

complaint

Mr S complains about a hire purchase agreement that was taken out in his name with BMW Financial Services (GB) Limited.

Mr S is represented in his complaint by his accountant who I will call "Mr C".

background

I set out the background of Mr S's complaint in the provisional decision I issued last year. I'll run through the background again here so that all relevant background information is in this one decision.

In October 2017 Mr S met an individual who Mr S describes as a used car salesman, I will call this man "Mr R". Mr R worked for a company I will call "H".

Mr S's position is that he told Mr R that he wanted to buy a car. He wanted to spend no more than £15,000 in total. He also specified the car must have a 2016 registration or later and must have less than 25,000 miles on the clock, along with a Euro 6 registration. Mr S tells us his requirements were very specific as he is a taxi driver and needed a car with these specifications in order to be able to work. Mr R suggested he could help Mr S out.

Mr S already had at least one car at this point. He sold one of his cars, which I will call "car 1" to H. Mr S told us he thought he was part exchanging car 1 with H to help pay for the purchase of a new car, with the characteristics I've outlined above. According to Mr S, Mr R told him car 1 was worth £7,500 but only gave him an invoice from H for £6,500. Mr S also said although Mr R gave him an invoice for £6,500 and took car 1, he never actually gave him (Mr S) the money. Though it is not clear why Mr S might have expected to get the £6,500 directly from H, if that money was meant to be used immediately, in part exchange for another car that Mr R on behalf of H, was sourcing. Neither is it clear why Mr S went along with H giving him an invoice for less than car 1 was apparently worth.

However, despite repeated promises Mr R did not immediately find Mr S a new car. Rather, nothing further happened until February 2018. At this point Mr S entered into a car finance agreement with a third-party finance company, a limited company I will call "C". The role of Mr R in this transaction is unclear. As although Mr S suggested that Mr R was acting as the dealership and the credit broker neither Mr R or H appeared to have this role, at least according to the written documents. Rather, the contractual documentation shows that a separate third-party company acted as the credit broker. It seems this same company was also the car dealership.

Unfortunately, the car supplied by C, which I will call "car 2" did not meet Mr S's needs and Mr S told Mr R he didn't want it. It does not appear that Mr S told C this though at the same time. Mr S appears only to have told Mr R about his dissatisfaction, at this point. Mr S said in any event he never took possession car 2, instead Mr R kept it.

Mr R it seems reassured Mr S yet again, telling him, he would put things right, he would return car 2, and that in the meantime, Mr S should ignore any calls he got from C chasing for payment. In the midst of this, Mr S said he did indeed receive a call from C asking him where its car was, and he told it he did not know and had never had possession of car 2. This appeared to be news to C. Mr S told us that C told him, it would get in touch with Mr R. As far as we are aware Mr S then heard nothing further from C.

In May 2018 Mr S entered into a new finance agreement, a hire purchase agreement for a used car. I will call this car, "car 3". This hire purchase agreement was with BMW FS. Mr S told us Mr R set up this deal too. However, the credit broking was not done by Mr R or indeed by H. Rather, according to the relevant contractual documents, it was done by another third party, a limited company that I will call "Z". Z was also the car dealership. It seems though that H was involved to some extent, in that H sold car 3 to Z. It seems then Z sold car 3 to BMW FS. Then BMW FS supplied car 3 to Mr S under the hire purchase agreement.

When he complained to BMW FS Mr S suggested he'd never signed the hire purchase agreement with it. But when Mr C spoke to us he said, Mr S had signed the finance agreement although the details had not been filled in. He, Mr S, also signed a blank direct debit form.

In addition, Mr S said that Z and BMW FS had the wrong contact details for him, and he thought this was significant. In particular, he thought this supported his stance that someone other than him had actually signed up for the hire purchase agreement. Although, as I mention above, Mr C contradicting Mr S, indicated Mr S had signed the hire purchase agreement.

Mr S also suggested that the terms of the hire purchase agreement had been misrepresented to him by Mr R acting for H, as he had not wanted to spend so much on a car. And also, because he would not have gone ahead if he realised how much he was agreeing to borrow.

The details we have of the hire purchase agreement show the car supplied by BMW FS had a cash price of £16,995. There was a payment which was noted as an advance payment of £3,000 and BMW FS provided credit of £13,995. There was no mention in the contractual documents of any part exchanged car. Specifically, there was no mention of the £6,500 from the sale of car 1 which Mr S said had been used to fund this contract.

Further, Mr S had been supplied by BMW FS with a car that had a 2015 registration and it had over 50,000 miles on the clock and didn't have a Euro 6 registration. Mr S told us he complained, once again, to Mr R. Mr R said as before, he would sort it out. One payment was made towards the car, but Mr S said he did not make that payment.

Mr C said Mr S is now out of work because he doesn't have a car so can't work as a taxi driver which is his profession. Although it appears that Mr S did have a second car in 2017, a car which I will call "car 4". We are aware of this because as part of his complaint submission Mr C told us that Mr S had been intending to sell car 4 to a person I will call "Mr M". Mr C also told us that Mr S then part exchanged car 4 for another car which I will call "car 5". Car 5 was supplied by a finance company that is not a party to this complaint. It is unclear what has happened to car 5 and why this is not suitable for Mr S's work.

Mr S has said he is willing to return car 3 to BMW FS which the mileage information shows he has been using. But he asks for £6,500 which as I have mentioned already, he says relates to car 1 which he thinks he part exchanged to finance the contract with BMW FS. Albeit at the same time he suggests he entered into no such contract. He also asks that BMW FS remove any negative information it has asked the credit reference agencies to register on his credit file. Mr S suggested he has been the victim of a fraud orchestrated by Mr R acting for H. Mr S told us he'd gone to the police about this.

BMW FS said its records show that Mr S entered into the hire purchase agreement with it in May 2018. Its records also show that only one payment was ever received, this was a payment by card. It hasn't been able to demonstrate who made this payment. In December 2018 it sent out a notice of arrears to the address it had for Mr S. It didn't agree that it had done anything wrong. In particular, it does not accept that it wasn't Mr S who entered into the contract with it.

Further, in summary BMW FS's stance is that Mr S could afford the lending. In addition, BMW FS indicated, if Mr S couldn't afford the lending it was up to him, rather than it, to know this. It thought that given Mr S had passed its checks it had done enough to make sure that the lending to Mr S was appropriate.

Dissatisfied with progress so far, Mr S came to our service.

I looked at Mr S's complaint and I issued a provisional decision. In summary, I said although I realised that Mr S had mentioned a series of events involving Mr R and H, I only had the power to look at the agreement Mr S has with BMW FS. Further, I explained Mr R and H were not a party to this complaint and so I had no power to require Mr R or H to do anything.

In addition, I said that Mr S had given inconsistent information about whether or not he had signed the hire purchase agreement with BMW FS. I would have expected Mr S to know, in the circumstances whether or not he had signed the hire purchase agreement. So, I thought the inconsistencies in his account were significant. With these significant inconsistencies in mind, I had difficulty relying on his version of events. On balance, I was satisfied that he had signed the hire purchase agreement.

I explained that in considering what is fair and reasonable, I need to have regard to the relevant law and regulations, regulator's rules, guidance and standards and codes of practice and (where appropriate) what I consider to have been good industry practice at the time.

The finance agreement with BMW FS, that is the hire purchase agreement, in this case is a regulated consumer credit agreement. As such this service is able to consider complaints relating to it.

I thought that Section 56 of the Consumer Credit Act 1974 is relevant law here. In essence, this provision makes BMW FS, responsible for any misrepresentations about the hire purchase agreement made by a party who credit brokered the hire purchase agreement. That would mean, on the face of it, any misrepresentations made by Z before Mr S entered into the hire purchase agreement. Moreover, BMW FS was obliged to give Mr S accurate information about the hire purchase agreement. Therefore, if I was satisfied that Z had misrepresented the contract to Mr S or indeed if I thought BMW FS had, I would think it fair and reasonable that BMW FS be held responsible for this.

However, the difficulty for Mr S is that none of the misrepresentations he says were made were made by Z or BMW FS. Rather he tells us Mr R and H had given him inaccurate information. It did not appear, on balance, that either Mr R or H had acted as a credit broker in relation to the agreement with BMW FS. That meant there was no relationship between Mr R, H and BMW FS that meant BMW FS had to take responsibility for the actions of Mr R or H.

I didn't agree that BMW FS had to refund the £6,500. I had no reason to doubt the details set out in the agreement. It did not mention any part-exchange of a car 1, or indeed any part-exchange at all. Further, I noted that there was quite a gap in time between the sale of car 1 to H and the agreement with BMW FS, during this intervening period Mr S entered into other finance agreements where the £6,500 might have been used in those deals, as seems more likely. For these reasons, I was not sufficiently persuaded the £6,500 Mr S refers to was actually included in the BMW FS agreement. Further still, I took on board also that Mr S has sent us information that suggests that he wanted the £6,500 back from Mr R. That does not suggest that this money was intended to be used as a deposit for a car Mr R was going to help Mr S find.

I then turned to the decision to lend. I went through, in great detail, the relevant regulatory provisions that BMW FS, a regulated lender, must take on board when deciding to lend. I said, taking into account the relevant rules, guidance, good industry practice and law, I thought there are two very pertinent questions I needed to consider in order to decide what's fair and reasonable in the circumstances of this complaint. These questions are:

1. Did BMW FS complete reasonable and proportionate checks to satisfy itself that Mr S would be able to repay the money he borrowed under the hire purchase agreement in a sustainable way?
2. If not, would those checks have shown that Mr S would have been able to do so?

I noted that if I found that BMW FS didn't act fairly and reasonably in its dealings with Mr S and that he has lost out as a result, I would go on to consider what is fair a way to put things right.

BMW FS provided us with information about the checks it carried out. In particular it said:

"This agreement was an auto acceptance through our underwriting system. This means in reaching an auto accept decision, consideration was given to the applicant's declared employment status, residential status and age, in conjunction with the requested monthly payment.

A Credit Reference Agency request for all of the applicant's existing credit account data was also made, and data successfully returned.

The relevant characteristics from the above data were then factored into the appropriate in-house scoring model, with an acceptable result achieved.

Subsequently the application was subjected to our standard suite of policy rules, with no concerns raised. The satisfactory results enabled an acceptance to be generated by our Credit Decision System without the need for any manual underwriting."

From the information BMW FS provided it relied on information given by Mr S about his job, home and age. It looked at the monthly payments but without reference to what his incomings might be or his pre-existing and continuing outgoings. And because apparently all his pre-existing finance agreements were in good order, he was approved after going through BMW FS's policy rules, whatever those might be.

In thinking what proportionate checks might have looked like here, I took account, amongst other things, of the amount of borrowing which was many thousands of pounds, the monthly

payments, Mr S's other borrowing including that he had taken out two other car finance agreements, in February 2018, that is very shortly before the agreement with BMW FS. BMW FS had very limited information about Mr S's overall financial situation it didn't seemingly know his income, or his expenditure. When I factored in all of this, I didn't find that the checks BMW FS did were proportionate in the circumstances.

That being so, I then had to look at whether I thought Mr S could afford the borrowing. To establish this, I needed to look at Mr S's financial situation. However, when I did that, I was not persuaded that we had received a full disclosure of Mr S's situation at the time he entered into the hire purchase agreement with BMW FS.

For example, I pointed out Mr S said he had an account with a bank I will call "I". Mr S tells us that in recent years he has not used the account and in fact says it is closed but I had not seen information that confirms this.

Further there were substantial incomings into his bank account, that have also not been explained such as for example a large deposit into his account with a bank I will call "H" the statements say this is a *"catering advance"*. Yet Mr S's profession has nothing to do with catering as far as I am aware.

I said, if Mr S could provide further information about his account with I and about the several incomings to his account with H, which are not related to his income as a taxi driver, please might he supply this, so I could take a look at this information before issuing my next decision.

But as things stood at the time I issued my provisional decision I did not intend to uphold Mr S's complaint as on balance, I could not find that Mr S could not afford the finance.

I asked Mr S and BMW FS to respond to my provisional decision, should they wish to do so. Mr S responded via Mr C. BMW FS sent no response as far as I am aware, but I am satisfied that it has had an adequate opportunity to do so, even taking into account that in the current circumstances given our country is in the midst of a pandemic, some businesses are needing longer than normal to respond.

In brief, Mr C on behalf of Mr S responded by sending in several documents, including the particulars of claim that Mr S, had had drafted for legal action that he began but then abandoned against H. Mr C went on to say, that Mr R and H were *"shady"*, and he sent online reviews of H from disgruntled customers. Mr C also sent in tax returns for Mr S which he suggested set out Mr S's full financial position. But we received no further information about the account with I or about the incomings into Mr S's account with H, which I mentioned above.

my findings

I thank Mr S for his response to my provisional decision. I've re-considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. I've reviewed the complete file again and revisited my provisional decision.

Mr S has provided new information in the particulars of claim about whether he did or did not enter into the hire purchase agreement with BMW FS. In this document he indicates that he did sign the hire purchase agreement with BMW FS. Albeit he suggests he did this because he was given inaccurate information about car 3 by H.

I've thought again about the nature of the relationship between Mr S, Mr R and H. If Mr R on behalf of H had acted as a credit broker in relation to the hire purchase agreement for car 3 with BMW FS then BMW FS could be responsible for any relevant misrepresentations made by H to Mr S prior to Mr S entering into the agreement.

However, although Mr S has seemingly very strong convictions about how H operated, and although I think it likely that H was involved in some capacity in the deal, I don't find, on balance, that H was acting as a credit broker here. I say this because, H does not appear as the credit broker in the agreement. Although it was possible that H could have operated as a credit broker even if it did not appear on the agreement, if for example H had introduced Mr S to Z in a way that made H a credit broker too. That being said, the reality of the agreement between Mr S and H is somewhat opaque. Mr S has been inconsistent in what he says happened between them, plus there are puzzling gaps in his account of events. For example, he does not explain why he accepted that H should give him one valuation of car 1 verbally and a different one in writing. Neither has he given a persuasive account of why he continued to persevere with H when according to Mr S, H let him down time after time. I accept that other customers of H may have been disappointed with its services. But that does not tell me what most likely happened in the individual circumstances of Mr S's complaint. Moreover, those customers seem to have had one-off or limited interactions with H, whereas Mr S had an ongoing arrangement with H via Mr R that seemed to last for months.

I note that it appears that according to Mr S, BMW FS has provided him with a car that is unsuitable for his work. That has caused me to wonder why Mr S went ahead with the purchase. But I also take account of the fact that Mr S has been using the car, for what purpose I don't know. Plus, Mr S has told us about five different cars that he appears to have bought and sold, including car 4 which Mr S was intending to sell to a buyer. In the circumstances, I can't discount the possibility that Mr S had some other commercial reasons for buying and selling cars that did not involve his taxi driving role and that might have been why he went ahead with the purchase of car 3. In any event, if Mr R acting for H did not act as a credit broker in relation to car 3, it is not relevant what Mr R said to Mr S before he entered into the hire purchase agreement because BMW FS would not be responsible for this.

Mr S asks that the agreement be set aside on the basis that it was misrepresented to him. He also asks for the return of his £6,500. But as I explained above, I find I have no proper basis to ask BMW FS to end the hire purchase agreement with Mr S on these grounds.

Since we have received no response from BMW FS I still find, for the reasons I set out above and in my provisional decision, that it did not carry out proportionate checks before it lent to Mr S. However, as I previously explained, if I am to decide that it is fair and reasonable to ask BMW FS to end the agreement and stop pursuing Mr S for the debt he owes under the agreement, I first need to be satisfied that on balance, Mr S could not afford the finance. Mr C has sent us additional information about Mr S's financial position at the time he took out the finance. But this information does not go far enough to persuade me that I have sufficient information to assess whether the lending was unaffordable. This is because we still have received no information about Mr S's account with I. Moreover, we still have received no information to explain the relatively large payments into Mr S's account with H. Mr S has not given us any reason for not supplying this information, and on the face of it, it appears he should be able to supply it with ease. It follows that I cannot fairly and reasonably ask BMW FS to take any further action in relation to this complaint point.

I have not been persuaded by the new information provided by Mr S. It follows I have reached the same conclusions for the same reasons that I outlined in this final decision and in my earlier provisional decision.

my final decision

My final decision is that I do not uphold Mr S's complaint.

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

Joyce Gordon
ombudsman