DRN-3300710

The complaint

Mr M complains about the charge for excess mileage that Mercedes-Benz Financial Services UK Limited, trading as Mercedes-Benz Finance, has made after he voluntarily terminated the hire purchase agreement under which a car had been supplied to him.

What happened

I issued a provisional decision on this complaint on 24 January 2022 in which I described what had happened as follows:

> "A new car was supplied to Mr M under a hire purchase agreement with Mercedes-Benz Finance that he signed in March 2014. The car had a price of £32,647.90, Mr M paid a deposit of £500 so the amount of credit was £32,147.90, and the total amount payable was shown on the agreement as £37,954.52. Mr M agreed to make 48 monthly payments of £459.99 for the car to be supplied to him and an acceptance fee of £180. If he wanted to purchase the car at the end of the agreement he'd have to pay an optional purchase payment of £15,100 and a purchase activation fee of £95.
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> The agreement said that Mr M had the right to terminate the agreement and that Mercedes-Benz Finance would be entitled to the return of the car and half of the total amount payable under the agreement (which was shown on the agreement as being £18,977.26). Mr M voluntarily terminated the agreement in August 2017 and he was charged £1,293.30 for excess mileage because he'd exceeded the mileage allowance, which Mercedes-Benz Finance had calculated on a pro rata basis as 35,000 miles, by 11,975 miles.
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> Mr M complained to Mercedes-Benz Finance about the excess mileage charge and he said that he'd agreed a mileage allowance of 12,000 miles per year. Mercedes-Benz Finance said that the contracted mileage allowance was 10,000 miles per year and that the obligation to pay an excess mileage charge if the return mileage exceeded the total mileage allowance was set out in the agreement. It said the mileage allowance had been re-calculated on a prorate basis in line with the length of time that Mr M had had the car and that, as he'd exceeded the allowance of 35,000 miles, the charge had been raised correctly and remained payable.
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> Mr M wasn't satisfied with its response so complained to this service. He says that Mercedes-Benz Finance has calculated the excess at a pro-rata rate which isn't specified in the contract and that it's contradictory to sections 99(2) and 173 of the Consumer Credit Act 1974. He says that he's offered to cover the mileage over the contracted figure of 40,000 miles, which he says is £627.75, which hasn't been accepted by Mercedes-Benz Finance but still stands".

I set out my provisional findings in that provisional decision which were as follows:

> "The agreement says:

> *"You have a right to end this agreement. To do so you should write to the person you make your payments to. We will then be entitled to the return of the goods and to half the total amount payable under the agreement, that is £18,977.26. If you have already paid at least this amount plus any overdue instalments and have taken reasonable care of the goods, you will not have to pay any more".*

The agreement also says, under a heading which says *"Default Charges"*:

> *"If you do not exercise your right to purchase the vehicle, an excess distance charge will be payable at the rate of 9.00 pence (plus VAT) for each Mile, by which the total distance travelled by the vehicle at the end of the period of hire exceeds the allowed distance, calculated at the rate of 10000 Miles per year (see Condition 12)".*

Condition 12 sets out more information about the excess mileage charge.

Sections 99 and 100 of the Consumer Credit Act set out the right that a consumer has to voluntary terminate their hire purchase agreement and the liability that is due on termination. The terms of the agreement, including those relating to any excess mileage charges, are required to comply with those sections. Section 99 says:

> *"(1) At any time before the final payment by the debtor under a regulated hire purchase or regulated conditional sale agreement falls due, the debtor shall be entitled to terminate the agreement by giving notice to any person entitled or authorised to receive the sums payable under the agreement.*
> *(2) Termination of an agreement under subsection (1) does not affect any liability under the agreement which has accrued before the termination …".*

So any liabilities which accrue prior to termination are not affected by the termination. If the excess mileage charge has accrued before the voluntarily termination of the agreement, I consider that it would be consistent with the provisions of section 99 for Mercedes-Benz Finance to make that charge to Mr M.

But I consider that the excess mileage charge accrues after the agreement has been terminated. The agreement says that the excess mileage charge applies … "*If you do not exercise your right to purchase the vehicle"* and the excess mileage charge is then calculated on the basis of the car's mileage after it has been returned – so it would only be known after the agreement had been terminated. For these reasons, I consider that Mercedes-Benz Finance can't charge for excess mileage in these circumstances under section 99.

Section 100 says:

> *"(1) Where a regulated hire-purchase or regulated conditional sale agreement is terminated under section 99 the debtor shall be liable, unless the agreement provides for a smaller payment, or does not provide for any payment, to pay to the creditor the amount (if any) by which one-half of the total price exceeds the aggregate of the sums paid and the sums due in respect of the total price immediately before the termination …*
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> *(3) If in any action the court is satisfied that a sum less than the amount specified in subsection (1) would be equal to the loss sustained by the creditor in consequence of the termination of the agreement by the debtor,*

the court may make an order for the payment of that sum in lieu of the amount specified in subsection (1).
(4) If the debtor has contravened an obligation to take reasonable care of the goods or land, the amount arrived at under subsection (1) shall be increased by the sum required to recompense the creditor for that contravention …".

Section 100(1) allows Mercedes-Benz Finance, in effect, to charge Mr M for half of the total price of the car under the agreement so, if he'd already paid that amount, he wouldn't have to pay anything more. Section 100(4) allows for the amount to be increased if Mr M had failed to take *"reasonable care"* of the car.

Under the agreement, the requirement for compensation to be paid because the car isn't returned *"… in good condition, repair and working order …"* is separate from any requirement pay for excess mileage. I'm not persuaded that exceeding a mileage limit would be considered to be failing to take reasonable care of the car or that any excess mileage charge would be included in the total price of the car. I don't consider that the provisions in the agreement that refer to excess mileage charges would reasonably be considered to be payable because Mr M had failed to take reasonable care of the car and I don't consider that Mercedes-Benz Finance can charge for excess mileage in these circumstances under section 100(4).

Section 173 of the Consumer Credit Act says that a term in an agreement is void to the extent that it's inconsistent with a provision in the act. For the reasons that I've set out above, I don't consider that the provisions of the agreement concerning excess mileage charges on a voluntary termination of the agreement are consistent with the protections of the Consumer Credit Act. I consider that those provisions are void to the extent that they relate to excess mileage charges when the agreement is voluntarily terminated.

Mr M has paid at least £18,977.26 to Mercedes-Benz Finance and I don't consider that it's allowed to also charge him for excess mileage in these circumstances. Even if I'm mistaken about this, I still consider that Mr M's complaint should be upheld because the agreement isn't as clear about the excess mileage charges as it should have been.

I consider that an underlying lack of clarity in the agreement about the cost of voluntarily terminating it is also an important consideration as to whether it's fair and reasonable for a charge for any excess mileage to be made in these circumstances.

I've considered the relevant provisions of the Financial Conduct Authority's Consumer Credit Sourcebook (CONC) including:

CONC 2.3.2 which says: *"A firm must explain the key features of a regulated credit agreement to enable the customer to make an informed choice as required by CONC 4.2.5 R (adequate explanations)"*; and

CONC 4.2.5 which says:
"(1) Before making a regulated credit agreement the firm must:
a) provide the customer with an adequate explanation of the matters referred to in (2) in order to place the customer in a position to assess whether the agreement is adapted to the customer's needs and financial situation; ...
(2) The matters referred to in (1)(a) are:
a) the features of the agreement which may make the credit to be provided under the agreement unsuitable for particular types of use;

b) how much the customer will have to pay periodically and, where the amount can be determined, in total under the agreement;
c) the features of the agreement which may operate in a manner which would have a significant adverse effect on the customer in a way which the customer is unlikely to foresee".

I've also considered principle 7 of the Financial Conduct Authority's Principles for Businesses which says: *"A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading"*.

I don't consider that the hire purchase agreement is as clear as it should have been or that it's consistent with the CONC provisions and the principles for business for the following reasons:

- one section of the agreement sets out in a box headed *"Termination: Your rights"* specific wording that Mercedes-Benz Finance was required to include in the agreement which says, in effect, that if Mr M had paid at least half the total amount payable under the agreement, he wouldn't have to pay any more – and there's no further comment in that section about excess mileage charges;
- the excess mileage charge is set out under a heading *"Default Charges"* but I don't consider that exceeding the contractual mileage would be a breach of contract as the contract specifically included a charge for exceeding that limit and I don't consider that excess mileage charges would be properly considered to be *"default charges"*;
- condition 8 of the agreement deals with *"Early Termination by you"* but doesn't specifically refer to a charge for excess mileage if a customer should terminate the agreement early and return the car – but it does refer to another condition which deals with additional charges regarding the condition of the car;
- condition 8 lists what Mr M would need to do and pay when terminating early and reiterates that he must comply with the terms of the *"statutory notice"* - one of which is that he won't need to pay more than £18,977.26;
- condition 12 of the agreement refers to the calculation of an excess distance charge in circumstances where the car is returned – including early termination - but I consider that there's a lack of clarity in the agreement about Mr M's liability if he voluntarily terminated it and I don't consider that the terms of the agreement are consistent with the provisions of the Consumer Credit Act;
- condition 12 is not well signposted in respect of early termination, and only appears to be cross referenced in the section headed *"Default Charges"*;
- the right to early terminate the agreement and the maximum liability for it are clearly set out on page 2 of the agreement in a bold box but the terms relating to charges for excess mileage, which might affect that liability on early termination, are not given equivalent prominence and I consider that they're not clearly and consistently set out or referred to; and
- condition 12 is included in the terms and conditions of the agreement and is not signposted in a way that would have naturally drawn Mr M's attention to it if he was intending to return the car early.

I consider that the lack of clarity in the agreement about excess mileage charges on voluntary termination could result in a significant adverse effect on Mr M in a way that he was unlikely to foresee. I don't consider that he was properly or adequately informed that an excess mileage charge would increase his liability beyond the £18,977.26 payable on voluntary termination of his agreement. I don't consider that Mercedes-Benz Finance has met its obligations under CONC 2.3.2 and CONC 4.2.5.

For reasons similar to those set out in the bullet points above, I don't consider that the agreement is clear, fair and not misleading - so I don't consider that Mercedes-Benz Finance has complied with principle 7 of the Principles for Businesses. I consider that the lack of clarity in the agreement is likely to have prejudiced Mr M financially and I don't consider that it's fair or reasonable for Mercedes-Benz Finance to charge him for excess mileage in these circumstances.

Mr M's complaint included that he'd agreed a mileage allowance of 12,000 miles per year and that Mercedes-Benz Finance has calculated the excess mileage at a pro-rata rate which isn't specified in the contract. As I don't consider that it's fair or reasonable for Mercedes-Benz Finance to charge Mr M for excess mileage, I haven't considered those issues any further.

I understand that Mr M hasn't paid the excess mileage charge of £1,293.30 – though he has offered to pay £627.75 to Mercedes-Benz Finance and it hasn't accepted that offer. I find that it would be fair and reasonable for Mercedes-Benz Finance to now remove the excess mileage charge of £1,293.30 from Mr M's account and I'm not persuaded that it would be fair or reasonable for me to require him to pay £627.75 to Mercedes-Benz Finance. If Mercedes-Benz Finance has recorded any adverse information on Mr M's credit file relating to that charge, I find that it would be fair and reasonable for it to remove that information".

Subject to any further comments from Mr M or from Mercedes-Benz Finance my provisional decision was that I intended to uphold this complaint. Mercedes-Benz Finance has accepted my provisional decision but Mr M hasn't responded to it.

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.

As Mercedes-Benz Finance has accepted my provisional decision and Mr M hasn't responded to it, I see no reason to change the findings that I set out in my provisional decision.

Putting things right

I find that it would be fair and reasonable for Mercedes-Benz Finance to take the actions described in my provisional decision and as set out below.

My final decision

My decision is that I uphold Mr M's complaint and I order Mercedes-Benz Financial Services UK Limited, trading as Mercedes-Benz Finance, to:

1. Remove the excess mileage charge from Mr M's account.

2. Remove any adverse information about that charge that it's recorded on Mr M's credit file.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 14 March 2022.
Jarrod Hastings
Ombudsman