

The complaint

Miss P complains about a car she acquired with finance provided by BMW Financial Services (GB) Limited ("BMWFS").

What happened

In March 2019, Miss P entered into a regulated hire purchase agreement with BMWFS, under which she acquired a new car. The cash price was £22,178.29. She paid a deposit of £2,789. The finance agreement was to be repaid over 48 months, at £289 a month, with an optional final payment of £8,509.54 if she wanted to keep the car.

In March 2023, at the end of the agreement, Miss P said she intended to pay the optional final payment and keep the car. But she said there were some issues with the car. There were problems with the clutch, the flywheel, and the gearbox, and the camshaft had jammed. There were fault codes about the drivetrain and a solenoid. There had also been water ingress through two vents into the boot, which had damaged the battery and the electronics, and had saturated the back seats, causing mould to grow on them (and later to grow on the front seats too). The mileage by then was nearly 33,000 miles.

In that same month, the dealership gave Miss P a courtesy car while it investigated her car. Then, as a gesture of good will, it offered to repair everything (except the clutch and flywheel, which Miss P had already had repaired at her own cost), and to pay for 100% of parts and 80% of labour. (The remaining 20% of labour would cost around £250.) This offer did not include replacing the vents, which would cost another £150.

But Miss P did not accept that offer. She complained to BMWFS. Meanwhile, she asked for the optional final payment to be put on hold while her case was investigated, but BMWFS did not agree to do this. Miss P still did not make the payment, and so in July 2023 the agreement was terminated. Miss P has asked for the default marker to be removed from her credit file.

Meanwhile, Miss P carried on driving the car, without repairing the drivetrain. The drivetrain continued to get worse, until the car finally broke down in August 2023. A mechanic advised her that the car was no longer driveable.

BMWFS did not uphold Miss P's complaint, citing a lack of evidence to show that these faults had been present when the car was delivered, four years earlier. BMWFS said they were only liable for defects which were present in March 2019. BMWFS said that the water ingress was probably due to a drain blockage, and the other issues were probably just wear and tear. There were no fault codes recorded in the car's memory relating to damage to the electronics.

Being dissatisfied with that outcome, Miss P brought this complaint to our service in May 2023. She said another garage had told her that the vents had not been made in the correct size and so did not fit properly, and they had not been sealed with sealant. This had allowed water ingress. She said the drivetrain issues were very similar to those described in a product recall in 2013. She initially asked for the car to be repaired for free, but after the car

broke down in August, she asked to reject it instead. She also asked to be refunded for the insurance payments she had made on a second car which she had acquired after the BMW had broken down.

Meanwhile, before the breakdown, our investigator had upheld this complaint. She agreed that the vents were faulty, and that they had been all along. She also said that as the drivetrain had failed after only four years and 33,000 miles, this meant that the car had not been durable, and so it had not been of satisfactory quality at the date of delivery. But she did not agree that the clutch and the flywheel had been faulty, so BMWFS was not responsible for them. She recommended that BMWFS arrange for the faults to be repaired at no cost to Miss P, pay her £350 for her trouble, and also that they refinance the optional final payment so that Miss P could pay it in monthly instalments.

After the car broke down, the investigator decided that repairing the car would no longer be possible without causing inconvenience to Miss P. So instead, she recommended that Miss P be allowed to reject the car, and that BMWFS refund her deposit, refund her insurance premiums on her second car, pay interest on all the refunds, and pay Miss P £650 for her inconvenience.

BMWFS maintained that there was still no evidence that the car had not been of satisfactory quality in 2019. So this case was referred for an ombudsman's decision.

I wrote a provisional decision which read as follows. (I have edited one sentence to correct an error.)

What I've provisionally 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 am minded to depart from our investigator's findings.

It is not in dispute that the car currently has some faults; the issue is whether the car was of satisfactory quality when it was delivered to Miss P in 2019. Under section 19 of the Consumer Rights Act 2015, the burden of proof is on Miss P to prove that the car was not of satisfactory quality at that time. BMWFS is not responsible for any problems which develop later, except if they prove that the car was not durable at the point of delivery.

In February 2022, when Miss P had had the car for three years, it was serviced by a BMW garage and an end of warranty check was carried out. No faults were found. The mileage then was 24,821 miles.

A year later, in February 2023, Miss P took the car to an independent third party garage to be serviced. This time, various problems were detected, which I've already listed. The car failed its MOT test a few days later. Its mileage was 32,957 miles.

Drivetrain, camshaft, and continuing damage

Unfortunately, there is not enough evidence about what was wrong with the drivetrain and the camshaft for me to be able to determine whether they had a fault at the point of delivery.

A camshaft should last for as long as the car, if the car is kept topped up with oil. But otherwise a camshaft can jam. There is no evidence about why this happened to Miss P's car, so I cannot safely conclude that the camshaft was defective all along.

I don't think the 2013 product recall helps Miss P. That was about a different model of car, and the issue was that the housing bolts of the variable camshaft timing adjustment unit were coming loose and breaking. But there is no evidence that that is what happened to Miss P's own car.

The only evidence about the drivetrain from the garage in February 2023 is an invoice which reads "Drivetrain error message dislaid" (*sic*). There is also no evidence from the mechanic who saw the car in August about what he found either. So there is no way of knowing whether the car broke down because a part had not been durable, or because it had been damaged by something external to the car, or because of wear and tear.

A drivetrain should last much longer than 33,000 miles or four years, so its failure *could* mean that it wasn't durable. But it could also mean that one of its parts was damaged due to something else, and that this could have been repaired early, preventing the failure of the whole system. In February 2023, the drivetrain had not failed yet; there was just an indication that something was wrong with it. That needed to be repaired straight away, and if it had been, then we would probably know what had gone wrong.

So even if I thought that the car was of unsatisfactory quality at the point of delivery – which I don't – I still wouldn't think that Miss P should now be able to reject the car. That is because she carried on driving it until it broke down, despite knowing that it had something wrong with the drivetrain and that this had not been repaired. By continuing to drive the car, further damage was inevitably caused to it, until it became undriveable. In an email on 6 April 2023, the dealership had told her not to drive the car if the engine management light was on.

And meanwhile mould was growing on the seats' upholstery because the seats were wet. That brings me to the water ingress.

Water ingress

Miss P discovered the water ingress in March 2023. She reported that to BMWFS. Two months later, in May, she took the car back to the third party garage. It told her that the vents had not been sealed with sealant (I take this to mean around the edges where they join the bodywork), and that she should take that up with the manufacturer. I have seen a single page document in which that garage confirmed that was what it had told her. It does not say that the vents were the wrong size. But it does say that the water had corroded the electrics, and had reached the battery (although it does not go so far as to say that the battery had been damaged).

I have thought about whether the lack of sealant might mean that the car was not of satisfactory quality at the point of sale. On one hand, this document does not say that the vents were supposed to have sealant, or why there had been no water ingress during the first three years. And BMW found no fault codes about the electronics, so BMWFS argues that this must therefore have been a recent development. It has suggested that an alternative explanation may be that there was a blockage in each vent caused by the accumulation of debris over time; that possibility has not been investigated.

On the other hand, the reference to the lack of sealant at least implies that the garage thought there should have been some, which is perhaps reasonable to conclude because the edges around the vents are a potential point of entry for water. However, I have not seen BMW's design specifications showing that the vents were supposed to have sealant, so I can't rule out BMWFS's alternative explanation for the problem.

So on the balance of probabilities, I don't think it has been proved that the vents were faulty or not durable at the point of delivery.

Nevertheless, BMWFS offered to replace the vents ... [at a cost to Miss P of] £150. If this had been done in April 2023, the mould would not yet have grown on the seats' upholstery; that could have been avoided. The repair cost has increased since then because the repair was not carried out when the problem was discovered.

The second car

In March 2023, BMWFS offered Miss P a courtesy car to use while the original car was being repaired. BMWFS told her it would insure the courtesy car for her. If the car had been repaired back then, it would not have broken down in August 2023, and Miss P would not have had to acquire a replacement car and insure it. So, quite apart from the fact that I am not satisfied that BMWFS was responsible for the repairs, I do not think it would be fair to require BMWFS to reimburse Miss P for the cost of insuring that car.

Final payment and credit file

BMWFS was under no obligation to refinance the optional final payment. The full amount became due at the end of the four year hire period, unless Miss P returned the car.

After BMWFS told Miss P that it did not agree to defer her final payment, it was necessary for her to either pay it in full and on time, or give the car back. By keeping the car, she became liable to make the payment. When she didn't make the payment, BMWFS had a duty to accurately report her payment history on her credit file, and this meant it had to record a late payment marker. Later, after warning her that it would default her account, and still not receiving any payment, BMWFS terminated her agreement and defaulted her account. I think it was entitled to do that. For these reasons, I won't order BMWFS to amend Miss P's credit file.

My provisional decision

So my provisional decision is that I do not intend to uphold this complaint.

Responses to my provisional decision

BMWFS accepted my provisional decision. Miss P did not. She wrote to her MP, who passed on her concerns. She said that the investigator had carried out a thorough and impartial review of the evidence in her case, and my decision would cause her serious financial detriment. Later, she wrote a much more detailed response to my decision. She said:

- A light on her dashboard had said: "Drivetrain. You can continue driving." She provided a photograph of this.
- Miss P had told the manager at the BMW garage about this, and the manager had emailed her to say she could continue driving. Miss P has provided a copy of that email, which is dated 6 April 2023.
- BMW had itself driven the car while inspecting it.
- Although she had not had the drivetrain repaired, it had been inspected by BMW.
- If the vents had not been faulty at the point of sale, then why would they have needed replacing in 2023? The vents do not fit properly and they move. Two inspections by different garages have found that they leak. No damage or debris blocking the vents was found.
- Electrics only show signs of corrosion if they have been sitting in water for a long time.
- The cost of replacing the vents would have been £250, not £150.

- At that time, Miss P had just paid £1,500 to replace the clutch and flywheel, so she could not have afforded another £250. As a single mother, this was a lot of money.
- The car only became damp and mouldy because BMWFS took such a long time to deal with this matter.
- Neither the vents nor the drivetrain issues can be classed as wear and tear.
- During the end of warranty check in February 2022, there had been a software update. The drivetrain issues had begun then.
- Although the 2013 product recall concerned a different model of car, different models can use the same parts, so the recall could still be relevant.
- A camshaft shouldn't fail so soon; the fact that it had was evidence of a fault.
- Miss P is now insuring two cars.
- In my provisional decision, under the heading "The second car," I had said that BMWFS had offered Miss P a courtesy car to use while the original car was being repaired. Miss P pointed out that the car had not been repaired, it had only been investigated. (That is true; my point in writing that paragraph was that if the car had been repaired, she would have had a courtesy car during the repair, which BMWFS would have insured for her, and so she would never have needed to insure two cars.)
- Miss P had only asked for the final payment to be put on hold while the car was being investigated, not because she couldn't afford it. BMWFS had declined that request and had defaulted her.
- I had written that the drivetrain could have failed because it wasn't durable, or because of "something else." Miss P asked for clarification of what "something else" could be. (I refer her to the paragraph just before that one, in which I said: "there is no way of knowing whether the car broke down because a part had not been durable, or because it had been damaged by something external to the car, or because of wear and tear." I will return to this matter below.)
- The replacement car will not last long as it is so old, and Miss P needs a car to get to work. If her complaint is not upheld, she will lose her job.

My findings

I have reconsidered the evidence in this case and the reasons I gave in my provisional decision for not upholding this complaint. Having done so, I remain of the view that BMWFS has not done anything wrong. I will address Miss P's objections below.

Drive-on damage

I have seen the photo of the dashboard light that says "Drivetrain. You can continue driving." That does make it easier to understand why Miss P kept driving the car. But the email from the dealership on 6 April (which says "If the car message says it is ok to drive then I am sure you will be fine") has to be understood in the context of the email chain in which it appears. Fifteen minutes later, the same manager sent Miss P another email which says:

"We can or cannot say if the vehicle is safe to drive.
If a vehicle has an EML light on we would always as a dealer advise not to drive the vehicle."

Other emails in this conversation, between 31 March and 6 April, make it clear that the topic of discussion was how to return the car to Miss P while she was deciding whether to accept the dealership's offer to repair the car and to pay for 100% of parts and 80% of labour. Miss P was about to go on holiday, and the dealership had told her that its offer was open for 30 days, and while she was making up her mind it could either keep her car on the garage forecourt at her own risk, or take it home. The issue about whether the car was safe to drive was only about returning the car to her home before she went on holiday. It certainly was not

the dealership's advice to carry on driving the car to work every day (once she returned to work) for an indefinite period.

In the light of that evidence, while Miss P cannot be criticised for driving the car home and for driving it on the odd journey after that, I am afraid that I still remain of the view that by driving the car on a daily basis, in the knowledge that the car was in need of repairs to moving parts, Miss P unwittingly made the existing damage worse, and it would not be fair of me to require BMWFS to pay for that.

(That will be a moot point if BMWFS is not responsible for any repairs at all, which will be the case if the car was of satisfactory quality at the point of sale.)

The cost of the repairs in March 2023, and Miss P's request to put the final payment on hold

I have double-checked the emails to verify the cost of repairing the vents. The dealership's offer email (dated 30 March) says that replacing the vents was not part of its gesture of good will, and that this would cost £150, which Miss P would have to pay for herself. This was in addition to the £250 which the dealership asked her to contribute to its offer to repair everything else as a gesture of good will. So the total cost to her, if she asked for everything to be repaired, would have been £400. I accept that this was a lot of money, and that she might not have been able to afford it right away.

Miss P has told me that the only reason she asked BMWFS to put the final payment of £8,509.54 on hold was not because she could not afford it, but only because the issues with the car had not yet been resolved. Of course, if she could afford to pay £8,500, that does not necessarily mean that she could afford to pay £8,900. But the alternative option that was open to her would have been to hand the car back and pay nothing instead, since the hire purchase agreement was coming to an end. (She could then have got another car, instead of keeping this one.)

BMWFS did not have to put the final payment on hold, or refinance it, and so I remain of the view that it was obliged to accurately report the non-payment of it to Miss P's credit file. Later on, it was entitled to default her account, and to report that too.

The vents and water damage

Although electrics do not corrode overnight, and I agree that the corrosion indicates that the water ingress had been going on for some time, I think that a year since March 2022 would have been long enough for that to happen. No corrosion was found in the end of warranty service in February 2022, or when the car passed its MOT in March 2022. Because of that, and also for the reasons I gave in my provisional decision, I am not satisfied that the vents were faulty at the point of sale.

Drivetrain and camshaft

I don't know if the software update in 2022 was the reason for the drivetrain deteriorating or not, but if it was, then BMWFS was not responsible for that, because it was not a fault present at the point of sale. BMWFS is not liable for anything that happened after the car was delivered to Miss P, unless it is because the car was not of satisfactory quality in March 2019.

Turning to the 2013 product recall, I accept that different models of car might use the same components. But as I said in my provisional decision, that recall was about faulty housing bolts which came loose and broke, and there is no evidence that that has happened to Miss P's car.

As I said in my provisional decision:

“A camshaft should last for as long as the car, if the car is kept topped up with oil. But otherwise a camshaft can jam. There is no evidence about why this happened to Miss P’s car...”

I still do not think there is enough evidence about what went wrong with the drivetrain and the camshaft for me to safely conclude that they must have been faulty all along. Lack of durability is one inference, but not the only inference, that can be drawn. I make no findings about what happened, and so I am unable to uphold Miss P’s complaint about these issues.

Conclusion

For the reasons I have given above, I have not changed my mind about this complaint.

Since Miss P is currently insuring two cars, one of which is not driveable, I would encourage her to consider taking the first car off the road and obtaining a statutory off-road notice (“SORN”) from the DVLA, so that she will no longer have to keep insuring it.

I would like to take this opportunity to remind BMWFS that it has a duty to treat sympathetically and positively a customer who is in financial difficulties. If Miss P cannot now afford to pay the final payment at once, then it should try and agree an affordable payment plan with her.

My final decision

My decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I’m required to ask Miss P to accept or reject my decision before 26 March 2024. But apart from that, this final decision brings to an end our service’s involvement in this complaint.

Richard Wood
Ombudsman