complaint

Mr H complains that BMW Financial Services (GB) Limited made a mistake in the mileage allowance in the finance agreement he entered into. He also disputes the charges applied since he tried to terminate the agreement.

background

Mr H says when he entered into an agreement with BMW he requested a mileage allowance of 25 to 30,000 miles per annum. The agreement only allowed 8,000 per annum. The amounts weren't due at termination so he shouldn't have to pay them. He also said he shouldn't have to pay interest charges. As the agreement was terminated, BMW couldn't serve him with a default notice for amounts it said were due.

Mr H argued that:-

- BMW hadn't produced the statement of needs which was crucial. There was an error in the registration plate in the original agreement. He said he wouldn't have signed an agreement with an allowance of 8,000 per annum so the copy he signed mustn't have had it on there.

- excess mileage only applied under consumer credit if the condition was poor. But BMW had accepted the car was in good order. He felt the charges didn't accrue prior to termination as they didn't arise until after the termination so weren't permitted by law. He said this service should uphold the letter of the law. It was up to the government and not this service to change the law.

- He felt the steps taken by BMW to send the debt to a collection agency and put a default on his credit file was abusive and bullying.

- BMW hadn't shown he signed any page of the agreement confirming the mileage of 8,000 nor a copy of the statement of needs which should've listed his mileage as 25 to 30,000 per annum.

- He suggested that he'd drop his claim for storage if BMW dropped its claim for excess mileage and cleared his credit file.

He tried to terminate the agreement in August 2016 but BMW wanted a form completed. He said he wrote again in late August telling them they had all they needed and that he'd charge for each day they didn't collect the car. He said he sent a second letter in early October as he hadn't heard from them.
BMW said the contract was clear the annual mileage allowance was 8,000. Mr H had signed the contract to confirm this. It said the contract clearly stated that excess mileage was payable and consumer credit law didn't affect this. It had told Mr H that he hadn't reached the half way point when he first tried to terminate and it was left that he would come back to them. They'd never received the letter he said he sent in late August re termination and storage charges. It didn't agree that consumer credit law prevented them from charging for excess mileage.

my provisional decision

I issued a provisional decision in this case. In summary I said it is difficult to be certain what might've been said at the time a contract is entered into. It is for this reason I needed to consider the evidence available. I'd seen the contract papers which showed an allowance of 8,000 and were signed by Mr H. I agreed he hadn't signed the actual page of the contract with the allowance but I'd seen the contract and the document numbers were the same on both parts. So I had no reason to think that the signed page wasn't attached to the previous page listing the mileage.

Mr H also signed a separate document to confirm the contract mileage was as agreed. I accepted this wasn't conclusive as it didn't say what mileage the contract reflected. Mr H says the contract was changed due to a registration plate error and he would never have signed one with this mileage figure. But Mr H hasn't produced written evidence of a contract showing a higher mileage.

I considered that I hadn't seen the demands and needs statement. But even if this did refer to a higher potential mileage figure that didn't mean that is what the parties agreed to include in the contract. Sometimes a customer may prefer to pay excess mileage as it defers the charges and they can't always be certain what mileage they might complete. By contrast if they adjust the mileage upwards the price also increases. In effect the consumer pays for a higher allowance whether or not they actually use it. So I don't think it makes any difference that I haven't seen the demands and needs statement.

On balance based on the evidence presented I thought it was reasonable to conclude that Mr H did sign a contract with a mileage allowance of 8,000 per annum pro rata.

Mr H says he wanted to terminate the contract in August 2016 and informed BMW he would charge for storage. There is no dispute he first contacted BMW re early termination in early August. But following a conversation with BMW he went off to check he'd made more than 50% of the required payments. I agree that Mr H wasn't required to complete any papers requested by BMW to confirm his voluntary termination but if he didn't do this he needed to be certain he'd clearly communicated his desire to do this.

I don't know why BMW didn't receive the follow up letter Mr H says he sent in late August 2016. But that isn't BMW's fault. In any event there were still further payments to make and Mr H could reasonably have chased BMW if he was keen to return the car as he had an interest in reducing his liability for insurance and other payments under the agreement as soon as was possible.

I though it was clear to both BMW and Mr H that he'd decided to terminate in early October. I thought BMW arranged to collect the car within a reasonable period after that. Given this I didn't need to consider whether Mr H was entitled to apply any charges for storage. But I did comment that he had no contractual right to charge for storage. Even if he was entitled to charge I didn't think it would be fair and reasonable to apply charges. I said that because I thought BMW responded and removed the car within a reasonable time of it becoming clear Mr H had exercised his right to terminate early.

Mr H argued that the excess mileage charges can't be applied under consumer legislation. But I didn't think the provisions Mr H relied on applied to sums that accrued prior to termination so it wouldn't exclude the excess mileage charges. I said that because Consumer Credit Act 1974, section 99(2), says: "*termination of an agreement…does not affect any liability under the agreement which has accrued before the termination.*"

Even if I was incorrect, Section 100(4) of the Act said that reasonable care must've been taken of the goods. I considered that in addition to damage beyond wear and tear, mileage is also a measure of what is reasonable care. Therefore, I didn't think that excess mileage charges are contrary to the Act and early termination didn't end that liability.

Even if that wasn't the case I didn't think it would be fair and reasonable to disregard them. The excess mileage allowance is imposed to protect the supplier from a decline in value of the car due to mileage which affects its condition and value. As Mr H completed significant excess miles it seems fair and reasonable that a charge should be levied. If this didn't happen it could allow consumers to set a low annual mileage allowance in the contract and then avoid paying any excess rightly due by an early voluntary termination which would be unfair.

Mr H also said excess charges can't have accrued before the contract was terminated because they weren't invoiced. But I didn't agree. It is true that the amount owed can't be calculated until after the contract was terminated. But that didn't mean the liability accrued after termination merely the calculation of the amount owed.

Mr H complained he'd been charged interest on the outstanding amount and the debt has been sent for collection and a default placed on his credit file. I noted the contract provides for interest on late payments but BMW have suspended interest charges at times. I thought it was reasonable to apply interest and enter a default as the amount was owed under the contract and remained unpaid.

Given my provisional conclusions I didn't need to consider Mr H's suggested settlement.

I didn't propose to uphold this complaint.

BMW said that it had nothing further to add.

Mr H didn't accept my provisional decision. He said that:-

- Under the legislation he was only liable to pay the amount by which one half of the total price exceeds the aggregate of the sums paid and the sums due in respect of the total price immediately before termination. He said the total price excluded penalties, damages for breach and compensation. He said the excess mileage was liquidated damages for breach of terms of the contract and fell into the excluded category of damages for breach. This meant that even if the excess mileage amount accrued before termination it was still excluded under section 100 of the Consumer Credit Act.

- He also referred to a Court of Appeal case about fair wear and tear and said that in a claim for damages it was up to the party claiming them to prove them. The court wouldn't speculate about the amount of damages that might be owed if there was proper evidence. He said BMW's condition report didn't mention any mechanical issues. If they wanted to argue unreasonable condition they needed to provide evidence not simply rely on excess mileage.

- The excess mileage charge was an arbitrary figure that didn't relate to the actual loss. He argued an engineers report would be needed to do this and demonstrate there was damage beyond what is considered reasonable care. He'd checked used car prices for cars of similar age and type and couldn't find a substantial difference in

value based on mileage. In fact he found one with higher mileage that was more expensive than one with much lower mileage.

- The contract clearly stated what the 50% figure was and this didn't include the excess mileage.

- The contract contained two termination clauses and the excess mileage was only referred to under one of them. This wasn't the clause he had used. He also felt having two clauses caused ambiguity. He argued that a court would construe the contract in the way most favourable to him.

- He also provided examples of the cost of different contracts with differing mileage allowances in terms of the total amount payable and also to show that there was almost no difference in the value of vehicles being sold when comparing mileage vs price.

- He also argued that the default marker was a breach of the Data Protection Act and was unlawful because the excess mileage wasn't payable and so the default marker was wrong. He referred to section 189 of the Consumer Credit Act which defined what was included in the total price and which expressly excluded any penalty, compensation or damages for breach. As the excess mileage was compensation/damages it was excluded.

my findings

I've reconsidered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

This service is independent and required to make a decision that is fair and reasonable to both parties. We are required to consider the law but do not have to follow it if this wouldn't produce an outcome that is fair and reasonable. It is not the purpose of this service to make decisions on points of law. That is a matter for the courts.

I have considered the arguments put forward by Mr H. I would comment that I don't believe that driving in excess of the assumed contractual mileage is a breach of contract. The contract doesn't prohibit Mr H from driving in excess of the assumed mileage but instead provides a mechanism for adjusting the price payable to reflect this. So I don't think his argument that the excess mileage is liquidated damages or compensation for breach and therefore outside of the Consumer Credit Act is correct.

I agree that there is more than one clause referring to termination in the contract. One doesn't explicitly refer to the excess mileage charge. However I note the excess mileage provision does expressly refer to early termination. So I think it is clear that the charges should apply however the contract is terminated. I note also that there are provisions stating the amount that would need to be paid to be 50% of the amount due. But I think that provision should be read in the light of the provisions re excess mileage.

I note Mr H's comments about the impact of mileage on value and that the excess allowance isn't a real measure of the impact on value. I would comment that Mr H didn't provide evidence of two identical cars with different mileage so I don't think this helpful.

With respect to the excess mileage charge this is the amount that he agreed to pay when he signed the contract. It isn't for this service to meddle with the commercial terms that parties agreed when they entered into the contract.

Even if all of that is wrong, I am not required to follow the law but to consider it. Having done that I still think it is fair and reasonable for Mr H to pay the excess mileage charges for the reasons I have already given in my first decision. It follows that I think it was reasonable for BMW to charge interest and to provide information to credit agencies showing that he was in default in making payments of amounts owed.

my final decision

I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 4 September 2017.

Colette Bewley
ombudsman