

The complaint

Mr T is unhappy that a hire purchase agreement he took out with BMW Financial Services (GB) Limited was misrepresented to him.

What happened

In January 2022, Mr T was supplied with a used car under a hire purchase agreement with BMW. He paid an advance payment of £2,279.04 and the agreement was for £41,869.96 over 49 months; with 48 payments of £672.16 and a final optional payment of £20,721.47. At the time of supply the car was just under five years old and had done 34,000 miles.

Mr T says that, although the finance was taken out in his name, the car was for his son and the credit broker who arranged the finance was aware of this.

Mr T was purchasing a series of investment properties and he was refused a mortgage due to the level of his indebtedness. Unhappy with this, he complained to BMW that the agreement was misrepresented to him - he says he wasn't made aware of the credit implications and risks involved with taking out credit in his own name, and he says he would never have taken out credit for his children had he known the impact it would have. Given this, Mr T wanted the agreement to be transferred into his son's name.

BMW didn't uphold Mr T's complaint and didn't agree to transfer the agreement. So, Mr T brought his complaint to the Financial Ombudsman Service for investigation.

Our investigator explained that, under Section 56 of the Consumer Credit Act 1974 (CCA), any negotiations between Mr T and the credit broker are deemed to have been conducted by them as an agent of the lender, in this instance BMW. Which means that, if the agreement was misrepresented, then BMW should do something to put things right.

However, the investigator thought the agreement Mr T signed made it clear that the credit reference agencies would record the agreement and how Mr T managed the payments. She also thought that, given his previous history of taking out credit, Mr T would be reasonably aware that his level of borrowing would have some impact on his credit file. So, she didn't think that the agreement had been misrepresented.

The investigator also said that the agreement was clear that Mr T was obliged to keep the car under his possession and control, and that he was not to take the finance out on behalf of someone else. So, by doing what he'd done, which included putting the V5C in his son's name, Mr T was in breach of the agreement. The investigator also thought that the credit broker was aware the agreement had been set up in such a way as to cause a breach. And BMW needed to do something to put things right.

The investigator thought that, as Mr T / his son had continued use of the car, it was only fair that they paid for this. So, she didn't think the payments he'd made should be refunded to him. Nor did she think he should be compensated for any impact on his credit file, for the reasons she'd already given. But she did think that BMW should collect the car at no cost to Mr T ; refund the deposit and statutory interest; limit Mr T's liability to the payments that had

already been made (so long as he stopped using the car); make an arrangement with Mr T for the missed payments to be paid; and, once any liability had been repaid, unwind the agreement and remove it from Mr T's credit file.

Mr T didn't agree with the investigator. He provided a letter from his financial advisor saying that he was unaware of any impact the additional borrowing would have on his credit file; and a letter from a mortgage lender stating the reason he was declined was due to indebtedness.

He said that, on the advice of his financial advisor, he'd asked BMW to transfer this agreement (and another that he'd previously taken out on behalf of his son) into his son's name, which they wouldn't do, and they never specifically told him that the level of borrowing he'd taken out might impact his ability to obtain further credit. And, had they told him this, then he wouldn't have taken the finance. So, he thought that BMW had failed in their duty of care towards him.

Mr T also said that, in October 2022, BMW failed to collect the car and remove the default they'd recorded on his credit file, despite having been told this was impacting his ability to grow his investment portfolio. And he said it was unfair that he was expected to pay for the use of the car when it was "*unrepairable*" and because he couldn't obtain finance for a replacement car.

Mr T explained that he was now paying an additional £700 a month because he was unable to obtain a fixed rate mortgage due to his poor credit rating, as well as explaining the impact this has had on him, his wife, and his son. He's also explained that the car is expensive to insure, tax, fuel, and maintain; and that he worries every time he drives it in case he's involved in an accident.

Because of this he's asked for an ombudsman to make a 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 done so, I've reached the same overall conclusions as the investigator, and for broadly the same reasons. If I haven't commented on any specific point, it's because I don't believe it's affected what I think is the right outcome.

In considering this complaint I've had regard to the relevant law and regulations; any regulator's rules, guidance and standards, codes of practice, and (if appropriate) what I consider was good industry practice at the time. Mr T was supplied with a car under a hire purchase agreement. This is a regulated consumer credit agreement which means we're able to investigate complaints about it.

Mr T has complained that the agreement has been misrepresented. When looking at complaints about misrepresentation, I'm looking at two things – whether there was a false statement of fact and, if there was, whether it was the false statement of fact that induced Mr T to choose this particular loan.

I've seen a copy of the agreement Mr T signed, along with the supporting documentation that he was provided. And I think the following parts of the documentation are key to this complaint:

Your obligations in relation to the use of the vehicle

Your key obligations will be: ...

2) to keep the vehicle in your possession and control. You must not take out the credit agreement on behalf of someone else.

What are the consequences of missing payments or breaking other terms of the agreement?

Missing payments or breaking other terms of the agreement could have serious consequences. We will report missed payments to the credit reference agencies, which may make it more difficult and expensive for you to obtain credit from us or other lenders.

If you do not keep up your repayments or break another obligation in the agreement, we may become entitled to terminate the agreement and recover possession of the vehicle.

Use of your Information ... What the credit reference agencies will do:

- a) Credit reference agencies will record the details that we give them about this agreement and how you manage it including the personal information you provide to us. If you do not repay in full and on time, they will record the outstanding debt. Account information given to these agencies remains on file for 6 years after the account is closed, whether settled by you or upon default.*

Your Care of the Vehicle

Until the Vehicle is returned to us at the end of the agreement or you become the owner of the Vehicle, you must:

- (g) keep the Vehicle in your possession and under your control and not ... allow someone other than you to become registered at the [DVLA] as the Vehicle's registered keeper.*

General Terms

- (b) you must not transfer this agreement to anyone, as it is personal to you.*

In signing the agreement, Mr T confirmed that he'd read the terms and conditions (including those referred to above) and that he agreed to be legally bound by these.

I'm satisfied the agreement makes it clear that the credit reference agencies would be advised of both the agreement and how it was conducted. And that this would be reported against Mr T's name for the length of the agreement, and up to six years afterwards. I also think that it's reasonable for someone taking out any form of finance agreement to expect this to be the case.

However, I don't think it's reasonable to expect a credit broker to explain every possible circumstance that might affect every possible customer, at the time and in the future, when dealing with an application. And I wouldn't expect them to do this because of both the impracticalities of covering all the potential options, and the excessive amount of time doing so would take. Instead, I would only expect them to provide the information relevant to agreement being taken (which in this case they did), and only discuss wider implications if asked, or if specific information was provided that would make this necessary.

I haven't seen anything to show me that Mr T discussed his other financial circumstances with the credit broker, or that he told the broker he was looking to grow an investment property portfolio and needed to maintain a credit profile that would allow for this. What's more, Mr T hasn't said that this was the case, or that his wider financial circumstances were raised with the credit broker and discussed.

I appreciate that, in his email of 18 July 2023, Mr T's financial advisor said that Mr T was unaware that his level of personal debt in relation to his income could have a negative effect on him being able to obtain further secured or unsecured credit. And that the agreement with BMW had the biggest impact on his credit file. But this doesn't mean that the credit broker should've assumed Mr T's circumstances and that, at some point in the future, Mr T may be declined a mortgage on an investment property because his debt to income ratio fell outside of one particular lender's risk profile that was in place at the time.

Given the above, I'm satisfied there was no false statement of fact regarding the agreement, and how Mr T managed payments to this, being recorded with the credit reference agencies. And, as there was no false statement of fact, then the agreement wasn't misrepresented.

Notwithstanding this, it's not disputed that Mr T explained to the credit broker that he was financing a car on behalf of his son – something which Mr T has explained that he's done for all his children. And this is one of two cars that Mr T financed for his son. While the agreement is clear that this is not acceptable, and would be classified as a breach, I can understand why Mr T believed these terms weren't applicable in his particular circumstance.

However, I don't think this would mean that Mr T would reasonably expect the agreement not to appear on his credit file, as the agreement was, and remained, in his name.

Mr T's financial advisor has said that Mr T's level of unsecured debt had risen from around £40,000 in December 2021 to around £101,000 in March 2022 – mainly as a result of the agreements Mr T had taken out for his son. And this was enough for him to be declined for a mortgage from a lender who had provided him with a different mortgage a few months earlier. And, in an email from the potential mortgage lender to the financial advisor, dated 22 February 2022, the lender confirmed that *"due to the high level of customer indebtedness, the application cannot proceed."*

Mr T has provided a copy of his credit file, dated 22 February 2022, which shows his credit score was excellent, but his affordability was very weak. It also shows that Mr T owed over £100,000 across 11 different credit accounts and an additional £162,000 over two mortgages. While it's clear that around half of the non-mortgage debt related to this agreement with BMW, this is less than 20% of his overall indebtedness (when mortgages are included).

I've not been provided with any information relating to Mr T's choice of lender's rules around indebtedness, nor have they confirmed that it was only the agreement with BMW that meant Mr T failed their lending criteria for an additional mortgage. What's more, I haven't seen anything to show me that the agreement with BMW was the sole reason that Mr T hasn't been able to obtain a mortgage with any other lender.

In addition to this, it's clear that the agreement with BMW is non-transferrable. And, if Mr T wanted his son to take over the agreement (and if BMW would agree to a transfer), then his son would need to fit BMW's lending criteria. And I think it's likely that he wouldn't, otherwise Mr T wouldn't have needed to take the agreement in his name in the first place.

As such, I'm not satisfied that BMW should compensate Mr T for the wider financial situation he now finds himself in.

However, as stated above, because the credit broker (acting on behalf of BMW as per the CCA) allowed an agreement to be put in place where Mr B was automatically in breach of the terms of that agreement, I'm satisfied that BMW should do something to put things right.

Putting things right

BMW issued a default notice to Mr M in March 2022, as the car wasn't registered in his name. And, as Mr M didn't register the car in his name before the default notice expired, once BMW had finished dealing with his complaint in May 2022, they terminated the agreement. However, in January 2023, BMW agreed that the agreement would be reactivated and the default removed.

In his comments on the investigator's view, Mr T said that BMW failed to collect the car in October 2022, and that they should've removed the default at that point. However, I've seen that Mr T contacted us on 21 October 2022 to advise us he'd been visited by a representative of BMW and he said they'd accepted they shouldn't have tried to recover the car at that point. The call note for this conversation (which says that the call wasn't recorded due to a system error) and subsequent email from Mr T also imply that Mr T believed that no recovery action should be considered until his complaint with us had been dealt with.

Given this, I can't agree that BMW failed to collect the car in October 2022.

Mr T only paid four payments to the car (February to May 2022). However, the service history book shows a service on 17 November 2022 (when the mileage was 46,036 miles) and Mr T confirmed that the mileage on the car on 17 May 2023 was 52,257 miles. This shows me that Mr T / his son has continued to use the car.

In his comments on the investigator's view, Mr T referred to the car as being "*unrepairable*", but he hasn't provided any evidence to show the car is off the road. He also referred to what he considered were the excessive costs of driving and maintaining the car. But, despite this, the evidence shows the car has continued to be used. As such it's only fair that he pays for this usage.

Given this, Mr T still owes the payments from June 2022 onwards. If, when the car is collected, the mileage still shows at 52,257 miles, then his liability for payments should stop at May 2022 (when this mileage figure was provided, and as no change in mileage would show the usage stopped). However, if the mileage shows that the car has continued to be used, then Mr T should be liable for payments up to the date of collection. And I would expect BMW to make an affordable repayment plan with Mr T to allow him to repay these missed payments over a reasonable amount of time.

So, if they haven't already, BMW should:

- collect the car, without any undue delay, at no cost to Mr T;
- remove the default and any adverse information recorded on his credit file;
- following collection, confirm to Mr T how much he still owes for the monthly payment arrears (based on my comments above), and make arrangements for him to repay this; and
- once this liability has been repaid, unwind the agreement, remove it from his credit file, and refund the deposit plus 8% simple annual interest from the date of payment to the date of refund.

If Mr T agrees, the deposit (plus interest) can be used to offset against the outstanding payments when his liability is calculated.

If BMW and Mr T are unable to agree a suitable repayment plan, or if Mr T fails to make any payments under any agreed repayment plan, then BMW are entitled to report this to the credit reference agencies. And this record is not required to be removed once the liability has been repaid and the agreement unwound.

Finally, the Inland Revenue require BMW to deduct tax from any interest paid. BMW are required to provide Mr T with a tax certificate for this interest if he asks for one.

My final decision

For the reasons explained, I uphold Mr T's complaint. And BMW Financial Services (GB) Limited should follow my directions above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 30 August 2023.

Andrew Burford
Ombudsman