

complaint

Mr S complains that a used car he acquired with finance provided by BMW Financial Services (GB) Limited (trading as Alphera Financial Services) (BMWFS) was of unsatisfactory quality when it was supplied.

background

The background to this complaint and my provisional findings are set out in my provisional decision dated 8 June 2020. A copy of this is attached and it forms part of my final decision.

In my provisional decision I explained what I'd decided about this complaint and what I intended to do – subject to any further submissions from the parties. Both parties have responded and accepted my provisional findings.

my findings

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

In light of the responses received from Mr S and BMWFS, I see no reasonable grounds to depart from my provisional conclusions.

my final decision

My decision is I uphold this complaint and require BMW Financial Services (GB) Limited (trading as Alphera Financial Services) to:-

1. end the finance agreement and arrange to take the vehicle back at no cost to Mr S;
2. refund the £500 deposit paid under the HPA;
3. refund 20% of each monthly instalment paid by Mr S towards the finance;
4. pay interest on the refunds referred to above at 8% simple a year from the date of payment to the date of settlement;
5. pay Mr S £150 compensation for distress and inconvenience; and
6. remove any adverse information recorded about the finance from his credit file.

If BMWFS considers that it is required by HM Revenue & Customs to withhold income tax from that interest, it should tell Mr S how much it's taken off. It should also give Mr S a tax deduction certificate 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 S to accept or reject my decision before 27 September 2020.

Claire Jackson
ombudsman

copy provisional decision

complaint

Mr S complains that a used car he acquired with finance provided by BMW Financial Services (GB) Limited (trading as Alphera Financial Services) (BMWFS) was of unsatisfactory quality when it was supplied.

background

Mr S took out a hire purchase agreement (HPA) with BMWFS on 16 April 2018 for this eight year old car with about 74,000 miles on the clock. The cash price was £4,250. A week after collecting the car Mr S had problems with central locking and the gearbox - he found the car jerked intermittently in reverse gear. The car has an automatic gearbox and Mr S was a new driver and used to a manual gearbox so he thought he might just need to get used to the car but things didn't improve.

He took the car to a local garage in June 2018 for diagnostic tests but these didn't identify a fault. The problems persisted and Mr S got in touch with the dealer that supplied the car (that I'll call M) in July 2018. M suggested Mr S should contact the company that provided a warranty he got with the car. Mr S did that but found he had to pay 40% of the cost of repairs under the warranty terms. He didn't think he should be expected to contribute towards this sort of repair - so soon after getting the car - so he complained to BMWFS.

BMWFS asked for evidence that a fault was present at the point of supply - and closed the complaint when Mr S didn't supply more information. Mr S says he did send additional evidence - to show that checks had indicated the gearbox needed replacing and repairs would cost nearly £3,000 - but he couldn't provide everything BMWFS wanted as costly investigations (that he couldn't afford) would be needed to diagnose the exact fault.

One of our investigators looked at the evidence. She was satisfied the car showed signs of a gearbox problem within six months of supply - and that's presumed to have been present at the outset under the Consumer Rights Act 2015 (CRA). She asked BMWFS if it would pay for an independent expert to inspect the car and it agreed. The expert provided his report in December 2019 - when the car had travelled just over 80,000 miles. He confirmed there was an internal transmission fault.

Our investigator recommends the complaint should be upheld. She thinks it is more likely than not the fault identified by the expert was present when Mr S got the car - as he reported similar gearbox problems very early on. She acknowledges the car was eight years old, and had a relatively high mileage, when it was supplied. But, she notes the expert says cars of this age and mileage wouldn't usually have this sort of problem and she's not persuaded it's likely to be wear and tear related. She doesn't think it's likely to be due to Mr S's "driving style" either - as he had problems with the gearbox so soon. And she's satisfied the relevant manufacturer has acknowledged there's judder at times with these gearboxes - and carried out modifications on newer models to fix this.

On balance overall, she thinks this car was probably of unsatisfactory quality when Mr S got it. To put things right, she thinks BMWFS should take the car back, cancel the finance and refund the £500 deposit. She considers the use Mr S had of the car was probably impaired as a result of this fault - as he only covered about 6,000 miles in the car over a year and eight months. She says BMWFS should refund monthly payments made towards the finance from November 2018 in full, in recognition of that - and pay interest on the refunds. She thinks Mr S is likely to have experienced distress and inconvenience as a result of being supplied with this faulty car and recommends BMWFS should pay £150 compensation to reflect that and remove any adverse information from his credit file.

BMWFS didn't agree and said (in summary)

- the expert considered the fault wouldn't have been present at the point of supply and this should be taken into account;
- even if the issue was present at the outset, on the balance of probabilities as our investigator suggests, it's not unreasonable to expect this in an eight year old car with about 75,000 miles on the clock that cost just over £4,000; and
- this car travelled more than 6,000 miles after supply which shows it was of satisfactory quality when Mr S got it.

Our investigator didn't change her mind. She's satisfied the expert said this sort of issue wouldn't be usual for a car like this. She's not persuaded it would be fair to hold Mr S responsible for a fault that occurred so soon after supply - even in a car of this price, age and mileage. She's seen no evidence to show Mr S was told the car had a fault at the outset - or that the price was reduced on account of this. And she thinks he's unlikely to have accepted the car if he'd known about the gearbox fault at the outset.

BMWFS asked for the matter to be referred to an ombudsman for review.

my provisional findings

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

BMWFS supplied this car under a finance agreement and it was required to ensure the car was of satisfactory quality when Mr S got it, under the CRA. The level of quality that's to be considered satisfactory will vary according to individual circumstances but it's generally reasonable to take the age, mileage and price paid for a vehicle into account.

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This car was eight years old and cost over £4,000 with about 74,000 miles on the clock at the point of supply. As such, I don't think Mr S could reasonably expect it to meet the same standards as a new vehicle as some parts were more than likely worn and would need to be repaired or replaced sooner or later.

There's no dispute that Mr S reported issues with the gearbox very early on. BMWFS arranged for an expert to check and see if the car had a fault. I am satisfied the expert seems to be independent and have relevant qualifications. I can see he inspected the car and took it on a road test last year and I've considered the report he provided after that. I think this is fairly detailed and makes sense and I consider it reasonable to give some weight to the expert's conclusions.

I am satisfied the expert experienced "a loud knocking type noise with a violent jolting present intermittently when changing between drive and reverse gears". He concluded that this was probably due to an internal transmission fault - albeit further investigation would be needed to identify the exact cause. And he did not think this fault was to be expected in a car of this age and mileage.

In light of this evidence, I'm satisfied the car had a gearbox fault present when the expert inspected it. But, I can only hold BMWFS responsible for this if I am satisfied it is likely to have been present when Mr S got the car. I accept the expert said "no clear evidence was presented during [the] inspection to confirm the fault would have been present" at the point of supply. But, part of my role here is to look at all of the available information and evidence and weigh this up in order to determine what is *most likely*, in all of the circumstances.

I am satisfied there's evidence that Mr S reported having trouble with the gearbox - specifically juddering on reversing - within weeks of getting the car. I have seen a booking confirmation from a third party garage (that I'll refer to as S) dated 28 June 2018 that says the car was booked in for a "gearbox inspection" as the "powershift" was "very jerky". I'm satisfied Mr S reported the same issue to M and BMWFS a few weeks later. And I'm satisfied that mechanics, who saw the car around the relevant time, concluded there was a

transmission issue which was significant enough to mean the gearbox would need to be replaced.

I think this evidence seems consistent with the fault identified by the independent expert in December 2019 having been present since the car was supplied. And I find this conclusion is supported by the fact the relevant manufacturer seems to have acknowledged there's a problem with this sort of gearbox - as taken steps to modify the clutch in later models to rectify the issue.

I don't think most people would expect to have to replace a gearbox just weeks after supply - even in a car of this age, price and mileage - and I think Mr B had a reasonable expectation that the gearbox in his car would not exhibit faults so soon. Taking everything I've seen into account, I am minded to find it more likely than not this car was of unsatisfactory quality when it was supplied.

Like our investigator, I think it is fair that BMWFS should put things right in this situation. I appreciate Mr S got a warranty with the car and M thought he could have the car repaired using that. But, I understand from Mr S, this didn't cover all of the costs of repair - meaning he would have had to pay about half of the estimated cost. I think it is understandable Mr S felt that was unfair, in these particular circumstances.

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The CRA says suppliers may be entitled to one opportunity to repair in this sort of situation - provided (broadly speaking) that doesn't take too long or prove too inconvenient. Looking at everything that happened, I consider it would have been reasonable for BMWFS to have the car checked much sooner than it did here. Given the time that's passed since Mr S first reported the problem, and the inconvenience he experienced as a result, I am inclined to find it fair that he should be allowed to reject the car and have the deposit paid under the HPA (set out as £500 in the agreement) refunded.

Our investigator considers the use Mr S had of the car was likely impaired significantly - because he'd only driven 6,000 miles in around a year and a half. So she recommends BMWFS should refund monthly instalments paid from November 2018. I've spoken to Mr S and he's confirmed that he has been able to continue to drive the car - albeit not as much as he would have done if the gearbox hadn't been faulty. He says the current mileage is about 82,000 miles.

Working out what's fair in this situation is not an exact science. I understand from Mr S that he anticipated driving about 5,000 miles a year originally - that's the annual mileage he declared to his insurers at the outset. I think it is likely, on balance, that his use has been impaired as a result of the gearbox issues and he's probably driven the car a bit less than he otherwise would. But, I'm satisfied that Mr S seems to have been able to use the car most of the time - looking at the mileage accrued since supply he's driven about 80% of the mileage anticipated at the outset. So, I am minded to find it is fair for BMWFS to refund 20% of each monthly instalment made since the car was supplied in recognition of impaired use.

I am satisfied that Mr S probably experienced some distress and inconvenience here - I can see he had to take the car in for checks several times, amongst other things. I am inclined to agree with our investigator that it is fair and reasonable for BMWFS to pay him £150 compensation for that - and remove any related adverse information recorded about this HPA from his credit file. I now invite both parties to consider my provisional conclusions and let me have any further comments or evidence by the date set out below.

my provisional decision

Subject to any further submissions that I may receive from the parties by 8 July 2020 my decision is I intend to uphold this complaint and require BMW Financial Services (GB) Limited (trading as Alphera Financial Services) to:-

1. end the finance agreement and arrange to take the vehicle back at no cost to Mr S;
2. refund the £500 deposit paid under the HPA;
3. refund 20% of each monthly instalment paid by Mr S towards the finance agreement;
1. pay interest on the refunds referred to above at 8% simple a year from the date of payment to the date of settlement;
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5. remove any adverse information recorded about the finance from his credit file.