to arrive. Based on this and other aspects, it seems Ms H was concerned about the financial implications of returning the car at this stage. So, I've considered everything both sides have said. I also considered the amount of time that has passed, and I think rescission of the contract is not the most fair and reasonable solution at the current stage.

As such, I have also looked at a remedy for breach of contract, namely for goods which are not as described. The requirement for goods to be as described is implied into the contract between Ms H and FCEE by the Consumer Rights Act 2015 (CRA). Under the CRA where such a term is breached, this provides Ms H several remedies: including repair, replacement, or monetary awards such as damages.

When considering what the right remedy is (rather than a rejection), I also thought about what both sides have said.

The supplying dealership indicated that the car Ms H bought had a new shape and led headlights and they explained that the manufacturer held the price, so Ms H bought a new model of the car at the original pre-model change price where they said the difference in the price was around £2,000.

Ms H, on the other hand, said that had she been told by the supplying dealership that she could not have the power folding mirrors in December 2021, then she would have acquired a different make of a car that came with power folding mirrors. But she said that this model since December 2021, had a price increase of about £1,400 on average across that car's range and that a generous discount of up to £1,600, which was available in December 2021 has since been removed. Ms H said that the official line is that there are no discounts, but after she put some pressure on the salesperson, she was told that he might be able to get her a discount of up to £600. So, Ms H said that this would still mean that the alternative car now would cost her approximately £2,400 more. That is why she believes that she should be paid £2,000 to reflect the situation she now finds herself in.

I have considered that a repair or replacement are most likely not practical remedies at this stage. I think the supplying dealership after investigating the matter, including checking with the manufacturer, has concluded that the power folding mirrors are unable to be retrofitted. So, a repair seems unreasonable at this stage. And I think, most likely, it would not be easy to replace the car with a similar one with power mirror folding features, and I think this process would, most likely, cause Ms H further inconvenience in any event. And I think that

sourcing another car would most likely result in an unjust enrichment here as these would likely come with additional specification and benefits. I also considered what the dealership said about Ms H acquiring a newer model for the price of the previous model. In which case there is a potential that she actually gained a benefit of acquiring a new model for a price that was based on the previous model.

Next, I considered if monetary award would be a fair and reasonable resolution. This would reflect the fact that Ms H has lost out on particular features she was expecting to have, which have impaired her ongoing use of the car. Ms H has gone into detail how technology continues to go forwards not backwards and how the downgraded current specification of the car will impact its value in the future. And she thinks prospective buyers will rather choose an older model of the car to have the features now missing on her, albeit newer, car model. But I recognise here that, had things gone as they should have, Ms H most likely would have paid for the increased specification – based on what I said above and because, most likely, she did buy the car in question at market value price. As such I think, most likely, she did not incur a direct financial loss, so I do not think it would be fair and reasonable to provide her a percentage discount based on the car's price. Even though some of the features are missing the car comes with others' such as a new shape and led headlights. But considering the misdescription and the situation Ms H has been put in, where rescission of the contract is no longer a fair and reasonable remedy, and neither are the other options, I still considered what impact the entire situation had on her, as having a car without the power folding mirrors has caused a significant distress and inconvenience to her.

Deciding what is a fair award for the distress and inconvenience is not an exact science. But in order to arrive at a fair and reasonable amount of distress and inconvenience amount that FCEE should pay Ms H, I have looked at the matters broadly. The lack of the power folding mirror was very important to Ms H, and I acknowledge the distress and inconvenience this has caused and will continue to cause her. All things considered, and noting this is not a science, I think that £1,500 would be broadly a fair and reasonable amount for the distress and inconvenience caused.

When arriving at this figure I have considered that, without the power folding mirrors, Ms H is unable to easily put her car into her garage and she is forced to keep it in the courtyard, where the car is exposed to the elements. I have also considered that Ms H has told us about her age and her health. She is more than seventy years old, and she suffers from osteoporosis and flare ups of pain in her lower back, shoulders, neck and arms. She had taken the time to explain how she chose the car in question specifically because she would have the features which would make life easier for her now and going forward, as she wanted to rely on technology to do a lot of the heavy lifting for her. But now she has to manually fold her mirrors when parking on busy streets and she finds this process quite difficult as well as dangerous at times. She also thought that she was buying a car for the long term; a car that would see her into her dotage. But now she feels that she might have to be forced to sell it earlier which I think, most likely, will cause her even further distress and inconvenience. So overall, I know the £1,500 is a significant amount but I think it fairly represents the distress and inconvenience of this specific situation.

I know that Ms H has also talked about some of the other features that she would have found beneficial, such as the mirrors being heated, so that during cold weather spells she would not have to clear mist or ice off the wing mirrors. Also, she said that the puddle lights would have been useful to her in poor lighting conditions due to her cataracts. But I think these features, as much as they would have been nice to have, they were not key consideration when Ms H was making the decision to acquire the car. And based on all the circumstances of this case I think Ms H still would have most likely bought the car even if those features were not included. These do not seem to be the key considerations being discussed in all the correspondence between her and the supplying dealership. Plus, as I

mentioned above, I think Ms H most likely would have paid for the increased specifications and most likely she did buy the car in question at market value price. So overall, I still think that a payment of £1,500 is reasonable here.

My provisional decision

For the reasons given above I intend to uphold this complaint and direct FCEE Bank Plc to pay Ms H £1,500 for the distress and inconvenience caused."

I asked both parties to provide me with any additional comments or information they would like me to consider by 25 September 2024.

FCEE did not respond.

Ms H responded and I will address her comments below.

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.

Following my provisional decision, Ms H said that she disputes that she acquired a better model for the price of the previous model as the manufacturer removed a number of features from the previous model. She believes that she has acquired an inferior model for the same price that she was quoted for a more enhanced model. And, she said in her view, the terms "market value price" and "listed price" are not the same thing because between the manufacturer's listed price and the price that the market are prepared to pay, there is a wide range of discounts and incentives offered by the dealerships and these are often subsidised by the manufacturer. So, she said that she would be surprised if the average buyer of this model paid anything like the listed price.

She also said if the specification had not changed from what she was promised but the price had gone up, she would have other options to consider and she would have contacted the other manufacturers to see what they had on offer or would have kept her older car for a while longer.

In addition, Ms H has said the issue of changed features on her car must have been front and centre stage with the dealership and a lot of thought and planning must have gone into how the changes to the model were to be communicated to customers. Therefore, she said that it has become almost impossible for her to believe that the misrepresentation could be down to a genuine error on the part of one sales representative.

I have considered all her points. And I think that whether the misrepresentation could be down to a genuine error on the part of one sale's representative is a bit of a moot point because, like I said in my provisional decision, I think the evidence indicates that Ms H was told a false statement of fact about the features of the folding mirrors. I have already concluded that the supplying dealership, a party that originally made a statement that is no longer true, had a duty to update Ms H. And I think they could have done this when they made contact with her in December 2021, but they did not. Also, I have already considered that, most likely, Ms H would not have purchased the car had she known the power folding mirrors option is not available on the new model. But I did consider that rescission of the contract is not the most fair and reasonable solution at the current stage due to all the reasons I mentioned in my provisional decision, and that is why I considered other remedies.

Also, I know that Ms H has questioned the pricing of the car and that she feels that she got an inferior model. But I also considered what the dealership had said about her acquiring a newer model for the price of the previous model. So, I still think that there is a potential that she actually gained a benefit of acquiring a new model for a price that was based on the previous model. One that had a new shape and led headlights, but at the original pre-model change price.

Overall, considering her points and all the reasons I mentioned in my provisional decision, I still think that most likely, Ms H did buy the car at market value price and, most likely, she did not incur a direct financial loss, so I do not think it would be fair and reasonable to provide her a percentage discount based on the car's price. And I still think that £1,500 fairly and reasonably represents the distress and inconvenience of this specific situation.

Considering everything again, I see no reason to reach a different conclusion to what I reached in my provisional decision copied above.

My final decision

For the reasons given above and in my provisional decision, I direct FCEE Bank Plc to pay Ms H £1,500 for the distress and inconvenience caused.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms H to accept or reject my decision before 25 October 2024.

Mike Kozbial
Ombudsman