

## The complaint

Mr D complains BMW Financial Services (GB) Limited (BMW) wrongly applied a default to his credit file. He says he did not receive any notice of the default and as BMW failed to follow the correct process it should remove the marker. Mr D says if it agrees to do so he will return the car.

## What happened

In July 2017, Mr D took out a finance agreement with BMW for a new car. The agreement required a monthly payment of £610.63 until October 2021 when the final payment of £16,189.35 became due. At this point Mr D would have the option to re-finance the agreement and keep the car or return it.

During the agreement period Mr D had cause to raise a number of complaints with regard to the communication with BMW, his complaints were in relation to late markers applied to his credit file. This previous complaint was upheld in part and the late markers were removed. This complaint relates to the actions BMW took after Mr D applied to re-finance the car with BMW, but the refinance agreement was declined.

The final payment of £16,189.35 became due on October 2021.

Mr D feels he was in negotiation with BMW to attempt to re-finance the car.

BMW say that once it declined to refinance the car it gave Mr D sometime to find finance elsewhere but didn't hear anything from him nor did it receive any payments and so on 25 December 2021 it issued a Notice of Sum in Arrears (NOSA).

On 5 January 2022, BMW issued a default notice which gave Mr D 20 days to address the outstanding balloon payment of £16,189.35, before BMW would look to terminate the agreement and recover the vehicle. The letter also detailed the impact this action could have on his credit file. As the balloon amount was not paid, BMW terminated the agreement on 16 March 2023. When this was actioned, a post default notice letter was sent to Mr D to advise him that BMW would now look to recover the vehicle. As Mr D had paid over a third of the agreement, BMW required him to complete a voluntary surrender form to enable it to recover the vehicle. BMW went on to explain if he did not complete the form, it would obtain a return of goods order from the court to repossess its asset.

Mr D says he didn't receive any of the notices and is adamant BMW failed in its obligations to issue the notices and follow the correct procedure prior to issuing the default notice, he says he was trying to re-finance the car as he wanted to keep it. He complained to BMW about the actions taken and the impact this had on his personal and business dealings.

On 25 April 2023, BMW issued its final response. It didn't uphold Mr D's complaint and in summary said it had followed the correct procedure. It said it would not be removing the default and Mr D needed to return the car.

Dissatisfied Mr D brought his complaint to his service.

An investigator looked into things for Mr D. In her view she sympathised with the position Mr D found himself in, but she found BMW had followed the correct process and didn't find that she could ask it to remove the default. But, she said the date of the default should be amended to 25 January 2023 rather than 16 March 2022, as this was the given date on the

default notice. She understood BMW had delayed the recording of the default because it reviewed Mr D's file but when it concluded the default to be accurate it should have backdated it.

Mr D disagreed. He is adamant he didn't receive the notices and as such couldn't have taken any steps to avoid the default. He feels BMW should be obliged to communicate on more than one occasion to ensure the notice has been received. He has now returned the car but asks that the default be removed because he did not have the opportunity to avoid what has been a huge impact on his personal and business life.

### **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 have independently reached the same outcome as that of our investigator. I understand this will come as a disappointment to Mr D – I'll explain why.

First, I'm very aware that I've summarised this complaint in far less detail than the parties and I've done so using my own words. I'm not going to respond to every single point made by all the parties involved. No discourtesy is intended by this. Instead, I've focussed on what I think are the key issues here.

Our rules allow me to do this. This simply reflects the informal nature of our service as a free alternative to the courts. If there's something I've not mentioned, it isn't because I've ignored it. Rather, I'm satisfied I don't need to comment on every individual argument to be able to reach what I think is the right outcome.

I would also like to reassure Mr D that I have listened to the telephone calls and looked at all the submissions he made, along with those provided by BMW.

Mr D's position is that BMW acted unfairly and unreasonably in defaulting his account because it did not follow the correct procedures as set out in the Consumer Credit Act 1974. Specifically, he says that he did not receive any notifications from BMW with regard to the notice of default, the cancellation of his finance agreement or the voluntary surrender forms. He says he was unaware it was going to terminate the account and as such had no opportunity to take steps to prevent it.

Where the evidence is incomplete, inconclusive, or contradictory (as some of it is here), I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances.

I don't think there is any dispute here that Mr D knew his final payment or balloon payment was due in October 2021. He also knew that BMW had not agreed to re-finance the agreement and he then had to find alternative finance or return the car. He was also aware that he did not make any payments from October 2021 onwards. Mr D knew the credit file markers had been removed up until December 2021 on the understanding that either the car would be returned, or the final payment made in full.

I can't see that any further attempts were made by BMW to telephone Mr D or email him, but equally I can't see that Mr D made any attempt to explain what his intentions were, he also didn't make any payment and he retained the car. So, given the circumstances of a final payment that became due on October 2021, and almost two months later with no plan in place or contact from Mr D, I don't find that BMW acted unreasonably in initiating the process to end the agreement.

In considering what is fair and reasonable, I need to have regard to the relevant law and regulations, regulators' rules, guidance and standards, codes of practice and (were appropriate) what I consider having been good industry practice at the relevant time.

When no further contact was received from Mr D, BMW sent a pre-default notice on 25 December 2022. I can see from the records it was sent to the address the address on file for Mr D. It states the terms of the agreement was breached and as a result the agreement was pending default action being taken, it noted what needed to be done for the action to stop. Now of course it is possible as the date is Christmas Day that there was a delay or even that the letter was lost in the Christmas post, but it wasn't returned to BMW.

Under relevant law Mr D had to be served with a notice of default before his account could be properly terminated. I understand that Mr D is adamant that he never received this notice either. But I also note the notice was correctly addressed and it appears BMW had no notification that the mail was returned to sender or not delivered either. This notice was sent after the Christmas period so I'm not persuaded I can hold BMW responsible if Mr D did not receive the notice and I don't think that BMW was at fault here. Neither do I think I can fairly say that BMW cannot rely on that notice.

I appreciate that Mr D feels BMW should have attempted more communication to advise him of the position and his previous experiences has led him to be very dissatisfied overall with the service he has received. But, so far as I can see BMW made it very clear that it would not re-finance the agreement which became due in October 2021. It removed credit markers and gave Mr D until December 2021 and then issued the notice of default on 5 January 2022. Mr D still had a further 20 days to avoid the default. Notwithstanding that he says he didn't receive that notice; he did know that he had the car and hadn't made any payments and the final payment was due some months ago. BMW had said he could return the car if he wasn't able to make the final payment but ultimately Mr D didn't make the payment nor did he return the car, nor did he make any further payments.

So, I don't think BMW acted unfairly or unreasonably in issuing the default notice and as I said I can't hold BMW responsible if Mr D did not receive it. To uphold Mr D's complaint I would have to conclude that BMW did not follow the correct process and I haven't seen anything to suggest that was the case.

It follows based on everything I've said above, I find that BMW has acted appropriately and therefore, I have no proper basis to tell BMW that it must ask the credit reference agencies to remove the default it asked them to register on Mr D's credit file. However, as BMW put the account on hold to review the case before applying the default on 16 March 2023, I'm agreement in with the investigator that the default should be back dated to 25 January 2022.

### **My final decision**

For the reasons I have given I uphold this complaint and direct BMW Financial Services (GB) Limited to amend the date of the default to 25 January 2022.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 18 September 2023.

Wendy Steele  
**Ombudsman**