DRN-3300731

The complaint

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

What happened

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

> "A used car was supplied to Miss F under a hire purchase agreement with Mercedes-Benz Finance that she signed in May 2014. The car had a price of £30,500, Miss F paid a deposit of £1,467.58 so the amount of credit was £29,032.41, and the total amount payable was shown on the agreement as £38,710.62. Miss F agreed to make 48 monthly payments of £452.98 for the car to be supplied to her and an acceptance fee of £180. If she wanted to purchase the car at the end of the agreement she'd have to pay an optional purchase payment of £15,225 and a purchase activation fee of £95. The car was about six months old and had been driven for 7,000 miles.
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> The agreement said that Miss F 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 £19,355.31). The agreement was due to end in May 2018 but Miss F voluntarily terminated it in April 2018. She was charged £2,138.76 for excess mileage because she'd exceeded the mileage allowance.
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> Miss F complained to Mercedes-Benz Finance about the excess mileage charge and she said that she'd agreed to a mileage allowance of 15,500 each year. Mercedes-Benz Finance said that the contracted mileage allowance was 10,000 miles per year and Miss F had signed the agreement so had agreed to the terms and conditions. It said that the excess mileage charge of £2,138.76 remained due.
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> Miss F wasn't satisfied with its response so complained to this service. She says, in summary, that she asked for an annual mileage allowance of 15,000 to 16,000 miles and wouldn't have agreed to a hire purchase agreement with an annual mileage limit of 10,000 miles".

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

> "The agreement says:
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> > *"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 £19,355.31. 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 13.00 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 Miss F.

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 Miss F for half of the total price of the car under the agreement so, if she'd already paid that amount, she wouldn't have to pay anything more. Section 100(4) allows for the amount to be increased if Miss F 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 Miss F 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.

Miss F has paid at least £19,355.31to Mercedes-Benz Finance and I don't consider that it's allowed to also charge her for excess mileage in these circumstances. Even if I'm mistaken about this, I still consider that Miss F'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
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> 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 Miss F had paid at least half the total amount payable under the agreement, she 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 Miss F would need to do and pay when terminating early and re-iterates that she must comply with the terms of the *"statutory notice"* - one of which is that she won't need to pay more than £19,355.31;
- 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 Miss F's liability if she 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 Miss F's attention to it if she 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 Miss F in a way that she was unlikely to foresee. I don't consider that she was properly or adequately informed that an excess mileage charge would increase her liability beyond the £19,355.31 payable on voluntary termination of her 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 Miss F financially and I don't consider that it's fair or reasonable for Mercedes-Benz Finance to charge her for excess mileage in these circumstances.
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> Miss F's complaint was that she asked for an annual mileage allowance of 15,000 to 16,000 miles per year. As I don't consider that it's fair or reasonable for Mercedes-Benz Finance to charge Miss F for excess mileage, I haven't considered whether or not the annual mileage limit in the agreement was incorrect.
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> I understand that Miss F hasn't paid the charge of £2,138.76 to Mercedes-Benz Finance. I find that it would be fair and reasonable for Mercedes-Benz Finance to now remove the charge of £2,138.76 from Miss F's account. If Mercedes-Benz Finance has recorded any adverse information on Miss F'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 Miss F or from Mercedes-Benz Finance my provisional decision was that I intended to uphold this complaint. Both Miss F and Mercedes-Benz Finance have accepted my provisional 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.

As both Miss F and Mercedes-Benz Finance have accepted my provisional decision, 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 Miss F's complaint and I order Mercedes-Benz Financial Services UK Limited, trading as Mercedes-Benz Finance, to:

1. Remove the excess mileage charge from Miss F's account.

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

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