

complaint

Mr H complains the description of the vehicle he acquired through a hire purchase agreement provided by BMW Financial Services (GB) Limited ("BMW") was misrepresented. He says he was told the vehicle was new when it wasn't. He wants to reject the vehicle and cancel the agreement.

background

Mr H tells us he wanted to buy a present for his wife and made enquiries about a new vehicle. And he decided to acquire what he believed to be a new car which was already in stock rather than wait for a purpose built model. At the time of the agreement, January 2017, he says the car showed mileage of 70 miles. Some six months later - when the car had done about 6,000 miles - Mr H says a service warning light appeared. But on taking the car to a local dealership he discovered the car was two years old - having been manufactured in June 2015. Mr H feels the description of the vehicle as "*new*" was a misrepresentation and he wants to reject the vehicle and cancel the agreement.

BMW told us Mr H had been offered a new factory built vehicle but had chosen a stock vehicle - as the factory built model would've taken several months to deliver. And by choosing the stock vehicle Mr H had benefitted from a £3,000 deposit contribution - which wouldn't otherwise have applied. It said the car supplied hadn't been altered in anyway from factory to delivery. And that whether a vehicle was new or used wasn't determined by when it was built but by the date of first registration. It was unable to accept rejection of the vehicle.

Mr H wasn't satisfied with this outcome and complained to us.

I issued a provisional decision on this complaint on 31 January 2018 in which I found Mr H should be permitted to reject the vehicle. Since then BMW hasn't made any further comment or provided any more evidence. Mr H has sent me evidence which he says shows the vehicle was previously registered under a different registration in July 2015. I'll deal with this in my final decision set out below.

my findings

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

I understand why Mr H is upset and frustrated about the situation he now finds himself in. He was supplied with what he thought was a "*new*" car even though he realised it would have been in the saleroom for some period of time. So I can see discovering the vehicle was many months older than it seemed would have come as a shock.

As Mr H has specifically referred to a misrepresentation I need to explain what this means and how we look at such cases. A misrepresentation is a false statement of fact which induces a customer to act upon it. In this case the misrepresentation is said to be the car was described as new - and this induced Mr H to enter the agreement. And whilst it wasn't BMW which is said to have made the misrepresentation - S56 of the Consumer Credit Act 1974 makes BMW responsible for misrepresentations made by the credit broker. I don't decide if Section 56 applies but I have to take account of relevant law when I decide what is fair and reasonable. And Section 56 is relevant law. So if I thought there had been a misrepresentation by the credit broker I would think it fair and reasonable to ask BMW to put things right.

I'm not in a position to know what was discussed at the relevant time but on the evidence I've seen I accept Mr H wanted to buy his wife a new car. It was for a special occasion and I don't doubt he was particular as to what he required.

He had the option to choose a purpose built model but this would have meant waiting several months. And bearing in mind it was a present relating a specific event I can understand him not wishing to encounter delay. So I can see why the immediate availability of a vehicle including some of the additional specifications he required would be attractive. And given the vehicle was in the showroom, was described as new and showed only 70 miles - it may well have seemed a good alternative.

It now turns out the vehicle was manufactured in June 2015 - some 18 months prior to it being acquired by Mr H. And presumably had been standing around in that time. I'm aware the business believes the vehicle is "*new*" as it equates that to when it's first registered. But I'm not sure the reasonable person would be of the same mind. I think most would consider "*new*" to be something only recently made. And had it been alternatively described as unregistered or unused and its true age disclosed I doubt if Mr H would have proceeded with the deal. It seems to me if I accepted the definition the business suggests - there'd be nothing to prevent a car made any number of years earlier being described as new - provided it hadn't been registered.

And I've also taken account of what the paperwork says. The invoice is *headed* "*New Vehicle Invoice*". The contract is described as "*New Vehicle Contract*" and the proposal summary also refers to the vehicle as new. It seems to me it would have been very easy to make clear what "*new*" in this context meant. So I think the description of the vehicle was misrepresented. And I agree with the view of the investigator in this regard.

Since my provisional view I've seen further evidence which appears to show this vehicle was previously registered, if only briefly, in 2015 under a different registration. BMW hasn't commented - but based on the documents I've seen I think this is what *probably* happened. Mr H has mentioned he feels this shows any misrepresentation was deliberate as opposed to being by way of omission.

I understand this would increase Mr H's level of frustration and it might affect the level of damages awarded in a court. But we aren't a court and it's not within our remit to punish a business. Where I find a misrepresentation occurs, whether intentional or not, I try to return the consumer to the position he'd have been in but for the misrepresentation.

I'd already found there'd been a misrepresentation - but this additional evidence potentially affects the value of the vehicle with which Mr H was supplied. So it's probable not only was the price of the vehicle higher than it would have been if this earlier registration had been disclosed but so were his monthly payments. If this vehicle had been supplied as first registered in 2015 as opposed to 2017 - there's little doubt they'd have been lower. Given the difference in likely valuations which I've seen relating to a similar vehicle I think it would be fair for Mr H to receive back three monthly payments.

I'm also aware Mr H felt he got a poor part-exchange price for the vehicle he surrendered - but that's not a matter with which I can interfere. He's described the figures as being "*smoke-screened*" - by which I infer he means clouded in uncertainty. But the agreement clearly states the part-exchange price agreed. The part-exchange price offered is a commercial decision. I can't say in exercising its commercial judgment the business acted unfairly.

In summary, I believe this complaint should be upheld as the description of the vehicle was misrepresented both in terms of age and in regard to previous registration history.

my final decision

For the reasons given above my final decision is to uphold this complaint.

I intend to order BMW Financial Services (GB) Limited to:

1. Accept the rejection of the vehicle.
2. Cancel the agreement with nothing further owing.
3. Collect the car at no further cost to Mr H.
4. Refund the deposit. The sum of £3,000 may be deducted from the deposit before this calculation is made.
5. Refund three monthly payments.
6. Arrange to remove details of this agreement from Mr H's credit file.

8% simple interest should be added to items 4 and 5 from date of payment to date of settlement.

*If BMW Financial Services (GB) Limited considers that it's required by HM Revenue & Customs to take off income tax from that interest it should tell Mr H how much it's taken off. It should also give Mr H a certificate showing this if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 20 April 2018.

Stephen D. Ross
ombudsman