

Complaint

Mr H has complained about a hire-purchase agreement that he entered into with BMW Financial Services (GB) Limited ("BMW"). He's said the agreement was unaffordable for him as he didn't have a job at the time. He's also said that he wasn't told about the need to have fully comprehensive insurance.

Mr H is being assisted in his complaint by his father Mr H Sr.

Background and my provisional decision of 12 March 2021

In October 2018, Mr H entered into a hire purchase agreement for a used car. The entire purchase price of £12,865.00 was funded by a hire-purchase loan from BMW. The loan had an annual percentage rate ("APR") of 12.4% and this means that the total amount of £17,071.80 was due to be repaid in 60 monthly instalments of £284.53.

In March 2019, Mr H Sr, on behalf of Mr H, complained to BMW. He said the monthly payments for the agreement were affordable for Mr H as he didn't have a job at the time the finance was agreed. While BMW was looking into the complaint about the affordability of the agreement the car was involved in an accident. BMW terminated the agreement and served notice that it would take possession of the vehicle because Mr H only had third party insurance cover and the terms and conditions of the agreement required him to have fully comprehensive cover. Mr H said he wasn't informed of this requirement and this was added to his complaint.

BMW didn't uphold Mr H's complaint. It said that its checks confirmed that the finance was affordable and so it was reasonable to lend. It also said that Mr H had confirmed that he answered he had purchased fully comprehensive insurance on his demands and needs statement and so it didn't agree Mr H was misled about the level of insurance cover required. Mr H was dissatisfied at BMW's response and referred the complaint to our service.

Mr H's complaint was considered by one of our investigators. She didn't think the checks BMW carried out before providing the finance were reasonable and proportionate. She also thought reasonable and proportionate checks would have shown Mr H couldn't afford to make the monthly payments. But she didn't think that BMW misled Mr H about the level of insurance cover required for the vehicle. Overall this led to her concluding that BMW unfairly entered into the hire purchase agreement with Mr H and the complaint should be partially upheld. BMW disagreed with our investigator. So the complaint was passed to an ombudsman.

I attach my provisional decision of 12 March 2021, which forms part of this final decision and should be read in conjunction with it. In my provisional decision I explained why I intended to uphold Mr H's complaint. I invited both parties to provide any further comments they may have had, by 26 March 2021, before I reached a final decision.

Following this, both BMW and Mr H responded to confirm receipt of my provisional decision, which was accepted and also say that they had nothing further to add. It was also brought to my attention that the vehicle was stolen before BMW had a chance to take possession of it from Mr H.

My findings

I have reconsidered all the available evidence and arguments, including the responses to my provisional decision, to decide what is fair and reasonable in the circumstances of this complaint.

I set out in some detail why I intended to uphold Mr H's complaint in my provisional decision. In the absence of anything further to consider from either party, I see no reason to change my overall conclusions.

However, it has been brought to my attention that the vehicle was stolen prior to BMW taking possession of it and the insurance cover Mr H had wasn't enough to make a successful claim. I'm sorry to learn that the vehicle was stolen. But I've already found that BMW's failure to act fairly and reasonably towards Mr H led to him having the incorrect level of insurance cover in the first place.

I don't think the vehicle being stolen prior to BMW taking possession of it changes things in that respect. So while I'd expect Mr H to reasonably co-operate with any attempts BMW may make to locate and recover the vehicle, in terms of providing details regarding the theft and the crime reference number etc, I'm satisfied that the method of putting things right proposed in my provisional decision of 12 March 2021, remains fair and reasonable in all the circumstances of the case. And that's what I'm telling BMW to do.

So overall and having carefully considered everything, I'm upholding Mr H's complaint. BMW should put things right for Mr H in the way I've set out below.

Fair compensation – what BMW needs to do to put things right for Mr H

I've thought about what amounts to fair compensation in this case. Where I find that a business has done something wrong, I'd normally expect that business – in so far as is reasonably practicable – to put the consumer in the position they *would be in now* if that wrong hadn't taken place. In essence, in this case, this would mean BMW putting Mr H in the position she'd now be in if she hadn't been sold the car in the first place.

But when it comes to complaints about irresponsible lending this isn't straightforward. Mr H was given the car in question and it has since been repossessed. So, in these circumstances, I can't undo what's already been done. And it's simply not possible to put Mr H back in the position he would be in if he hadn't been sold the car in the first place.

As this is the case, I have to think about some other way of putting things right in a fair and reasonable way bearing in mind all the circumstances of the case. Our website sets out the main things we consider when looking at putting things right in cases where we conclude that a lender did something wrong in irresponsible/unaffordable lending complaints.

We typically say the borrower should repay the amount lent and the lender refunds any interest, fees and charges the borrower paid. This is because the borrower will have had the benefit of the credit they were provided with and it's usually the extra paid over and above this – any interest fees and charges – that will have caused the consumer to lose out.

So, in this case, this would mean Mr H paying back the £12,850.00 he was originally lent. But I don't think that a refund of the interest fees and charges is appropriate here. The car was repossessed soon after the agreement started and a settlement on this basis would

mean Mr H paying for the full amount lent for a car he had for a few months, without having it at the end.

I've therefore given careful thought to how else it might be fair and reasonable to put things right for Mr H bearing in mind he was provided with a hire-purchase agreement, rather than cash here. In circumstances where a borrower was provided with finance to purchase a car they were unable to afford to make the payments for, it's usually appropriate for the car to be returned and the agreement ended. I've already explained that BMW repossessed the vehicle. So clearly there is no need for Mr H to now return the car.

Mr F did have use of the car for a period of time. And I think that it's fair and reasonable for my award to reflect this. There isn't an exact formula for working out fair usage. But in deciding what's fair and reasonable, in the circumstances, I've thought about the amount of interest charged on the agreement, Mr H's usage of the car and what sort of costs he might have incurred to stay mobile if he didn't have this car.

In doing so, I'm mindful that although Mr H didn't have the car all that long there's likely to have been a significant depreciation in value. The vehicle was involved in an accident and as Mr H didn't have comprehensive insurance his policy didn't cover the damage to the car. There has been some suggestion that there was extensive damage and an insurance company may well have considered the vehicle a total loss. But it's been brought to my attention that the vehicle was stolen before BMW was able to recover it. I've seen sufficient evidence demonstrating that the theft was reported to the police but the level of cover Mr H had meant that he wasn't able to make an insurance claim.

Our investigator thought that Mr H repaying a total amount equivalent to the market value of the vehicle around the time it was involved in the accident fairly reflected his usage as well as the reduction in value during the period he had the vehicle. I've given careful thought to whether Mr H's failure to obtain comprehensive insurance, his accident and the subsequent theft of the vehicle, which his insurer failed to pay out for, were new intervening acts that should limit BMW's liability and increase the amount Mr H needs to pay to cover his usage.

In considering this matter I'm mindful that I've found BMW acted unfairly or reasonably towards Mr H in some other way by failing to adequately explain maintaining comprehensive insurance cover was a requirement of the hire purchase agreement. I think that had BMW acted fairly and reasonably in relation to this matter, Mr H would have obtained the correct insurance cover and the damage from the accident and/or the loss from any theft might have been covered, or he simply wouldn't have bought the vehicle in the first place.

I say this because his circumstances might have prevented him from obtaining comprehensive insurance cover on this vehicle at all, or he might have only been able to obtain it on terms he simply wouldn't have been able to accept – Mr H was already paying around £250 a month for the third-party insurance cover he did obtain.

So I'm satisfied that Mr H not having the right level of cover to make an insurance claim was a reasonably foreseeable consequence of BMW's failure to act fairly and reasonably towards him when entering into the hire purchase agreement. As this is the case, I don't think that Mr H's accident, the subsequent theft of the vehicle and his inability to make an insurance claim for these events, because he didn't have the correct level of cover were new intervening acts that should limit BMW's liability here. And I don't think that this should increase the amount Mr H pays to reflect his usage.

Bearing all of this in mind, I think that it would be fair and reasonable for BMW to waive all outstanding amounts on Mr H's balance apart from the £569.06 he was in arrears by at the time the vehicle was repossessed. I do realise that requiring Mr H to repay this will result in him paying a little more for usage than normal. But given everything that has happened and all the circumstances here, I'm satisfied that this doesn't produce an unfair outcome here.

All of this means that I find it is fair and reasonable in all the circumstances of Mr H's case for BMW to put things right in the following way:

- reduce the outstanding balance on Mr H's account to the £569.06 he was in arrears by at the time BMW took possession of the vehicle;
- amend Mr H's credit file so that the account reflects the amount owing once BMW makes the required adjustments.

My final decision

For the reasons set out above and in my provisional decision of 12 March 2021, I'm upholding Mr H's complaint. BMW Financial Services (GB) Limited should put things right in the way I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 25 April 2021.

Jeshen Narayanan
Ombudsman

COPY OF PROVISIONAL DECISION

Complaint

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Background

In October 2018, Mr H entered into a hire purchase agreement for a used car. The entire purchase price of £12,865.00 was funded by a hire-purchase loan from BMW. The loan had an annual percentage rate ("APR") of 12.4% and this means that the total amount of £17,071.80 was due to be repaid in 60 monthly instalments of £284.53.

In March 2019, Mr H Sr, on behalf of Mr H, complained to BMW. He said the monthly payments for the agreement were affordable for Mr H as he didn't have a job at the time the finance was agreed. While BMW was looking into the complaint about the affordability of the agreement the car was involved in an accident. BMW terminated the agreement and took possession of the vehicle because Mr H only had third party insurance cover and the terms and conditions of the agreement required him to have fully comprehensive cover. Mr H said he wasn't informed of this requirement and this was added to his complaint.

BMW didn't uphold Mr H's complaint. It said that its checks confirmed that the finance was affordable and so it was reasonable to lend. It also said that Mr H had confirmed that he answered he had purchased fully comprehensive insurance on his demands and needs statement and so it didn't agree Mr H was misled about the level of insurance cover required. Mr H was dissatisfied at BMW's response and referred the complaint to our service.

Mr H's complaint was considered by one of our investigators. She didn't think the checks BMW carried out before providing the finance were reasonable and proportionate. She also thought reasonable and proportionate checks would have shown Mr H couldn't afford to make the monthly payments. But she didn't think that BMW misled Mr H about the level of insurance cover required for the vehicle. Overall this led to her concluding that BMW unfairly entered into the hire purchase agreement with Mr H and the complaint should be partially upheld. BMW disagreed with our investigator. So the complaint was passed to an ombudsman for a final decision.

My provisional findings

I've considered all the available evidence and arguments provided from the outset in order to decide what's fair and reasonable in the circumstances of this complaint.

Taking into account the relevant rules, guidance and law, and considering the main reason for Mr H's complaint, I think there are two overarching questions that I needed to consider in order to decide what is fair and reasonable in the circumstances of this complaint. These questions are:

- Did BMW complete reasonable and proportionate checks to satisfy itself that Mr H would be able to make his repayments in a sustainable way?
 - If so, was a fair lending decision made?
 - If not, would those checks have shown that Mr H would've been able to do so?
- Did BMW act unfairly or unreasonably towards Mr H in some other way?

If I determine that BMW did not act fairly and reasonably in its dealings with Mr H and that he has lost out as a result, I'll go on to consider what's fair compensation.

I'll proceed to consider the first of the overarching questions.

Did BMW complete reasonable and proportionate checks to satisfy itself that Mr H would be able to make his repayments in a sustainable way?

The regulations in place when BMW lent to Mr H required it to carry out a reasonable assessment of whether Mr H could afford to make his repayments in a sustainable manner. This is sometimes referred to as an "affordability assessment" or "affordability check".

Any affordability checks have to be "borrower-focused" – so BMW had to think about whether repaying the loan sustainably would cause difficulties or adverse consequences *for Mr H*. In other words, it wasn't enough for BMW to think only about the likelihood that it would get its money back without considering the impact of repayment on Mr H himself.

Checks also had to be "proportionate" to the specific circumstances of the loan application. In general, what constitutes a proportionate affordability check will be dependent upon a number of factors including – but not limited to – the particular circumstances of the borrower (e.g. their financial history, current situation and outlook, and any indications of vulnerability or financial difficulty) and the amount / type / cost of credit they are seeking. Even for the same customer, a proportionate check could look different for different loan applications.

In light of this, I think that a reasonable and proportionate check generally ought to have been *more* thorough:

- the *lower* a customer's income (reflecting that it could be more difficult to repay a given loan amount from a lower level of income);
- the *higher* the amount due to be repaid (reflecting that it could be more difficult to meet a higher repayment from a particular level of income);
- the *longer* the term of the loan (reflecting the fact that the total cost of the credit is likely to be greater and the customer is required to make payments for a longer period); and

There may also be other factors which could influence how detailed a proportionate check should be for a given loan application – including (but not limited to) any indications of borrower vulnerability, any foreseeable changes in future circumstances, or any substantial time gaps between loans. I've thought about all the relevant factors in this case.

BMW's checks

BMW's decision not to uphold Mr H's complaint appears to be based on Mr H's application being auto accepted. BMW says that factors such as declared employment status, residential status, age, the monthly payment and credit checks all contributed to the decision to auto-accept the application. I'd like to focus on some of these factors.

I'd like to start with the employment information that BMW had for Mr H. It appears there were two employers listed for Mr H at the time of the application. Both had him listed as a mechanic for different companies. The first said he'd been with the employer for 6 months but had been in his occupation for 4 years. The second said Mr H had been employed as a mechanic with the same employer for 8 years. Neither record appears to indicate Mr H's income was captured.

Equally, Mr H was only 19 years old at the time and had supplied other information confirming this was the case. So I find it highly unlikely that he declared that he'd been in occupation as a mechanic since he was 11 or 15. Our investigator asked BMW for an explanation on these discrepancies. But it

simply says that they didn't result in Mr H being auto accepted for finance he wouldn't been auto accepted for anyway. But given the importance BMW says employment details played in its decision to auto accept the application, I consider it fair and reasonable to have expected it to have queried this significant discrepancy before proceeding with this application.

I've also thought about the reliance BMW appears to have placed on any credit check carried out in this case. While a credit check can often provide some useful information on an individual's ability to maintain payments to previous credit commitments, it was always likely to have been of limited use in these circumstances. I say this because a 'clean' credit file is unlikely to have said much about Mr H bearing in mind he was 19 and so only really able to apply for credit in the year preceding this application. So he wouldn't have had a chance to demonstrate the stellar repayment record BMW's auto acceptance appears to suggest he had.

More importantly I'm unsure what Mr H having no other credit commitments, in these circumstances, could possibly have told BMW about Mr H's ability to repay just over £17,000.00 at approaching £300 a month. Mr H might not have had to make payments to existing credit commitments. But this doesn't in itself mean he had the disposable income to make the repayments to this agreement as and when they fell due. BMW almost presents it as fact that Mr H being a young adult living with parents and having no existing credit commitments means the agreement was affordable. But I disagree and I don't understand how it could possibly have reached this conclusion – notwithstanding the application having been auto accepted – without having any record of Mr H's monthly income and the discrepancies over his employment.

In the absence of anything else to indicate that BMW took any further steps to ascertain Mr H's monthly income or regular expenditure, I find that BMW did not carry out reasonable and proportionate checks before reaching the conclusion the agreement was affordable for Mr H.

Would reasonable and proportionate checks more likely than not have shown that Mr H was able to sustainably make the repayments to this agreement?

As proportionate checks weren't carried out before this agreement was provided, I can't say for sure what they would've shown. So I need to decide whether it is more likely than not that a proportionate check would have told BMW that it was unfair to enter into this agreement with Mr H.

Mr H has provided us with evidence of his financial circumstances at the time he applied for the finance. Of course, I accept different checks might show different things. And just because something shows up in the information Mr H has provided, it doesn't mean it would've shown up in any checks BMW might've carried out. But in the absence of anything else from BMW showing what this information would have shown, I think it's perfectly fair and reasonable to place considerable weight on it as an indication of what Mr H's financial circumstances were more likely than not to have been at the time.

I've seen what Mr H says about not having been employed at the time of the application. But I think that he was. And the information provided suggests that he lost his job around the time the agreement was terminated. In any event, Mr H's bank statements show that he was receiving a monthly salary of around £700. It's clear that the monthly payments for the finance alone would have swallowed up a significant portion of Mr H's monthly income.

BMW would also have been aware that Mr H's age and the car he was sold meant that he'd also be faced with a significant outlay for insurance. Although BMW wouldn't have known exactly how much Mr H's insurance premium would be, it would have known the insurance group of the vehicle being financed and that it was a condition of the finance agreement to as well as a legal requirement for Mr H to ensure the vehicle was insured. And when the running costs of the vehicle are added to the finance and insurance costs, it's clear that Mr H didn't have enough in funds to meet the cost of this vehicle in a sustainable manner.

So in these circumstances, I'm intending to issue a final decision which finds that reasonable and proportionate checks would more likely than not have alerted BMW to the fact that Mr H wasn't able to make the payments to this agreement without experiencing financial difficulty and/or borrowing further. And so it follows that he wasn't in any sort of financial position to sustainably make the repayments to this agreement.

Did BMW act unfairly or unreasonably towards Mr H in some other way?

Mr H has said he wasn't told it was a requirement of the finance agreement to have fully comprehensive cover. He's also said he arranged his insurance cover in the dealership so it (and BMW as a result) should have known that he only had third-party insurance cover. We've been able to get hold of a recording of the call Mr H has referred to from his insurer. I've listened to it and it's clear that call was placed from the dealership. There is clearly someone (likely to be the person selling the vehicle to Mr H) in the background providing details on the car. But it's also clear that Mr H was amending an existing policy, providing third-party cover, which he had for his existing vehicle, rather than arranging a new policy.

As a result, there isn't too much of a discussion about the level of cover. Third-party cover is mentioned but only once and fleetingly. In these circumstances, I can't reasonably conclude the salesperson should have realised Mr H was arranging a policy with only third-party cover. So I don't have enough here to reasonably conclude the salesperson ought reasonably to have realised Mr H had purchased insurance with a level of cover which would lead to him breaching the terms and conditions of the hire-purchase agreement.

That said, even though there isn't enough here for me to say that BMW's representative knowingly allowed Mr H to breach the terms and conditions of the hire purchase agreement, this isn't the end of the matter. I say this because I'm mindful that the Consumer Credit Sourcebook ("CONC") includes provisions regarding the information a lender (or its agent on its behalf) is required to provide to a borrower and how it needs to be presented.

In October 2018, when BMW provided this agreement to Mr H, CONC 4.2.5R said:

"Pre-contractual adequate explanations

(1) Before making a regulated credit agreement the firm must:

(a) provide the customer with an adequate explanation of the matters referred to in (2) in order to place the customer in a position to assess whether the agreement is adapted to the customer's needs and financial situation;

(b) advise the customer:

- (i) to consider the information which is required to be disclosed under section 55 of the CCA; and*
- (ii) where the information is disclosed in person, that the customer is able to take it away;*

(c) provide the customer with an opportunity to ask questions about the agreement; and

(d) advise the customer how to ask the firm for further information and explanation.

[Note: section 55A(1) of CCA]

(2) The matters referred to in (1)(a) are:

- (a) the features of the agreement which may make the credit to be provided under the agreement unsuitable for particular types of use;*

- (b) *how much the customer will have to pay periodically and, where the amount can be determined, in total under the agreement;*
 - (c) ***the features of the agreement which may operate in a manner which would have a significant adverse effect on the customer in a way which the customer is unlikely to foresee; [my emphasis]***
 - (d) *the principal consequences for the customer arising from a failure to make payments under the agreement at the times required by the agreement including, where applicable and depending upon the type and amount of credit and the circumstances of the customer:*
 - (i) *the total cost of the debt growing;*
 - (ii) *incurring any default charges or interest for late or missed payment or under-payment;*
 - (iii) *impaired credit rating and its effect on future access to or cost of credit;*
 - (iv) *legal proceedings, including reference to charging orders (or, in Scotland, inhibitions), and to the associated costs of such proceedings;*
 - (v) *repossession of the customer's home or other property; and*
 - (vi) *where an article is taken in pawn, that the article might be sold, if not redeemed;*
and
 - (e) *the effect of the exercise of any right to withdraw from the agreement and how and when this right may be exercised.*
[Note: section 55A(2) of CCA and paragraph 3.13 of ILG]
- (3) *The adequate explanation and advice in (1) may be given orally or in writing, except where (4) applies.*
[Note: section 55A(3) of CCA]
- (4) *Where the matters in (2)(a), (b) or (e) are given orally or to the customer in person, the explanation of the matters in (2)(c) and (d) and the advice required in (1)(b) must be given orally to the customer.*
[Note: section 55A(4) of CCA]

BMW is relying on section 5(b) of the terms and conditions of Mr H's agreement which said:

"you must pay for and maintain comprehensive insurance cover for the Vehicle's full value against all insurable risks (including fire, theft, damage, loss in transit, seizure and the cost of repatriation if the vehicle is taken outside the U.K.). You must inform the insurer of our interest in the Vehicle. You must produce the policy to us if we request this".

It has also referred to a 'Demands and Needs' form completed by the sales advisor during the application process. On this form the question *'Do you protect your car with fully comprehensive insurance?'* is asked and a 'yes' is selected in the box next to it. As I understand it, BMW argues the yes answer to this question means that it met its obligations in a way that was fair and reasonable.

I've carefully thought about what BMW has provided. The first thing to say is that it isn't in dispute that it was a requirement of the terms and conditions of Mr H's agreement for him to have had comprehensive insurance. And it also isn't in dispute that Mr H driving the vehicle without having obtained comprehensive insurance permitted BMW to end the agreement and take possession of the vehicle. But the question I have to consider here is whether BMW acted fairly and reasonably by meeting its obligation to adequately explain the need to purchase comprehensive insurance.

I'm mindful here that BMW knew that Mr H was only 19 years old. It would also have known the insurance group of the vehicle being sold. I'm not saying this means it would have known whether Mr H could get the comprehensive cover required and on what terms. But I don't think it's unfair to say that bearing in mind what BMW knew, it ought reasonably to have been apparent that Mr H might find

it more difficult to obtain the comprehensive cover required than the average purchaser; and even if he was able to get such cover it was likely to be on terms where he'd have to pay more.

I've also already mentioned BMW's reliance on Mr H's clear credit file and lack of existing commitments in terms of his ability to afford the monthly payments. But this also means BMW will have been aware of Mr H's lack of previous experience taking out financial products.

Bearing all of this in mind, I think BMW ought to have realised that section 5 and section 7 (which set out the consequences of breaching section 5) of the terms and conditions were likely to have been of greater significance to Mr H. And, in my view, in order to act fairly and reasonably here, BMW will have needed to have done more to adequately explain section 5 given it was a feature of the agreement which may have operated in a way which would have a significant adverse effect on Mr H, which he is unlikely to have foreseen.

I've considered the documentation BMW has referred to and whether it acted fairly and reasonably towards Mr H in this context.

Section 5 of the terms and conditions is on page 5 of Mr H's agreement. This is three pages after where Mr H was asked to sign to confirm his acceptance of the terms and conditions. I'm not saying that this means the terms and conditions were unclear. But I've already explained how BMW ought to have realised how important this information was given what it knew about Mr H.

So, in these circumstances, I think BMW ought to have taken greater care to highlight a section which it ought reasonably to have realised could have had a significant adverse impact on Mr H, much more prominently in order for it to have provided an adequate explanation of this matter and for it to have acted fairly and reasonably. And this means that I don't think BMW's provision of the terms and conditions in itself meant that it adequately explained, in a fair and reasonable way, that failing to obtain comprehensive insurance could lead to it taking possession of the vehicle.

I don't think that the Demands and Needs form BMW has referred to adds too much here either. It's clear that this form was produced and completed with the purpose of assessing Mr H's suitability for any additional insurance products BMW's agent could sell to him. It wasn't an explanatory document contained any explanations about the hire purchase agreement Mr H was about to sign and it didn't even refer to it at all.

Equally, while the Demands and Needs form does appear to record that Mr H answered yes to the *do you protect your car with fully comprehensive insurance?* question, it's not entirely clear whether Mr H is being asked about the level of cover he usually purchases, or the cover he will purchase for the vehicle he's being sold. In any event, what is clear is that this document doesn't state purchasing comprehensive insurance is a condition of the hire purchase agreement Mr H is entering in to, or explain the implications if he fails to do this.

Furthermore, BMW provided all of this documentation to Mr H in person. So I think it's fair and reasonable for BMW's agent to have told Mr H about the need to purchase comprehensive insurance cover. I haven't seen anything to suggest that BMW provided Mr H with an oral explanation of section 5(2), which I've already explained why, in my view, was a feature of the agreement which may have operated in a manner which would have a significant adverse effect on Mr H in a way which he was unlikely to foresee. And BMW hasn't even suggested that such an oral explanation took place either.

Bearing all of this in mind and having considered everything, I'm currently intending to find that BMW didn't adequately explain, in a fair and reasonable way, a feature of the agreement which may have operated in a way which would have a significant adverse effect on Mr H, which he is unlikely to have foreseen. And as this is the case, I'm intending to issue a final decision which finds BMW did act unfairly or unreasonably towards Mr H in some other way.

Conclusions

Overall and having thought about the two overarching questions, set out on page 2 of this decision, I'm intending to issue a final decision which finds that:

- BMW *didn't* complete reasonable and proportionate checks on Mr H to satisfy itself that he was able to make the payments to this agreement;
- reasonable and proportionate checks *would* more likely than not have shown Mr H was unable to sustainably make the repayments to this hire purchase agreement;
- BMW *did* act unfairly or unreasonably in some other way towards Mr H;

The above findings leave me intending to reach the overall conclusion that BMW unfairly and unreasonably entered into this hire purchase agreement with Mr H.

Did Mr H lose out as a result of BMW's shortcomings?

I've considered whether Mr H suffered adverse consequences as a result of BMW unfairly entering into this hire purchase agreement with him. The agreement was terminated in April 2019 and BMW took possession of the vehicle at this point. Given Mr H will have made payments, still had an amount owing and was left without a vehicle – as a result of the vehicle being repossessed - I think Mr H lost out.

So overall and having thought about everything provided and what's fair and reasonable in all the circumstances of this case, I find that Mr H lost out because BMW unfairly entered into a hire purchase agreement, which it ought to have realised was unaffordable for him, with him. And this means I think that BMW needs to put things right.

Fair compensation – what I think BMW needs to do to put things right for Mr H

I've thought about what amounts to fair compensation in this case. Where I find that a business has done something wrong, I'd normally expect that business – in so far as is reasonably practicable – to put the consumer in the position they *would be in now* if that wrong hadn't taken place. In essence, in this case, this would mean BMW putting Mr H in the position she'd now be in if she hadn't been sold the car in the first place.

But when it comes to complaints about irresponsible lending this isn't straightforward. Mr H was given the car in question and it has since been repossessed. So, in these circumstances, I can't undo what's already been done. And it's simply not possible to put Mr H back in the position he would be in if he hadn't been sold the car in the first place.

As this is the case, I have to think about some other way of putting things right in a fair and reasonable way bearing in mind all the circumstances of the case. Our website sets out the main things we consider when looking at putting things right in cases where we conclude that a lender did something wrong in irresponsible/unaffordable lending complaints.

We typically say the borrower should repay the amount lent and the lender refunds any interest, fees and charges the borrower paid. This is because the borrower will have had the benefit of the credit they were provided with and it's usually the extra paid over and above this – any interest fees and charges – that will have caused the consumer to lose out.

So, in this case, this would mean Mr H paying back the £12,850.00 he was originally lent. But I don't think that a refund of the interest fees and charges is appropriate here. The car was repossessed soon after the agreement started and a settlement on this basis would mean Mr H paying for the full amount lent for a car he had for a few months, without having it at the end.

I've therefore given careful thought to how else it might be fair and reasonable to put things right for Mr H bearing in mind he was provided with a hire-purchase agreement, rather than cash here. In circumstances where a borrower was provided with finance to purchase a car they were unable to afford to make the payments for, it's usually appropriate for the car to be returned and the agreement ended. I've already explained that BMW repossessed the vehicle. So clearly there is no need for Mr H to now return the car.

Mr F did have use of the car for a period of time. And I think that it's fair and reasonable for my award to reflect this. There isn't an exact formula for working out fair usage. But in deciding what's fair and reasonable, in the circumstances, I've thought about the amount of interest charged on the agreement, Mr H's usage of the car and what sort of costs he might have incurred to stay mobile if he didn't have this car.

In doing so, I'm mindful that although Mr H didn't have the car all that long there's likely to have been a significant depreciation in value. The vehicle was involved in an accident and as Mr H didn't have comprehensive insurance his policy didn't cover the damage to the car. There has been some suggestion that there was extensive damage and an insurance company may well have considered the vehicle a total loss. But this hasn't been confirmed and I understand that BMW took possession of the vehicle.

Our investigator thought that Mr H repaying a total amount equivalent to the market value of the vehicle around the time it was involved in the accident fairly reflected his usage as well as the reduction in value during the period he had the vehicle. I've given careful thought to whether Mr H's accident and his failure to obtain comprehensive insurance which meant his insurer failed to pay out, were new intervening acts that should limit BMW's liability and increase the amount Mr H needs to pay to cover his usage.

In considering this matter I'm mindful that I've found BMW acted unfairly or reasonably towards Mr H in some other way by failing to adequately explain maintaining comprehensive insurance cover was a requirement of the hire purchase agreement. I think that had BMW acted fairly and reasonably in relation to this matter, Mr H would have obtained the correct insurance cover and the damage from the accident might have been covered, or he simply wouldn't have bought the vehicle in the first place. I say this because his circumstances might have prevented him from obtaining comprehensive insurance cover on this vehicle at all, or he might have only be able to obtain it on terms he simply wouldn't have been able to accept – Mr H paid around £250 a month for the third-party insurance cover he did obtain.

So I'm satisfied that Mr H not having the right level of cover to make an insurance claim was a reasonably foreseeable consequence of BMW's failure to act fairly and reasonably towards him when entering into the hire purchase agreement. As this is the case, I don't think that Mr H's accident and his inability to make an insurance claim because he didn't have the correct level of cover were new intervening acts that should limit BMW's liability here and should increase the amount Mr H pays to reflect his usage.

Bearing all of this in mind, I think that it would be fair and reasonable for BMW to waive all outstanding amounts on Mr H's balance apart from the £569.06 he was in arrears by at the time the vehicle was repossessed. I do realise that requiring Mr H to repay this will result in him paying a little more for usage than normal. But given everything that has happened and all the circumstances here, I don't think that this produces an unfair outcome.

Mr H's credit file

Generally speaking, I'd expect a lender to remove any adverse information recorded on a consumer's credit file as a result of the interest and charges on any credit they shouldn't have been given. But I'm mindful that Mr H will be left with an outstanding balance once all adjustments have been made and I think that his credit file show this.

So, at this stage and having carefully thought about everything, I'm intending to say that BMW should amend Mr H's credit file to reflect the amount that will now be owing once all adjustments have been made to his account.

All of this means I'm intending to issue a final decision telling BMW that it would be fair and reasonable in all the circumstances of the case to put things right in the following way:

- reduce the outstanding balance on Mr H's account to the £569.06 he was in arrears by at the time BMW took possession of the vehicle;
- amend Mr H's credit file so that the account reflects the amount owing once BMW makes the required adjustments.

My provisional decision

For the reasons I've explained, I'm intending to uphold Mr H's complaint and tell BMW Financial Services (GB) Limited that it needs to put things right in the way that I've set out above.

So unless the comments and evidence I get by 26 March 2021 change my mind, that's what I'll tell BMW to do in my final decision.

Jeshen Narayanan
Ombudsman