

The complaint

Mr M complains about a car he acquired with finance provided by BMW Financial Services (GB) Limited (trading as ALPHERA Financial Services) (“BMW FS”).

What happened

In October 2021 Mr M acquired a car under a credit agreement with BMW FS. The car was about three and a half years old, having been registered in 2018. The mileage was 11,340. The cash price was £37,495.

Mr M says that he experienced an issue with the car unexpectedly braking suddenly, and he noticed that the engine management light (EML) was on. He complained about this to the dealer shortly after the car was delivered. In April 2022 he complained to BMW FS. But BMW FS rejected his complaint in May 2022, saying that Mr M had failed to provide evidence in support of his case. So Mr M brought this complaint to our service. (Shortly afterwards, BMW FS offered to have the car inspected, and then depending on what was found, either letting Mr M reject the car and refunding him about £950, or repairing the car.)

Mr M provided our investigator with copies of two reports from a garage, dated April and May 2022, each stating that there were several faults with the car, including one with the braking system. The May invoice carries a warning stating that the braking fault makes the car too dangerous to drive. (In April the mileage was 18,458 miles, and in May it was 19,080 miles.)

In December 2022 (when the mileage was 26,680 miles), Mr M obtained a third independent report, this time from a different garage, which confirmed that there had been multiple historic faults, but went on to say that the car was no longer faulty. But after that, Mr M complained that the fault was still recurring. He sent photos of his dashboard with some fault lights illuminated. And in March 2023, the garage that had provided the earlier reports confirmed in an email to the investigator that the car was dangerous and unfit for the road.

The investigator upheld this complaint. He referred to Mr M’s photos, and to the findings of the garage in May 2022. The investigator concluded that the car had not been durable when it was supplied to Mr M. He thought that the author of the report in December 2022 had not detected the fault only because the fault was intermittent, not because there was no longer a fault. The braking fault had just not occurred during the test drive of two miles.

The investigator thought that it would not be appropriate to try to repair the car, as the issue occurs intermittently and is difficult to replicate, and has been going on for a long time. Instead, he recommended that Mr M be allowed to reject the car; end the agreement and have it removed from his credit file; refund his deposit, five percent of the payments he had made, and the cost of his visits to the garage and of the independent report (with interest on all of these refunds at the rate of eight per cent a year); and pay him £300 compensation for his trouble.

Mr M said that was not enough. BMW FS asked for an opportunity to repair the car. So this case has been referred to me for an ombudsman’s 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.

I accept the first garage's evidence that the car has a serious fault which causes it to spontaneously brake without warning, based on the inspections it carried out in April and May 2022. That garage did not attempt to repair that fault, and it probably hasn't just cleared up by itself, so I think the December 2022 report does not prove that the braking fault no longer exists, only that it didn't recur on that occasion. So I uphold this complaint. It only remains for me to decide what a fair remedy would be in this case.

Putting things right

My starting point is that BMW FS is entitled to one attempt at repairing the car. That is because it has that right under the Consumer Rights Act 2015. However, that right is subject to a duty to do so within a reasonable time and without significant inconvenience to the consumer (see section 23(2)(a)).

I note that this fault occurs intermittently. I have seen an email from the garage to the investigator, dated 11 March 2023, which states that the fault occurred during a test drive, but when the car was returned to the garage and the fault memory was read, there were no fault codes. The writer concluded that this meant that there was no direction or starting point indicated as to where to begin trying to fix the problem. He said: *"In my opinion this car will need too much time and money spent on it to make sure that the fault is fixed."*

For that reason, I find on the balance of probabilities that the car is unlikely to be repairable within a reasonable time and without significant inconvenience to Mr M. I will therefore allow Mr M to reject the car, with the consequence that the finance agreement should be ended and removed from his credit file.

I have kept in mind that my decision has to be fair to both parties, and so I have considered the impact of this remedy on BMW FS. However, I am not of the view that the car cannot be repaired, only that it probably can't be repaired within a reasonable time. So BMW FS will still be able to have it repaired, and then once repaired it can be sold or hired to another consumer.

I have also considered the fact that Mr M could be provided with a courtesy car while the car is being repaired, instead of rejecting it. But he is not entitled to a car of the same quality, so he could end up being required to drive an inferior car in the meantime, which could be for quite a while. I could order BMW FS to provide him with an equivalent car, but that could still lead to arguments about whether that requirement is being complied with. So I think that a clean break is best, and that can be achieved by ending the agreement and having the car collected.

Turning to financial compensation, Mr M has said that even with the refunds recommended by the investigator he will still have spent over £10,000 on a dangerous car which he first complained about in November 2021. He argues that if his complaint had been resolved promptly, then most of that money would have been paid towards a reliable car that he would now own. Instead, he has nothing to show for that money, and he will now have to start from scratch.

Balanced against that is the fact that under the 2015 Act Mr M is not entitled to a full refund of everything he has paid. That is because under section 24(8) a refund may be reduced to take into account the use he had of the car. I note that he didn't stop driving it after he was

told to; the mileage indicates that he continued to drive it, covering 7,600 miles between May and December 2022. That is about 1,000 miles a month, which is roughly how much he was driving it before. So I agree with the investigator that a refund of five percent is fair.

I will also award £300 for Mr M's distress and inconvenience. Although there were no serious incidents, I recognise that it must have been distressing for him to drive a car with a serious safety issue.

My final decision

My decision is that I uphold this complaint. I order BMW Financial Services (GB) Limited (trading as ALPHERA Financial Services) to:

- End the agreement with nothing further to pay;
- Remove any adverse information from Mr M's credit file in relation to the agreement;
- Collect the car at no cost to Mr M;
- Refund Mr M's deposit / part exchange contribution of £1,374.75;
- Refund 5% of all of Mr M's monthly rental payments;
- Refund Mr M £200 for the two garage visits;
- Refund Mr M £199 for the cost of the independent report;
- Pay Mr M simple interest on all of the above refunded amounts at the rate of 8% a year from the date of payment until the date of settlement;
- Pay Mr M a further £300 for his inconvenience.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 2 June 2023.

Richard Wood
Ombudsman