

The complaint

Miss F complains that the car she acquired under a hire purchase agreement with BMWFS Financial Services(GB) Limited trading as BMWFS Financial Services (“BMWFS”) was misrepresented to her.

She also complains about the fairness of a charge BMWFS applied in relation to another hire purchase agreement.

What happened

Miss F entered into a hire purchase agreement to acquire a car with BMWFS in 2015. For the purposes of my decision I'll refer to that as the first agreement.

In March 2018 Miss F terminated that first agreement and entered into another, again with BMWFS. I'll refer to that as the second agreement. To terminate the first agreement Miss F was required to pay the shortfall to bring her to the voluntary termination point and a charge for excess mileage, which she did.

In June 2018 Miss F raised a complaint with BMWFS about the sale of her second agreement. She said she had told the supplying dealer that her requirements in ending her first agreement and entering into another was that she should be supplied with a similar car with the same specification and configuration, and the payments should make her be no worse off financially. Miss F said she was aware she needed to pay a sum to terminate the first agreement early, but was prepared to do so on the basis that she was provided with insurance products to offset that cost.

Miss F raised a number of other issues. In summary, she said;

- A service pack had not been provided as part of the second agreement, but she had one previously, so it should have been provided. She would've been worse off if she had to purchase one.
- Some of the infotainment system's features that were on the previous car were also not included and so needed to be purchased.
- Despite the dealer saying the car would have the same configuration as the old car, and with Miss F specifically requesting it on a number of occasions, the car did not feature folding rear seats.
- She was given the impression that an excess mileage charge was rarely applied, so she need not worry about one being applied in relation to the termination of her first agreement. Yet she was charged this by BMWFS.

Miss F asked to be provided with a car which met her requirements or to be released from the second agreement without cost to her.

I understand that in the meantime Miss F also complained to the supplying dealer. It seems that whilst it resolved some of Miss F's issues, by providing a free service pack for example,

it wasn't able to do all that Miss F had asked it to. I understand that the supplying dealer ultimately offered to buy back Miss F's car and supply her with the same model supplied under the second agreement, but with folding rear seats as she wanted, and discount the additional cost of that (£10,000) by some £7,000. This meant that Miss F would have to pay a contribution of £3,000. I also understand that Miss F didn't accept this.

BMWFS gave its final response to Miss F's complaint in September 2018. It said that the excess mileage charge had been applied correctly and that the supplying dealer had no record of discussing folding rear seats with Miss F prior to the sale. It also said that Miss F was presented with the car's specification before signing the second agreement, so she would have been able to see the car didn't have folding seats, so it didn't think that the car or agreement had been misrepresented.

Miss F brought her complaint to our service. She reiterated the points she had made to BMWFS and introduced a point about the fairness of the excess mileage charge, specifically that in the first agreement it wasn't clear the mileage allowance would be charged on a pro-rata basis if the agreement ended early. She also said that if that had been made clear, she would've kept the car, not exceeded the mileage allowance, and then terminated the agreement once she'd made sufficient payments to do so without further cost to her.

One of our investigators upheld the complaint, albeit in part. Firstly, they were satisfied that BMWFS had applied the excess mileage charge correctly having taken into account Miss F's agreement as well as relevant legislation - the Consumer Credit Act 1974 (CCA). With specific reference to the relevant legislation, they said;

- S99 of the CCA sets out the right for a consumer to terminate a hire purchase agreement early and S100 sets out what liabilities a consumer has on termination.
- In brief, on termination a consumer is liable to pay at least half of the 'total price' of the agreement. 'Total price' is defined by S189 of the CCA as the total sum payable under the hire purchase agreement. It doesn't include charges for items that are payable as compensation for breach of an agreement. This means that any charges for breaches of the agreement are in addition to any liability for termination.
- S99 sets out that any liabilities that the consumer accrued prior to termination aren't to be affected by the termination.
- The hire purchase agreement set out that the excess mileage charges will accrue "immediately prior to termination". The term in Miss F's agreement was clear that the charge accrued before termination and was therefore not affected by the termination.
- The terms of the agreement don't set out that exceeding the mileage allowance is breach of the agreement. The excess mileage charges must therefore be included in the total price of the agreement.
- The mileage charge therefore accrued prior to termination and counted towards the total price of the agreement. Miss F's accrued liability under S100 therefore included paying an additional amount for excess mileage.
- The credit agreement set out clearly the terms surrounding when excess mileage would be charged, when it would accrue and how much it would cost.
- The agreement made it clear that this charge would be payable on voluntary termination of the agreement if any pro-rated mileage allowance had been exceeded.

- The investigator concluded that when considering all the terms of the agreement as a whole, he was satisfied it was made clear and not misleading about when an excess mileage charge could be applied and for how much. He was therefore satisfied it was fair and reasonable for BMWFS to charge the additional amounts.

Lastly, our investigator found that Miss F's version of events in relation to her complaint about folding seats had been persuasive. Our investigator said that Miss F likely wouldn't have entered into the second agreement until she'd paid a sufficient amount to end her first one early, without further cost, so, he recommended that BMWFS pay Miss F;

- The early settlement, or voluntary termination, charge she paid of £2,702.51 with simple interest added; and
- £200 compensation for the distress and inconvenience caused and for the inconvenience of not having a car with folding seats.

Miss F agreed, but BMWFS disagreed. It said it didn't consider there was sufficient evidence to suggest that Miss F had been led to believe she'd be supplied with a car with folding rear seats. It also said that the cars were different in size and models and what might be a free option on one car may not necessarily be free on another. It also suggested that Miss F could've compared the vehicle specifications and proposals on both agreements to determine the differences. Lastly, it said that it hadn't responded to a complaint about the fairness of an excess mileage charge.

Whilst the complaint has been with our service, Miss F terminated her second agreement in January 2021. I understand that she had paid the necessary minimum amount to terminate early, and she also paid an excess mileage charge.

The case was passed to me and I made a provisional decision on it. In summary, I said;

This complaint is about two separate hire purchase agreements, both of which were provided by BMWFS. From what I've seen, I don't think that BMWFS has responded to Miss F's complaint about the fairness of the excess mileage charge. Nonetheless, BMWFS didn't object to our investigator giving a perspective on it, so that's where I'll start.

The fairness of the excess mileage charge as a term in the contract

I've considered the first hire purchase agreement Miss F entered into with BMWFS in 2015. It allowed Miss F use of the car, subject to certain conditions. One of those was only driving a certain distance each year and overall throughout the agreement. The agreement set out what would happen should Miss F not meet those requirements.

Miss F exercised her right to end the agreement. In some instances, voluntary termination allows the hirer to simply hand the car back without having to pay anything more. But that is dependent on, amongst other things, how much has been paid to the agreement, whether there are arrears to be paid, the condition of the car and whether any excess mileage or other charges are due.

Whether or not it is fair for a lender to apply the charge will be unique to every case, as it will depend on the terms of the agreement that has been entered into. In other words, what I have to decide is, has the agreement been constructed in a way as to allow the charging for excess mileage without contravening what is set out in the CCA regarding voluntary termination? In Miss F's specific case, I think it has. I'll explain why.

As explained by the investigator, S99 sets out that any liabilities which accrue prior to

termination are not affected by the termination. What this means is that Miss F is liable to pay any charges which have built up prior to the termination of the agreement, and that these charges are in addition to the other liability for early termination.

The first page of Miss F's hire purchase agreement has a section headed: "Excess mileage charges". This section sets out the mileage allowance and what charges will apply if that mileage is exceeded. It says that if the agreement is terminated early the mileage allowance will be pro-rated to the reduced period of hire and that "your obligation to pay any excess mileage charges will accrue immediately prior to termination." I'm satisfied Miss F's agreement is worded clearly in setting out when excess mileage charges accrue.

The agreement also has a section headed "Termination: your rights". This section contains specific wording which BMWFS were required to include in the agreement, and in summary, sets out that so long as Miss F has paid at least half the total amount payable under the agreement, she will not have to pay any more. I've thought about whether this conflicts with the rest of the terms of the agreement, specifically those that explain charges for exceeding the mileage might apply.

Having read all of the terms of the agreement as a whole, I don't think the agreement is either unclear or misleading concerning the charges for excess mileage. I think it explains that the excess mileage charge can be applied in addition to other charges for voluntary termination. I don't therefore consider that the way this specific agreement has been constructed has prejudiced Miss F.

Miss F's liability under her agreement with BMWFS was not capped at the minimum amount she needed to pay to terminate the agreement early. Miss F accepts, I think, that she was required to pay an additional sum to terminate the agreement early. From what she's said I also think she was aware that under her agreement she'd be required to pay a charge for excess mileage. She has, however, questioned whether the agreement was clear. Given the reasons above, I'm satisfied that the agreement was clear in relation to the sums Miss F would be required to pay, and BMWFS acted fairly by applying a pro-rated charge for excess mileage.

Was Miss F's second agreement mis-brokered, misrepresented or mis-described

Miss F's allegations of misrepresentation are in relation to things she was told by the supplying dealer before entering into her second agreement, rather than BMWFS. I can consider a complaint about antecedent negotiations carried out by the supplying dealer against BMWFS because section 56 of the CCA says that it can be held liable for those negotiations.

Establishing what was discussed between Miss F and the supplying dealer isn't straight forward given I wasn't party to any of the conversations they had. And the only documented negotiated conversations I've seen between Miss F and the supplying dealer are regarding the service pack.

But I needn't see documentary evidence of everything that was said. When the evidence is incomplete, inconclusive or contradictory, I make my decision on the balance of probabilities – that is, what I think is most likely to have happened given the available evidence and the wider circumstances.

I've carefully considered all of the evidence I've been provided in relation to this case. Like our investigator, I've found that Miss F's version of events has been plausible, persuasive and consistent. And I note that when asked by BMWFS, the supplying dealer said it had no record of discussing folding seats, but didn't appear to dispute having discussed the other

particular criteria Miss F has talked about.

So, overall, I'm persuaded that Miss F entered into her second agreement having agreed with the supplying dealer that she wouldn't be worse off financially in respect of her monthly payments and the car would meet the same specification and/or configuration. I also accept that she was likely told an excess mileage charge might not be applied in relation to the termination of her first agreement.

Dealing firstly with the excess mileage charge; I accept that if Miss F was told that the charge was rarely applied, it was misleading based on what BMWFS has subsequently said. I also accept it could've influenced Miss F's decision to terminate the agreement, but I don't think it did in this case. I say this because Miss F's use of both cars exceeded the mileage allowances on both agreements, so I think she would've paid a charge for excess mileage at some point, whether she ended the agreement at the point she did, or later.

Additionally, based on what Miss F has said, I'm not satisfied or persuaded that she was given any assurances that a charge definitely wouldn't be applied. So, I don't think Miss F ought reasonably to have believed that would be the case. I've also seen that Miss F was sent a termination pack from BMWFS on 17 March 2018, before she entered into the second agreement. I think that pack was clear on the charges which could apply on termination in respect of excess mileage. If Miss F had any doubts about whether or not an excess mileage charge would be applied, I think she could've clarified this with BMWFS before committing to the second agreement.

In respect of the service pack and infotainment subscription, I think the relevant question I need to answer here is whether it was reasonable for Miss F to expect those things to be provided on the basis that the new car would be the same specification and configuration.

I think that most people would expect that to mean that the car's physical features would be broadly the same and meet an equivalent standard. In my view a service pack and infotainment subscription wouldn't usually be referred to as part of a car's specification, or configuration. In any case, I'm aware that Miss F negotiated the inclusion of a service pack before entering into the agreement. But I don't think that Miss F was assured, or reasonably ought to believe she would get a free infotainment system subscription.

From what Miss F has said I think the crux of her complaint is about whether or not she was led to believe the car would feature folding rear seats. She's spoken at length about having stressed their importance during negotiations with the supplying dealer, particularly because she'd previously had use of the same brand of car which didn't feature them as standard equipment.

I think that most people would consider the addition of folding rear seats to come under a description of a car's configuration. And given the necessity to purchase them as an extra, I also think they could be considered to be part of the car's specification in this particular case.

I accept Miss F could have done her own research regarding the extras the car might come with and that she was provided with the car's specification. But I think it's fair to assume that Miss F's knowledge of what equipment and features come as standard with certain cars was less sophisticated than the supplying dealers. Given the apparent ambiguity about whether certain cars come with folding rear seats as standard, I think it was reasonable for Miss F to interpret that if the car was the same specification and configuration, it would have folding rear seats.

So, I'm persuaded that Miss F was likely led to believe the car she was supplied with under the second agreement would come with folding rear seats, and I think it was a key

consideration that caused her to enter into the contract.

Miss F has said that she wouldn't have entered into the second agreement if she hadn't been misled about the folding rear seats, which I accept. I don't, however, accept that Miss F would've waited until the point she didn't need to pay any additional sums to terminate the first agreement.

I say this on the basis that aside from the folding rear seats, Miss F appears to have otherwise been satisfied with the car she was supplied with – I've seen an email from her conveying that sentiment to the supplying dealer. It also seems that other than the particular issues Miss F raised about folding seats, a service pack and infotainment subscription, Miss F was also satisfied with the deal she received in respect of the finance agreement.

I'm also satisfied that Miss F was prepared to end her first agreement early in the knowledge that she'd need to pay a sum to reach the minimum required to terminate the agreement, because she was provided with insurance products which she says offset the cost and she would've purchased in any event.

I can't say for sure what I think Miss F would've done if she knew the car didn't come with folding rear seats. In my view though, I think she would've sought an alternative car with folding rear seats at the same time, if one had been available. If she'd done that, she'd likely be in the same position, financially at least, as she has been throughout the second agreement. But, in terms of asking BMWFS to put things right, I need to decide what's fair given the subsequent events which played out.

As I've explained above, I don't think Miss F has lost out financially, even if she was led to believe the car would have folding rear seats when it didn't. The impact of this situation, in my view, is that Miss F has been inconvenienced by not being able to make use of folding rear seats for the duration of the second agreement.

Before issuing my decision, our investigator asked Miss F to explain the impact this had on her. She's explained that the issue came to light some months after taking ownership of the car whilst attempting to load something long at a garden centre. She's also specified that the impact over the duration of the agreement is that she needed to borrow a van on occasion, or pay for delivery of items when required.

Given what Miss F has said, I think it's fair to say that her use of the car wasn't significantly impaired due to its lack of rear folding seats. Particularly because it seems that she exceeded the mileage allowance of the second agreement. It seems to me that it caused infrequent inconvenience, which I accept is nonetheless frustrating for Miss F. All things considered, based on the impact Miss F says she's been caused, I think she ought to be compensated with £500 for the inconvenience of not being provided with a car with folding rear seats. But I'm not persuaded that she's otherwise lost out financially as a result of what's happened, so I don't intend to make any further award.

Both BMWFS and Miss F responded. BMWFS highlighted that the two cars were fundamentally different – the first was a car built for large boot space and comes with folding rear seats as standard. The second was a saloon and didn't include as many free options. It suggested that Miss F had a responsibility to check that the new car met the specifications she required. Miss F disagreed and maintained that she had been misled to the extent that it resulted in her paying an early termination charge she otherwise wouldn't have.

The case has been passed back to me to make my 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.

Having considered the further submissions from both parties in response to my provisional decision, neither have caused me to change my mind on the case. I'll explain why.

I accept the point BMWFS has made about different models of cars featuring different equipment, specification and configuration as standard. But, for the reasons explained in my provisional decision, I'm still of the opinion that Miss F was likely told that the new car's specification and configuration would be the same as the old one. And I don't think that was an accurate description in this case.

Additionally, while I accept that the cars were different – one seems to be a hatchback and the other a saloon – they weren't fundamentally different to the extent that it wasn't possible for them to both feature folding rear seats. So, I don't think the differences of the cars ought to have caused Miss F to realise that the new one didn't meet the specification or configuration she required.

I also accept the point Miss F made – that she was likely misled. I don't however accept that the result of what happened is that she paid an early termination charge she otherwise would not have. As my provisional decision explained, I think Miss F ended up in the position she wanted to be in, insofar as the car she received, albeit without the use of folding rear seats. I accept that caused her inconvenience during her ownership of the car, and she should be compensated £500 for that.

My final decision

For the reasons explained above, my final decision is that BMW Financial Services(GB) Limited trading as BMW Financial Services is required to pay Miss F £500 compensation.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss F to accept or reject my decision before 24 March 2022.

Stephen Trapp
Ombudsman