

The complaint

Mr K has complained about the quality of a car he acquired under a hire purchase agreement with BMW Financial Services (GB) Limited trading as ALPHERA Financial Services (BMWFS).

What happened

In May 2018 Mr K acquired a two-year-old used car under a four-year hire purchase agreement with BMWFS. The car cost around £80,000, had covered 2,000 miles, and Mr K paid a £5,000 deposit. Payments were around £1,000 per month, with a balloon payment of around £44,500. The agreement had an annual mileage limit of 8,000.

A few different parties were involved in setting up the agreement. Mr K's broker acquired the car from a third-party dealership who I'll refer to as 'O'. Mr K's broker then sold the car to BMWFS. And BMWFS supplied the car to Mr K under its hire purchase agreement.

Mr K says the car broke down in March 2020. At this point it had covered around 30,000 miles. He says the car juddered and suddenly lost power when he was driving on a dual carriageway. Dashboard lights came on and Mr K had the car towed home. He was unable to turn it on or move it. O was closed because of the Government imposed national lockdown due to Covid-19. But Mr K got in contact with it when it opened. Around this time, Mr K also spoke to BMWFS and asked for support because his income had reduced due to the impact of Covid-19 on his work.

BMWFS offered Mr K a three-month payment deferral due to the impact of Covid-19 on his finances. This was subsequently extended to six months.

Mr K took the car to a manufacturer franchised dealer in April 2020. It said the problem with the car was a crankshaft/crankshaft bearing failure. And Mr K says the car required a new engine.

Mr K says the manufacturer wasn't willing to help him with the repair cost because there was a missing service. Mr K complained because he says O told him the car had a full-service history. Around this time, Mr K also found out the car had been seized by the police in May 2016 and had been stored with O before being sold on. He says the car missed a service while being held by the police. So, Mr K was unhappy and felt the car wasn't as described. He also said he thought the issue that caused the car to fail was a known defect for the model of car he acquired.

BMWFS weren't willing to help Mr K with the repairs. It said that as it obtained the car from Mr K's broker, it couldn't be held responsible for any misleading information from O. It said that Mr K's broker would have to take up the issue with O direct. BMWFS also said given the car had covered over 30,000 miles and taking into account how long Mr K had use of it, it thought the car was of satisfactory quality.

In August 2020 Mr K spoke to BMWFS and said he wanted to hand the car back because he couldn't afford the repayments. BMWFS went through Mr K's options including selling the car, part exchanging it and voluntary termination. And around this time Mr K had decided to pay to replace the engine himself. He sourced an engine for £3,714 and had it fitted for £2,215.76.

Mr K got the car back in October 2020 and decided to voluntarily terminate the agreement. Once excess mileage charges and damage charges of around £2,400 were added, Mr K was left owing £25,370.49.

Mr K asked our service to look in to things. He didn't want to pay the voluntary termination shortfall. He wanted a refund of the repair costs and compensation for the distress and inconvenience. He also complained about having to pay for a hire car for the time he'd been without use of a car. He says he'd lost earnings due to the problems and that it had negatively affected his health. Mr K also says that if one of the parties involved had helped him, he would have kept the car. But paying for the engine replacement cleared out his savings so he decided to hand it back.

Our investigator considered the complaint and decided to uphold it. In summary, our investigator thought, on balance, the car wasn't of satisfactory quality. He said he didn't think a reasonable person would expect an engine to fail at around 30,000 miles. He noted the garage that replaced the engine had said:

'This is not something that could have been affected by user input, potentially by lack of oil or heavy oil degradation from lack of servicing. My honest opinion is that it was a sudden failure by manufacturing weakness, however this is only an opinion and is not grounded from any analysis.'

He also noted the manufacturer franchised dealer had said:

'Cause:

Low incidence of crankshaft failure are being encountered, caused mainly by incorrect location of the main bearing shells during assembly, or through rotation of the shells during normal use. A new procedure has been implemented to ensure:

- more rapid resolution of customer concerns, and*
- greater visibility of failure models in order to improve repair process and parts delivery.*

Action:

For any suspected crankshaft/bearing failure, please contact your local Dealer Technical...team for details of the enhanced customer handling procedure.'

Our investigator also thought about whether there was enough evidence to demonstrate the car wasn't as described. But as the original advert was no longer available, he didn't think there was sufficient evidence to demonstrate this. And he didn't think the fact the car had been in police storage would have impacted the complaint outcome.

Our investigator thought Mr K would have kept the car had BMWFS fairly paid for the repairs. And he recommended BMWFS:

- Refund the deposit of £5,000*.
- Pay a refund of rentals between the months of March 2020 and October 2020 as the car was unusable* (if any payments were made in that time).
- Refund the repair costs of £5,929.76*.
- Pay £200 for the distress and inconvenience.
- Remove the outstanding balance on the agreement after Mr K had voluntarily terminated, £25,370.49.
- Remove any adverse information from Mr K's credit file in relation to the agreement.

* pay 8% simple yearly interest on all refunded amounts from the date of payment until the date of settlement.

But he didn't recommend BMWFS pay Mr K in relation to any loss of earnings or for the cost for his hire car.

Mr K agreed with the recommendation, but BMWFS didn't. BMWFS said Mr K sourced the car himself and that there was no evidence the car was mis-sold. And it said there was no evidence the fault was present or developing at the point of supply. It said Mr K had covered nearly 30,000 miles and that he went over his annual mileage limit – indicating the car was of satisfactory quality.

I issued a provisional decision that said:

The car was supplied to Mr K under a regulated hire purchase agreement. Our service is able to consider complaints about these sorts of agreements. BMWFS is the supplier of the goods under the agreement and is responsible for dealing with a complaint about their quality.

The Consumer Rights Act 2015 (CRA) covers agreements like the one Mr K entered into. The CRA implies terms into the agreement that the goods supplied will be of satisfactory quality, fit for their intended purpose, and as described.

The CRA says that goods will be considered of satisfactory quality where they meet the standard a reasonable person would consider satisfactory – taking into account the description of the goods, the price paid and other relevant circumstances. In a case involving a car, the other relevant circumstances a court would take into account might include things like the age and mileage at the time of supply and the car's history.

In Mr K's case, the car supplied was used and had covered around 2,000 miles, so there'd be different expectations than if it was a brand-new car. But it's worth pointing out that Mr K paid around £80,000 for the car and it was only two years old with very low mileage. So, I don't think he would have expected any significant issues with it for a fair amount of time.

Goods to be of satisfactory quality

Based on what I've been told, along with the diagnosis provided, I'm satisfied there was a fault with the car that led to Mr K needing to replace the engine. And I've thought about whether or not the fault made the car of unsatisfactory quality.

One the one hand, the fault became apparent when the car was around four years old. Mr K had been driving it for two years and it had covered nearly 30,000 miles. There was also a missing service – which Mr K says is the reason the manufacturer wouldn't assist him. The manufacturer franchised dealer's notes also said the fault could have been caused through rotation of the shells during normal use.

But on the other hand, amongst other things, satisfactory quality covers durability. For cars, this means the components must last a reasonable amount of time. Of course, durability will depend on various factors. But I don't think a reasonable person would generally expect there to be a fault with an £80,000 car of this age leading to the need for an engine replacement when it had covered less than 30,000 miles, providing it had been looked after.

I've then gone on to consider the manufacturer franchised dealer comments on the fault. It has described the fault as being caused mainly by incorrect location of the main bearing shells during assembly. I think this is very important. The dealer is saying the fault is mainly caused by a manufacturing issue. And there seems to be a special process that's been implemented for cars affected by the issue. So, while it's not proof there was a manufacturing issue in this case, I think it shows it was more than likely – which is what I need to establish.

In addition to this, while not conclusive, the garage that replaced the engine also thought that the fault was probably caused by a sudden failure due to a manufacturing weakness – which supports the view there was an inherent defect.

I've also thought about the missing service and how much that's likely to have affected things. Having looked at the service history, the following services took place:

- 27 January 2016 when the car had covered 9 miles
- 4 May 2018 when the car had covered 2,034 miles
- 6 February 2019 when the car had covered 13,344 miles

So while there was a missing service in 2017, I note that the car had not covered many miles and had two subsequent services carried out prior to the fault in 2020. I'm not able to say exactly what impact the missed service had on the car. But, based on all the circumstances following it, and considering what the manufacturer franchise dealer has said, I don't think I can safely conclude the missed service was likely the main contributing factor to the fault.

Having weighed everything up, despite the car being four years old and having covered 30,000 miles, on balance, I think there was a manufacturing problem that led to the failure – meaning the car wasn't of satisfactory quality. So, I think there's been a breach of contract.

Goods to be as described

I've also thought about Mr K's complaint that the goods weren't as described. Like our investigator pointed out, there's a lack of evidence on how the goods were described. And I'm also mindful that BMWFS did not buy the car direct from the business, O, that Mr K says mis-sold the car. It was bought from Mr K's broker. So, it's fair to say the arrangement was slightly more complicated than 'usual'. But given I've already found there to be a breach of contract, I don't think I need to now make further findings on how the goods were described.

Covid-19 support

For completeness' sake I've also thought about how BMWFS handled Mr K's request for support as his income had reduced due to the impact of Covid-19. BMWFS offered Mr K a six-month payment deferral. This is the type of support the Financial Conduct Authority set out in its guidance titled Motor finance agreements and coronavirus: temporary guidance for firms. So, I think BMWFS has acted fairly here and provided Mr K with the support he required.

Conclusions

Seeing as Mr K had to pay to fix a fault that, in my view, made the car of unsatisfactory quality, as a starting point, I think it's fair that he's reimbursed the cost for this – along with interest.

Another thing for me to decide is whether the shortfall should be removed, and Mr K's deposit refunded. On the one hand it looks like Mr K had some financial difficulties around the time he decided to voluntarily terminate the agreement. He'd told BMWFS that he couldn't afford to make the payments. But on the other hand, he's also told BMWFS that he would have carried on with the agreement had he not had to pay for the engine to be replaced. He said that the repair cost cleared out his savings.

I'll never know what would have happened had things gone as I believe they should have done. It was an uncertain time for many people during the pandemic. But, on balance, I'm willing to accept that Mr K would not have wanted to hand the car back had it not been for the problems relating to the fault. He'd paid a substantial amount towards the agreement, so he had a lot to 'lose' by giving the car back. The cost of the repairs was nearly £6,000. Had Mr K not had to use this money to fix the car, he could have used it towards paying for the car for another six months while he was looking to get back on his feet.

Taking all this into account, seeing as I don't think, on balance, Mr K would have elected to voluntarily terminate the agreement had it not been for the faults, I think it's fair the shortfall is waived. And seeing as Mr K now has to effectively start again, I think it's only fair he receives his deposit back as well with interest.

I agree with our investigator that Mr K shouldn't have to pay for the use of the car for the time he wasn't able to use it due to the fault. So, payments between March 2020 and October 2020 should not be due. It looks as though this is the period Mr K had his payments deferred. So, for the avoidance of doubt, if that's the case, the payments should be waived.

BMWFS has also charged Mr K around £2,400 after he handed the car back. This is made up of £2,137.42 for excess mileage and £272 for damage to the alloys. Mr K hasn't said he disagrees with the charges for the mileage or the alloys. But for completeness' sake, I've reviewed both charges. Having looked at the photos of the damage to the alloys, I think all four alloys show damage that falls outside of what would be considered fair wear and tear. The alloys all have scratches that aren't insignificant. BMWFS might pay to repair the alloys or will likely have suffered a loss in resale value if it chose not to. Taking everything in to account I think the £68 charge applied for each alloy is fair and reasonable.

I think BMWFS has also calculated the excess mileage charge fairly as well. In fact, it looks like BMWFS has permitted Mr K 8,980 miles per year whereas the agreement has a limit of 8,000 – meaning Mr K is better off. So, I think BMWFS' excess mileage charge for Mr K is fair.

As I've found that the excess mileage and damage charge have been calculated fairly, I think it's fair for BMWFS to deduct this amount from Mr K's refund. By my calculations, the voluntary termination shortfall that should be waived after the charges are removed is £22,961.07 (£25,370.49 - £2,409.42). I'm therefore amending the proposed redress to reflect this.

I'm not going to direct BMWFS to reimburse Mr K for hire car costs because I'm already directing it to refund or waive the payments that were due during the time Mr K had to hire a car. The monthly cost for the hire car was less than the monthly payment towards the agreement – so Mr K will not be losing out. And, while Mr K has said not being able to use the car led to a loss of earnings, I'm mindful he's shown us he had another hire car to use. And he hasn't provided us with evidence to demonstrate the loss of the car under the agreement with BMWFS has led to a financial loss. So, I'm not going to direct BMWFS to compensate Mr K for his loss of earnings.

Finally, I turn to the compensation. I'm sorry to hear the matter has impacted Mr K's health. It can't have been easy, and I thank him for taking the time to bring the complaint to us. It's not a clear-cut case. And I don't think it would be fair to ask BMWFS to pay compensation because it reached a different conclusion to mine. But I've decided the car supplied wasn't of satisfactory quality. And when that happens, there's a fault, a breakdown, and repairs required there's bound to be a level of inconvenience caused to the consumer. Which is what I think has happened here to Mr K. I'm inclined to agree that BMWFS should also pay Mr K £200, like our investigator recommended.

Mr K accepted the provisional decision. BMWFS provided further submissions. In summary it said:

- The fact Mr K was able to cover such a significant number of miles proves the worthiness of the car. Manufacturers don't guarantee cars for life which is why there are warranties.
- A reasonable person would have asked for confirmation the car had full-service history. In this case responsibility should fall with Mr K because he sourced the car himself, from a friend.
- If the fault was caused by a manufacturing issue the matter would be more appropriately resolved by BMWFS paying for the repairs.
- The provisional decision is based on the balance of probabilities and not fact.
- It doesn't object that Mr K shouldn't have to pay for the car when he was unable to use it, but it doesn't agree it should have to pay back the deposit.

However, as a way to resolve things, BMWFS offered to:

- Refund the repair costs with interest.
- Pay £200 compensation.
- Waive the voluntary termination shortfall.

Mr K didn't accept the offer, so the case has been passed back to me to make a final decision.

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.

I've considered BMWFS' response to my provisional decision.

I've already set out that BMWFS is the supplier of the goods and is responsible for dealing with a complaint about their quality. I haven't suggested BMWFS should be responsible for problems for 'life'. I've set out my reasons why, on balance, I don't think the car was of satisfactory quality at the point of supply – which is what BMWFS is responsible for. Ultimately, I don't think the car was sufficiently durable – even taking into account the age and mileage covered.

BMWFS has set out what it thinks Mr K should have done when acquiring the car. But my role is to decide if something has gone wrong and whether BMWFS needs to take any action as a result of that. And I find I have enough evidence to do so.

I agree a repair might have been a fair way to resolve things taking into account the remedies set out in the CRA. But I also pointed out that things have moved on. BMWFS had the opportunity to pay for the repair but didn't choose to do so. Mr K has now voluntarily terminated the agreement, so a repair is no longer possible.

I'm able to decide a case on what I think is fair and reasonable. Sometimes an ombudsman has to decide things on the balance of probabilities. But I should point out I don't think it's in dispute there was a fault with the car based on the evidence. Mr K broke down and a manufacturer franchised dealer set out the nature of the fault.

Finally, my provisional decision set out why I think Mr K's deposit should be refunded, so I'm not going to go over that again here.

As BMWFS hasn't provided anything materially new for me to consider, I don't see reason to depart from the conclusions I reached in my provisional decision.

Putting things right

To put things right, I'm directing BMW Financial Services (GB) Limited trading as ALPHERA Financial Services to:

- Refund the deposit of £5,000*.
- Refund or waive payments required between March 2020 and October 2020*.
- Refund the repair costs of £5,929.76*.
- Pay £200 for the distress and inconvenience.
- Waive the voluntary termination shortfall of £22,961.07.
- Remove any adverse information from Mr K's credit file in relation to the agreement.

*BMWFS should pay simple interest at 8% a year, from the dates of each payment until the date of settlement.

If BMWFS considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr K how much it's taken off. It should also give Mr K a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

BMWFS is able to deduct the excess mileage and damage charges totalling £2,409.42 from the refund.

BMWFS must pay the compensation within 28 days of the date on which we tell it Mr K accepts my final decision. If it pays later than this it must also pay interest on the compensation from the date of my final decision to the date of payment at 8% a year simple.

My final decision

My final decision is that I uphold this complaint and direct BMW Financial Services (GB) Limited trading as ALPHERA Financial Services to put things right in the way set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 1 October 2021.

Simon Wingfield
Ombudsman