

The complaint

Mr H complains about the way BMW Financial Services(GB) Limited trading as ALPHERA Financial Services (“BMWFS”) handled his agreement which eventually resulted in its termination.

What happened

Mr H referred a complaint to us along with his representative. As the complainant is Mr H, for ease, I have addressed my decision to him only throughout, when referring to what he and his representative have told us.

In June 2022, Mr H entered into a hire purchase agreement with BMWFS to acquire a used car. The agreement was for 36 months, where Mr H was to pay 35 monthly amounts of £628.21, with an optional final repayment of £40,324.97 due. The cash price of the car recorded on the agreement was £79,995 and Mr H made an advance payment of £29,595.67. The agreement said the maximum annual mileage permitted in the car was to be no more than 6,000 (the maximum total throughout the agreement was 41,273) and the car was supplied with a mileage of 23,273.

Mr H said he initially used a third-party company to insure the car up until August 2023. He said the insurance company chose not to renew the policy as they believed the car was uninsurable.

Mr H said he struggled to find another insurance company to insure the car. So, it was parked on private property and not driven during this period.

BMWFS issued a Default Notice to Mr H in August 2023 as the car was uninsured and the letter explained the possible consequences if Mr H didn't take the necessary action of providing proof of it being insured.

Mr H managed to insure the car using a different third-party insurance company from 14 August 2023. This was a motor fleet policy where the insured named on the policy was Mr H's name followed by Mr H's company name i.e. “[Mr H] trading as [company name]”. The vehicle type for Mr H's car supplied under this agreement was recorded as “Private cars” and comprehensive cover under the insurance policy.

In September 2023, BMWFS terminated Mr H's agreement and sent him a letter explaining it was due to not complying with the recent Default Notice.

Mr H complained to BMWFS and they responded to him and gave their final response in January 2024. In summary they said that Mr H took out an agreement with them in his personal capacity and was therefore required to be insured under a personal policy and not a fleet policy. They explained that they issued a Default Notice to Mr H against his account with them in relation to the car not being insured in his name. And that they gave Mr H some time to have the insurance corrected to reflect insurance in Mr H's name, as he was the agreement holder. But they later terminated their agreement with Mr H in September 2023 as he didn't satisfy the Default Notice issued to him.

In February 2024, Mr H was sent a Notice of Sums in Arrears in relation to the agreement.

Unhappy with BMWFS's response, Mr H complained to our service in February 2024. Mr H believed he did comply and remedy the Default Notice by providing an insurance policy to BMWFS. He said he'd never had an issue before with providing a motor fleet policy.

Mr H confirmed to our investigator that payments under the agreement stopped when it was terminated and he was still in possession of the car. Mr H also shared circumstances surrounding his health and the urgency in reaching a fair and reasonable outcome promptly.

Our investigator upheld Mr H's complaint and explained what BMWFS needed to do to put things right. In summary, she explained that BMWFS were correct in issuing a Default Notice as the car was uninsured at times. But she went on to explain that she thought Mr H complied with the default notice by insuring the car with a comprehensive policy for a private car within the timescales set out in the notice. So, she didn't think BMWFS should have terminated Mr H's agreement with them. Our investigator initially directed a remedy to BMWFS to put things right for Mr H, but BMWFS didn't agree with it. In particular, our investigator among other things thought BMWFS should refund the advance payment Mr H made and also waive any arrears accrued since the agreement was terminated.

BMWFS disagreed with the investigator's outcome and made an offer to resolve things. In summary they offered to:

- Ensure collection was issued promptly, if Mr H agreed to voluntary surrender the car.
- Sell the car at auction, and settle the outstanding agreement balance with the auction funds.
- Consider a review of any shortfall and/or waive it, in light of the incorrect termination.
- Remove any adverse impact on Mr H's credit file and mark the default notice as satisfied as they accepted Mr H did insure the car.
- Pay £450 for the distress and inconvenience caused.

BMWFS explained among other things that they didn't feel Mr H should be refunded the advance payment he paid for the car as he had use of it for a significant period of the agreement. And they also didn't think it was fair to waive monthly repayments since the agreement was terminated as Mr H still had possession of it and use of it during that time.

Mr H didn't agree with BMWFS's offer. Our investigator issued her further opinion where she explained that she still thought the complaint should be upheld. In summary and among other things, she thought BMWFS should put things right by:

- Taking the car back at no charge to Mr H.
- Refunding Mr H's advance payment he made.
- Recalculating the rental due under agreement from its inception to when her view was issued, and deduct any monthly payments outstanding from Mr H's advance payment he made.
- Calculating the pro rata mileage allowance from the agreement's inception to when her view was issued – and adding any excess mileage fees where applicable under the agreement.
- Paying Mr H £750 for the distress and inconvenience caused.
- Removing any adverse information recorded on Mr H's credit file in relation to this complaint.

As BMWFS didn't agree with the investigator's opinion, the complaint was passed to me to decide.

I issued a provisional decision on 19 July 2024 where I explained why I intended to uphold Mr H's complaint. In that decision I said:

"First and foremost, I'm sorry to hear about Mr H's medical prognosis. I appreciate it is a difficult time for both Mr H and his family and I hope Mr H is reassured that the provisional decision I have reached is a fair one, considering all the circumstances.

This complaint is about a hire purchase agreement with BMWFS which is a regulated financial product. As such, we are able to consider complaints about it.

It is no longer in dispute that BMWFS incorrectly terminated the agreement in September 2023. But what is in dispute is what a fair and reasonable outcome should be for BMWFS to put things right, given the circumstances.

Our investigator directed the business a set of instructions to put things right. On the other hand, BMWFS disagreed with the direction and put forward an offer which they believed was fairer in the circumstances. My findings below will focus on what I think would be a fair way to resolve things in a pragmatic and fair way. And at the heart of my consideration is our service's principle that, where a business has made a mistake, we should aim to direct a business to put things right by trying to put the customer back into a position they would have been in had the mistake not occurred.

To summarise, BMWFS believe a fairer way to resolve the complaint is to treat the agreement as though the car has been voluntary surrendered.

In broad terms, what this would mean is that the car will likely be sold at auction and the proceeds of the sale will be offset against any possible shortfall Mr H would have been liable for under the agreement for early termination. BMWFS say they will consider reviewing or waiving any shortfall, if there is one. But I have noted that this isn't a guarantee that any shortfall will be reduced or waived, but only considered.

I'm also mindful that Mr H made a significant advance payment to acquire the car along with the agreement. So, I think it would be fair to say Mr H has some sort of vested interest in it. If Mr H was to voluntarily surrender the car, then it would mean he would lose the contribution he has made in the form of the advance payment he put towards the agreement. I'm also mindful that the car was supplied using a hire purchase agreement – with the option to take ownership of the car once the agreement ended. This means the value of the car at the end of the agreement has already been fixed, and if the car was to be sold at auction, there is an element of uncertainty as to what value the car will be sold at.

So it follows that I don't think voluntary surrendering the car is a fair way to resolve things here.

Had BMWFS's mistake not occurred and the agreement wasn't terminated, it would likely still be active today. So considering things here, I think the agreement should be reinstated. I'm satisfied this would be a fair outcome as it gives Mr H the opportunity to consider his options at the end of the agreement, just as he would have been able to, had the agreement remained active.

But I'm mindful that many months have now passed since the agreement was terminated, and the car is still in Mr H's possession. I've thought very carefully about things here.

It isn't clear why BMWFS didn't attempt to collect the car, considering they terminated the agreement in September 2023. As the car wasn't collected, BMWFS believe Mr H is liable for monthly repayments that have accrued while he has remained in possession of it.

Mr H has explained to our service that the car had continued to be used on some occasions travelling to appointments. And Mr H also supplied us with a photo showing the mileage of the car at 35,000 in June 2024. This means the car has travelled around what I would expect it to have done, given the annual permitted mileage under the agreement is 6,000 miles per year.

Considering things here, I think it would be fair for Mr H to pay BMWFS the monthly repayments which were due under the agreement from September 2023 up until when the agreement is reinstated. I say this because Mr H continued to have use of the car during this time and has told our service on occasions he has continued to use it. I don't think BMWFS should charge interest on this amount as it was their mistake for the agreement being terminated and payments then not being made. I accept that the amount payable will be a significant sum, given several months have passed. So, I would expect BMWFS to work with Mr H here and agree a suitable repayment plan, should he need one.

Mr H has also explained that his credit file has been impacted due to BMWFS believing he didn't comply with the default notice. As BMWFS has accepted their error here, I'm satisfied the default was incorrectly applied. So it follows I think this default should be removed from Mr H's credit file. I also think any adverse information, such as arrears that have accrued and may have been recorded on Mr H's credit file since the termination of the agreement, should also be removed, as again, it wasn't his fault the agreement was terminated and payments then not being made.

I've also considered whether Mr H has suffered some inconvenience due to this complaint. Mr H promptly provided BMWFS a copy of his insurance policy upon being served a default notice but the agreement was still cancelled. Mr H complained to BMWFS but at the time, BMWFS didn't agree they made a mistake. I have seen confidential internal correspondence involving BMWFS which suggests they were, or at the very least, should have been aware as early as December 2023 of their error. But despite this knowledge, Mr H had no option but to refer his complaint to our service, having exhausted and been left frustrated with his experience complaining to BMWFS. I'm satisfied Mr H suffered significant inconvenience and BMWFS should pay him £550 in compensation."

I set out that I intended to uphold this complaint. And I gave both parties the opportunity to send me any further information or comments they wanted me to consider before I issued my final decision.

Responses to the provisional decision

Mr H responded and queried, among other things, how the agreement can be reinstated when BMWFS won't accept his insurance policy, which was the issue from the outset.

Mr H also queried how he can be expected to pay back instalments from when the agreement was wrongfully terminated up until when it was reinstated.

Mr H went on to explain that he feels the outcome reached in my provisional decision is unfair. And that this was BMWFS's fault in the first place, but he is having to make repayments.

BMWFS didn't respond to my provisional decision before the deadline I set.

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'm not persuaded to change my opinion from the provisional decision I made.

I appreciate the further comments Mr H has made and I mean no discourtesy to him to summarise them as brief as I had above.

I've noted Mr H's comments and that he has queried how the agreement can be reinstated if BMWFS won't accept his insurance policy. But, as I explained in my provisional decision, BMWFS have now accepted they made a mistake in saying Mr H's insurance policy wasn't in line with their terms and conditions. And I have seen correspondence to show feedback was intended to be given to those that made the mistake. So, I don't think there is now an issue of Mr H's insurance policy not being accepted as BMWFS have accepted it is a valid policy in his name.

Turning my attention to the repayments I think Mr H should pay. I appreciate this is likely to be a large amount of money and as I explained in my provisional decision, I would expect BMWFS to work with Mr H here and agree a suitable repayment plan, should he need one.

But I'm satisfied what I set out in my provisional decision is fair and reasonable. Mr H continued to have use of the car during the time the agreement was wrongfully terminated and has told our service on occasions he has continued to use it. However, as I explained, I don't think BMWFS should charge interest on this amount as it was their mistake for the agreement being terminated and payments then not being made.

Turning my attention now to Mr H's final comments. I have the greatest sympathy for Mr H's circumstances. But my role is to consider what is fair and reasonable, and to remain impartial during my considerations. Also, at the heart of my decision is our service's underlying principle that, where a business has made a mistake, we should aim to direct them to put things right by trying to put the customer back into a position they would have been in had the mistake not occurred.

I accept BMWFS made an error here, which is why I have upheld this complaint and will direct them to pay a significant sum for the distress and inconvenience caused, as well as reinstate the agreement, with the aim to put Mr H back into the same position he would have been in, had the mistake not occurred.

In summary, I think BMWFS needs to do more in this instance to put things right. I'm satisfied the outcome reached is fair and reasonable in the circumstances.

My final decision

For the reasons I've explained, I uphold this complaint and I instruct BMW Financial Services(GB) Limited trading as ALPHERA Financial Services to put things right by doing the following:

- Reinstatement of the agreement Mr H held with BMWFS, as if it had never been terminated, and without charging Mr H any fees for this.
- If Mr H accepts the decision, set an appropriate repayment plan with him for the monthly repayments owed since the agreement was terminated up until when it is reinstated. No interest should be added to this amount.

- Pay Mr H £550 compensation for the distress and inconvenience caused by BMWFS.
- Remove any adverse information in relation to this specific complaint BMWFS may have made to Mr H's credit file.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 2 September 2024.

Ronesh Amin
Ombudsman