DRN-3329324

The complaint

Miss T 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 28 January 2022 in which I described what had happened as follows:

> "A new car was supplied to Miss T under a hire purchase agreement with Mercedes-Benz Finance that she signed in September 2016. The car had a price of £21,245.49, Miss T paid a deposit of £1,829.12 so the amount of credit was £19,416.37 and the total amount payable was shown on the agreement as £24,263.16. Miss T agreed to make 48 monthly payments of £274.98 for the car to be supplied to her. If she wanted to purchase the car at the end of the agreement she'd have to pay an optional purchase payment of £9,225 and a purchase activation fee of £10.
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> The agreement said that Miss T 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 £12,131.58). The agreement was due to end in September 2020 but Miss T voluntarily terminated the agreement early and she returned the car. She received an invoice from Mercedes-Benz Finance in July 2019 for an excess mileage of £648 based on excess mileage of 9,000 miles.
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> She complained to Mercedes-Benz Finance about the excess mileage charge and said that it couldn't be enforced under the Consumer Credit Act 1974 because she'd voluntarily terminated the agreement. She also said that she'd been told that she wouldn't have to pay any excess mileage charges.
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> Mercedes-Benz Finance said that the obligation to pay an excess mileage charge if the agreement was voluntarily terminated was set out in the agreement and that the mileage allowance had been re-calculated in line with the length of time that she'd had the car. It said that the Consumer Credit Act allowed it to determine what is considered reasonable condition and that excess mileage has a negative effect on the car's value, which isn't reasonable, so it retains the right to charge for excess mileage following the voluntary termination of an agreement.
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> Miss T wasn't satisfied with its response so complained to this service".

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

> "The agreement includes wording that's prescribed by regulation about a consumer's right to voluntarily terminate an agreement and says, under a heading which says: "*Termination: Your Rights"*:

> *"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 vehicle and to half the total amount payable under this agreement (£12,131.58). If you have already paid at least this amount plus any overdue instalments and have taken reasonable care of the vehicle you will not have to pay any more".*

The agreement also says:

> *"If you return the vehicle to us and have exceeded the total permitted mileage, which is based on an annual permitted mileage of 15,000 miles, an excess mileage charge of 6.00p excluding VAT for each mile will be payable by you for each additional mile exceeding the total permitted mileage".*

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 T.

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 return the vehicle to us and have exceeded the total permitted mileage …"* 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 the consumer for half of the total price of the car under the agreement so, if they'd already paid that amount, they wouldn't have to pay anything more. Section 189 of the Consumer Credit Act defines *"total price"* as *"… the total sum payable by the debtor under a hire-purchase agreement or a conditional sale agreement, including any sum payable on the exercise of an option to purchase, but excluding any sum payable as a penalty or as compensation or damages for a breach of the agreement...".*

Section 100(4) allows for the amount payable to be increased if the consumer had failed to take *"reasonable care"* of the car. The agreement requires the car to be returned in accordance with Mercedes-Benz Finance's vehicle return standards, which are included as part of the agreement, and says that compensation will be payable for a breach of that obligation. That's a separate requirement to the requirement to pay for excess mileage.

There's no requirement in the agreement for Miss T not to exceed the total permitted mileage so I don't consider that exceeding that mileage would be a breach of contract. I consider that the agreement sets out the maximum mileage that the car can be driven before additional charges become payable. I'm not persuaded that exceeding a mileage limit would be considered to be failing to take reasonable care of the car or that the excess mileage charge would properly be considered to be compensation for a breach of contract. But I'm also not persuaded that any excess mileage charge would properly be considered to be included in the total price of the car under section 100(1) because the charge accrues after the agreement has been terminated.

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 T 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.

Although I've reached that conclusion based on the provisions of the Consumer Credit Act, I've also considered whether the wording contained in the agreement would cover a charge for excess mileage being made if the agreement is voluntarily terminated. The termination notice that's included in the agreement doesn't refer to an excess mileage charge if the agreement is voluntarily terminated. The notice says that the consumer can terminate the agreement if they've paid half the total amount payable under the agreement. The total amount payable is clearly set out in the agreement but the agreement also refers to an excess mileage charge if the car is returned and the total permitted mileage has been exceeded. There's a conflict in the agreement between those provisions - and the specific wording to be included in the termination notice is prescribed by regulation.

> The car could be returned to Mercedes-Benz Finance for a number of reasons, but I'm only considering it being returned if the agreement has been voluntarily terminated. The agreement says, immediately above the signature: *"This is a Hire Purchase Agreement regulated by the Consumer Credit Act 1974. Sign it only if you want to be legally bound by its terms"*. I consider that it would be reasonable to expect a consumer to have read the whole agreement before signing it and, if they'd done so, they would be aware of the termination notice and also the excess mileage charge.
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> I consider that the agreement could have been more clearly drafted to specify that the excess mileage charge would be payable if the agreement was voluntarily terminated and the total permitted mileage had been exceeded. But I consider that the excess mileage terms do enough to qualify the termination notice set out in the agreement. I consider that the contractual terms of the agreement alone would give Mercedes-Benz Finance the right to charge for excess mileage in those circumstances.
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> But, as I've already said, the excess mileage charge isn't permitted under sections 99 and 100 so is void and, even though the agreement does provide for an excess mileage charge to be added to this amount, I find that it's unable to charge Miss T for the excess mileage in these circumstances.
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> Miss T complained to Mercedes-Benz Finance that the excess mileage charge couldn't be enforced under the Consumer Credit Act 1974 because she'd voluntarily terminated the agreement and she also said that she'd been told that she wouldn't have to pay any excess mileage charges. As my finding is that Mercedes-Benz Finance can't charge her for the excess mileage, it isn't necessary for me to make any finding on the part of her complaint about what she says she was told about the excess mileage.
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> I understand that Miss T hasn't paid the excess mileage charge of £648. I find that it would be fair and reasonable for Mercedes-Benz Finance to now remove that charge from her account. If it's recorded any adverse information on her credit file relating to that charge, I find that it would also be fair and reasonable for it to remove that information".

Subject to any further comments from Miss T 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 Miss T 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 Miss T hasn't responded to my provisional decision and Mercedes-Benz Finance has accepted 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 Miss T'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 T's account.

2. Remove any adverse information about that charge that it's recorded on Miss T's credit file.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss T to accept or reject my decision before 29 March 2022.
Jarrod Hastings
Ombudsman