

## **The complaint**

Mr W complains that BMW Financial Services(GB) Limited (“BMWFS”) unfairly charged him for excess mileage and for damage after he took the decision to voluntarily terminate a hire purchase agreement (in respect of a car) in his name.

## **What happened**

In October 2017, Mr W acquired a used car using a hire purchase agreement from BMWFS. The cash price of the car was £16,987.00 and it was approximately three years old with 39,606 miles on the odometer.

The total repayable under the agreement was £20,400.03. Mr W was required to make 47 monthly payments of £265.44 and there was a final optional payment of £7,924.35 if he wished to buy the car at the end of the agreement.

The agreement set out that Mr W had the right to terminate the agreement at any time before the final payment was due. In doing so, BMWFS would be entitled to the return of the car and at least half of the total repayable under the agreement. The agreement set out this was £10,202.02.

In May 2021 Mr W chose to exercise his right to terminate the agreement early. In June 2021, after Mr W had handed the car back, BMWFS charged him £1,115.42 for excess mileage and £434.00 for damage – a total of £1,549.42.

The agreement set out that Mr W could terminate the agreement early by returning the car and by paying:

- any arrears and any other sums which have become payable under the agreement before the termination (including any excess mileage charge)
- the amount (if any) by which one-half of the total amount payable exceeds the aggregate of the advance payment and repayments paid
- compensation for damage to the car that is deemed beyond fair wear and tear

The agreement also set out that Mr W had an annual mileage allowance of 8,000 and a total mileage allowance of 71,606 (inclusive of 39,606 miles on the odometer at the time of acquisition). It said that if he exceeded this allowance BMWFS could charge him 5.64 pence for every mile that he exceeded the allowance by. It said that in the event he terminated the agreement early, the mileage allowance would be pro-rated for the time the car was on hire.

Mr W didn't think the £1,115.42 excess mileage charge and £384.00 of the damage charge (£434.00 less £50.00) was enforceable so referred the matter to our service for investigation. Mr W paid BMWFS £50.00 of the damage charge he accepted was enforceable in July 2021.

After paying the above £50.00 – reducing his total liability to £1,499.42 – Mr W entered into a payment arrangement with BMWFS to pay it £30.00 a month commencing September 2021. This meant that by July 2022 Mr W had a debt recorded in BMWFS' books of £1,169.42 (£1,499.42 less £330.00 [11 monthly payments of £30.00]).

Mr W's complaint was considered by one of our investigators who came to the view that it should be upheld in part.

He was satisfied that BMWFS had calculated the excess mileage charge correctly in line with the terms of the hire purchase agreement and the Consumer Credit Act 1974 ("CCA"). He also found that the terms of the agreement were clear around the possibility of an excess mileage charge being payable on voluntary termination.

In summary, he 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 Mr W'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 a 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. Mr W's accrued liability under S100 therefore included paying an additional amount of £1,115.42.
- 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.
- 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 amount.

When the car was collected, by an agent of BMWFS, it was inspected with Mr W present. The report produced following this inspection noted the following damage and charges (net of VAT):

• scratched LHF wheel	£68.00
• paint chips on LHF door	£40.00
• rust on LHR inner door shut	£45.00
• scratched boot lid	£106.00
• scratched RHR door window trim	£29.00
• scratched RH sill	£106.00
• paint chips on RHF door	£40.00
• total invoiced to Mr W	£434.00

The investigator considered the charges invoiced to Mr W to decide if they were fair and reasonable given that the car was approximately seven years old when returned in 2021 (with an odometer reading of 88,050) and approximately three years old when first acquired by Mr W in 2017 (with an odometer reading of 39,606).

Having done so he came to the view that BMWFS could fairly and reasonably charge for the following:

• scratched LHF wheel	£68.00
• rust on LHR inner door shut	£45.00
• scratched RH sill	£106.00
• total	£219.00

but not the following:

• paint chips on LHF door	£40.00
• scratched boot lid	£106.00
• scratched RHR door window trim	£29.00
• paint chips on RHF door	£40.00
• total	£215.00

BMWFS responded to say it accepted the investigator's view and therefore it would reduce the sum it was seeking from Mr W (for damage) to £219.00 (from £434.00).

Mr W responded to say that to a certain extent he understood the excess mileage charge was payable by him, but not the reduced damage charge given the age of the car when it was returned.

The investigator considered Mr W's response to his view but wasn't persuaded to change his mind. Therefore, the complaint has been passed to me for review and 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.

First, I would like to point out I've read and considered the whole file, but I'll concentrate my comments on what I think is relevant. If I don't comment on any specific point, it's not because I've failed to take it on board and think about it but because I don't think I need to comment on it in order to reach what I think is the right outcome.

Secondly, I would add that where the information I've got is incomplete, unclear or contradictory, I've to base my decision on the balance of probabilities.

In paying his monthly rentals to BMWFS, the hire purchase agreement allowed Mr W use of the car for the duration of the agreement. He also had the option to purchase the car outright at the end of the agreement in exchange for the final payment of £7,924.35. While Mr W was entitled to use the car, that use was subject to certain conditions, such as maintaining and taking care of the car and only driving a maximum mileage each year and overall, throughout the lifetime of the agreement. The agreement set out what would happen should Mr W not meet those requirements.

Mr W exercised his right to voluntarily terminate the agreement. In some instances, voluntary termination allows the hirer to simply hand back the car without having to pay anything more. But this 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.

In this case Mr W accepts that he was required to pay at least £10,202.02 to voluntarily terminate the agreement. But he disputes the excess mileage charge of £1,115.42 that has been added on top of this figure.

The CCA sets out the rights consumers have to voluntarily terminate their hire purchase agreements and the liability that is due on termination. The termination your rights section of Mr W's hire purchase agreement also refers to the liability that is due on termination and in his case, that was £10,200.02. Various sections of the agreement Mr W had with BMWFS also referred to the liability on early termination, including where excess mileage, damage charges or other charges may increase the final liability.

Whether or not it's 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've 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 Mr W'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 aren't affected by the termination. What this means is that Mr W 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 Mr W'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 reduced to reflect the shorter period of hire and that *"your obligation to pay any excess mileage charge will accrue immediately prior to termination."* I'm satisfied Mr W'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 Mr W has paid at least half the total amount payable under the agreement, he 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 Mr W.

I'm also satisfied that any excess mileage charge that would be applicable under this agreement will have accrued prior to termination. It follows that Mr W is liable to pay the excess mileage charge and that this is consistent with what is allowed to be charged under S99 of the CCA.

So overall, I'm not persuaded BMWFS has acted unfairly or unreasonably towards Mr W in seeking from him £1,115.42 in respect of excess mileage.

I note that Mr W submits that immediately prior to acquiring the car on finance with BMWFS, he was advised that if he financed any replacement car with BMWFS then there would be no excess mileage charge payable on the car.

Now I accept I can't say for certain Mr W wasn't advised what he says he was, but Mr W's submission in this respect isn't supported by the documentation that has been provided to our service, much of which has been signed. Therefore, I'm not persuaded it would be appropriate for me to direct BMWFS to waive the excess mileage charge for this reason.

The investigator came to the view that BMWFS could fairly and reasonably charge Mr W for the following:

• scratched LHF wheel	£68.00
• rust on LHR inner door shut	£45.00
• scratched RH sill	£106.00
• total	£219.00

Having had regard to the inspection report produced by BMWFS' agent and the various photographs that have been provided I'm satisfied, like the investigator, that BMWFS can reasonably charge Mr W for the above damage and that in all the circumstances £219.00 represents a fair and reasonable sum for this damage.

For the avoidance of doubt, I can confirm that when coming to this conclusion I took a pragmatic approach to what constitutes fair wear and tear given the age of the car both when it was returned and when it was first acquired rather than applying (without question) guidelines published by one or more third party organisations.

I note that Mr W says that a third party (in the trade) said the car was in good condition for its age. But this isn't, in itself, sufficient for me to conclude that BMWFS should have to waive the 'reduced' charge of £219.00.

I appreciate that Mr W will be disappointed by my findings but in summary I'm satisfied that BMWFS can (for the reasons given above) fairly and reasonably hold him liable for £1,115.42 in respect of excess mileage and £219.00 in respect of damage.

### **My final decision**

My final decision is that BMW Financial Services(GB) Limited must reduce the sum its seeking from Mr W (in respect of damage) by £215.00 to £219.00 (from £434.00) and ensure this reduction is fairly and accurately reflected in anything that it's reporting to credit reference agencies. But it need do nothing further.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 3 August 2022.

Peter Cook  
**Ombudsman**