

complaint

Mrs R complains Mercedes-Benz Financial Services UK Limited will not repair her car despite there being a known fault from before she acquired it under a hire purchase agreement.

background

Mrs R acquired a used Smart car from a Mercedes dealership in March 2015. The car was about a year old at the time and had done 4,110 miles. The total payable for the car was £8,291.96 and Mrs R took out a hire purchase agreement for this over three years.

In June 2015 a service measure was issued, Service measure 602, as in some cars vibrations in the belt drive system may have led to premature wear and tear and a failure of the Poly-V-belt. Mrs R was written to in May 2016 asking for the car to be booked in for the service measure to be carried out.

Mrs R says she never received this letter. But she did receive an e-mail that was sent to her and she booked her car in for June 2017. But she was unable to attend this appointment as she'd had an unrelated accident and she didn't drive. Mrs R was written to a third time in November 2017 but the letter was returned as undeliverable.

In May 2018 Mrs R was driving her car on the M25 when it started to bellow thick black smoke and it lost all power. Mrs R had to be recovered back home as it was a Sunday and the garage wasn't open. The mechanic carried out an inspection and found the tensioner had snapped and the belt had frayed. Mrs R arranged for the car to be taken to a Mercedes dealership and initial indications were that it would carry out a repair. However, it was found the engine needed replacing and as the service measure hadn't been carried out the dealership was only willing to pay 50% of the cost.

Mrs R complained to Mercedes. She said she had been sold a car it knew was faulty – as thousands of cars had been recalled in China in 2014 for the same issue. She had also come across other articles and information on-line which she said supported her view that Mercedes knew of this issue before she acquired the car. Mercedes didn't uphold the complaint. It said it wasn't aware of the service measure when she acquired the vehicle and doesn't agree it was sold under false pretences. It said it had provided numerous notifications of the service measure needing to be carried out but this wasn't done. It considered the dealership's offer to cover 50% of the repair costs to be fair and reasonable.

Mrs R asked us to look into the matter. Our investigator didn't uphold her complaint. He wasn't persuaded the evidence showed Mercedes knew of the problem before Mrs R acquired her car, although he did accept it likely had a fault at the time. But as Mrs R hadn't had the service measure completed, he didn't think Mercedes needed to do anything to put this right.

Mrs R asked for the matter to be reviewed, reiterating her previous points. She also said that when she had to cancel her booking to have the service measure completed she was reassured the car was still safe to drive and argued that she wouldn't have extended her finance agreement had she known otherwise. Since the matter has been referred to me I asked Mrs R to provide information about her accident and for how long she had driven the car for, before she broke down. Mrs R has provided a text screen shot showing a physio appointment for 17 May 2018. She says this was her final appointment and she didn't drive

her car while she was under the physio. She explained she made a short trip to the shop (less than a mile) and it was on her second trip that the car broke down.

I issued my second provisional decision on 10 May 2019, explaining why I was still minded to uphold this complaint but awarding different redress because Mercedes had sold the car at auction, despite my first provisional decision requiring a repair. Both parties have responded which I summarise below.

From Mercedes:

- It doesn't believe it fair I have placed a lot of weight on the testimony of Mrs R. There are a number of significant coincidences that have resulted in what appears to be a perfect storm and would call into the question the credibility of the statements.
- Other than a text which it hasn't had sight of, there is no evidence of when Mrs R's accident occurred, the nature of it or what prevented her from driving.
- The vehicle had done about 30,000 miles yet the testimony is that it wasn't driven for 11 months. So it has asked for evidence of the accident or injuries.
- There is no evidence a service was carried out at any time during the three years. Whilst it accepts that services can and will be carried out away from its network it would expect there to be some evidence. It finds it hard to believe Mrs R would have done 30,000 miles in 24 months and it can see no evidence that she was not driving during that period.
- It had argued that there was no evidence the service measure was directly linked to the failings – but has since withdrawn this argument.
- It considers there is a dispute over whether the appointment was actually cancelled as Mrs R could simply have not attended the dealership on the agreed date.

From Mrs R:

- She believes Mercedes should also refund the deposit she paid as she bought a defective car.
- As Mercedes sold the car, and even with a provisional decision in her favour, she is in a worse position as she is carless.
- She doesn't believe it fair that money awarded as compensation or repayments should have to serve as a deposit for a new car elsewhere.
- She confirmed following her accident she was diagnosed as having a broken wrist and ligament damage to her knee. Her physiotherapy was a long drawn out process due to the injuries sustained.
- The car had been serviced. The contract wasn't that she was only allowed to drive 10,000 miles a year but if she averaged more than that and returned it she would have to pay excess mileage costs. She drove to other parts of the country to visit family members.

The information about Mrs R's accident and mileage was sent to Mercedes including a copy of the text (although it had already had sight of this as it made comments on it in response to the first provisional decision) but it hasn't provided any further comments for my consideration.

As before I will respond the points made in the body of my findings below.

my findings

I've considered all the available evidence and arguments, including the further responses to my second provisional decision, to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I uphold this complaint and award the same compensation.

Mrs R acquired the car using a hire purchase agreement in March 2015. As the finance provider, Mercedes is responsible for the quality of the car provided. Because of the date of the agreement the relevant legislation is the Supply of Goods (Implied Terms) Act 1973 and, in summary, this means the car provided using the agreement should be of satisfactory quality (free from minor defects, be safe and durable, and fit for the purpose for which they were supplied).

When deciding whether something was of satisfactory quality, there are a number of factors to take into account, such as the age and mileage of the car. This car was one year old and had only done 4,110 miles so I wouldn't expect it to have shown much in the way of wear and tear. Mercedes wouldn't be responsible for any wear and tear as this isn't a defect or fault, but it would be responsible for any defect or faults you wouldn't expect (or reasonably be aware of) for a car of this age and mileage.

Mrs R argued that Mercedes was aware of a fault with her car when she acquired it. I didn't agree. The information Mrs R provided related to a recall in China, not in the UK. The Chinese recall involved vehicles built there and so would be subject to the vagaries of production in a different factory. I also considered the forum information but this was generally individual people with individual problems. I read the link which set out a number of issues with Smart cars and I noted Mrs R had relied on this information to show that Mercedes had tried fixing this problem previously. But that information wasn't from an independent or impartial source, and I noted bad language was used in the article. I therefore didn't find the information persuasive and wasn't persuaded the evidence she relied on showed Mercedes knowingly sold her a car it knew was faulty.

Mercedes issued a service measure to prevent possible premature wear or failure of the Poly-V-belt. I understood this measure was issued in June 2015 and neither party corrected me on this. This was only three months after Mrs R acquired her car. So it seemed entirely plausible there was an issue with the belt drive system at the time Mrs R acquired it. Indeed, I noted when Mercedes inspected the car, it said the car breaking down was as a result of the service measure not being carried out. Given that, I think there was a defect at the point of sale and so the car wasn't of satisfactory quality.

I found Mercedes argument that Mrs R had 15 months of use of the vehicle and so it wasn't a fault present at the point of sale rather disingenuous. I agreed Mercedes didn't send Mrs R the service measure until 2016 – but it first came out in June 2015, just three months after she acquired the car. It was its decision to leave notifying Mrs R for so long. The opening paragraph of the letter said:

At smart we continually monitor the performance of our cars and pay particular attention to any issues that could have an impact on the reliability of your car. Despite careful quality control during production of our products, a technical problem has unfortunately been identified which we would like to resolve immediately.

So Mercedes' own service measure referred to the production of its products and that a technical problem had been identified. I'm satisfied, therefore, that the problem with Mrs R's

car had been there since production and was likely as a result of a design fault or other manufacturing problem.

Usually, Mercedes would be responsible for putting that right. However, I needed to consider whether the service measure being issued and which alerted Mrs R to a potential problem was an intervening act, such that the burden for rectifying the defect and any damage it subsequently caused shifted to her.

I gave very careful consideration to this and took note of the content of the service measure notification and what Mrs R told us of subsequent conversations she had. I think if there had been a product recall, or if the service measure informed Mrs R that her car might not have been safe to drive without the measure being completed, then I might find it fair that her not having that done means Mercedes is no longer responsible for the cost of any repairs.

But I don't find that a fair outcome here. Mrs R said she didn't receive any of the letters sent to her about the service measure. I understood the first letter was sent in May 2016 (not June as previously said). Mercedes' records indicated this was sent correctly to Mrs R and usually we would find correctly address mail is correctly delivered. But Mercedes said it also sent a letter in November 2016, however it has no record of this – so it's far from certain this was even sent. And I know that another letter sent in November 2017 was returned as undelivered, despite it being addressed correctly. So I thought there was some doubt whether the letter sent in May 2016 reached Mrs R.

Mercedes considered there was sufficient evidence that the first letter would have arrived. But I found the evidence weighed more in favour of her not receiving the first letter. Mercedes still hasn't been able to provide any records that it wrote to her in November 2016. And it isn't in dispute that the letter sent a year later was returned as undelivered. So I remained of the view there was doubt the letter sent in 2016 reached Mrs R, even if it was sent.

Mrs R did book her car in for the service measure in June 2017 after receiving an e-mail about this. But she couldn't attend the appointment as she had an unrelated accident and so she didn't drive. She says she spoke with the dealership who reassured her the service measure was preventative and the car was still safe to drive. I considered this entirely plausible.

The service measure notification said:

We have established that on some cars it is possible that under certain operating conditions, vibrations in the belt drive system may lead to premature wear or possibly to failure of the Poly-V-belt. As a result, the alternator and the water pump will no longer operate. In the event of a Poly-V-belt failure you would be notified by the respective indicator lamps in the instrument cluster. We believe your car could be affected by this concern.

This didn't seem overly alarming and certainly didn't indicate the type of damage Mrs R's car subsequently experienced to be possible. And I bore in mind that Mercedes itself didn't write to Mrs R until a year after the service measure was introduced, which didn't seem indicative of an issue that could cause extensive damage to the engine or that there was any urgency in needing the measure completed. And Mrs R told us, and I accepted, that when she had to cancel her appointment she was reassured that her car was safe to drive – that she could book her car in another time. So although I agreed with Mercedes that a customer was

legally responsible for making sure their car was kept in a safe condition and was safe to drive, I hadn't been provided with any evidence Mercedes warned her it wasn't or that extensive damage could be caused. Had it done so, I found Mrs R would have acted with much more urgency.

Mercedes hadn't been able to find any records of a call with Mrs R and the dealership and so it concluded the call/s never took place. That seemed an overly negative inference from the evidence available. Not being able to find a recording of a call simply evidences that a call recording isn't available or the call wasn't recorded, not that a call didn't take place. And given Mrs R had to cancel the appointment, I'm satisfied it's more likely than not that she did speak with the dealership. I remained satisfied that Mrs R's testimony was plausible, particularly given the content of the service measure itself.

Mercedes finds the amount of weight I have placed on Mrs R's testimony to be unfair. It argues there is no evidence she cancelled her appointment; she could simply have decided to not turn up. I would firstly say it is for me to decide what weight I place on what evidence. Mrs R has been consistent with her testimony throughout. But it's clear from what I've said above that that isn't all I have considered. I have taken into account the information provided by Mercedes and the content and tone of the service measure in reaching my findings, alongside the other information provided by Mrs R that I didn't find persuasive. I do accept that some customers may simply not turn up to an appointment. But I find Mrs R's testimony persuasive. Mercedes argument is purely speculation; it hasn't provided any evidence from the dealership that Mrs R missed her appointment or was a 'no show'.

I was mindful that Mrs R didn't finish her physio until 17 May 2018 – and I understood she didn't drive whilst she was still having that treatment. So there were only three days between Mrs R starting to drive again and the car breaking down. Mrs R told us she only drove the car once to the shop before it broke down on its next journey. It appeared she did very little driving between the car being booked in for the service measure and when it subsequently broke down. I wasn't persuaded Mrs R continuing to drive the car meant it was now fair for her bare the cost of repair. I said this because the potential for the engine failure to happen would have been as likely en-route to the dealership – and Mercedes had tasked Mrs R with taking the car there under its own steam. I therefore found that Mrs R's actions didn't negate Mercedes' fundamental obligation to provide goods of satisfactory quality, or that the service measure itself meant there was an intervening act such that the burden for meeting repair costs should fairly shift to Mrs R.

Mercedes referred to me finding there was evidence that Mrs R couldn't drive but it wasn't persuaded by the text screen shot provided. There was no dispute that Mrs R cancelled her service measure appointment because of her accident. And the text screen shot was evidence of her last appointment. And her testimony about whether she drove or not was also evidence. Mercedes hadn't provided me with any reason why that evidence should have been called into question, such as evidence that Mrs R drove the car or that it had done many miles since being booked in for the service measure.

Mercedes now says it believes that Mrs R may have driven the car during the period she said she wasn't. It has referred to the mileage done since the car was acquired in support of this. But it hasn't provided any further comments on the details of Mrs R's accident or injuries or that she drove to other parts of the country to visit family. I have therefore proceeded on the basis it has nothing further to say about these points.

The text screen shot provided by Mrs R is contemporaneous evidence that she had been receiving medical treatment. She has explained her injuries and I accept that damage to a knee (and to the wrist) is likely to have some impact on whether or not a person can, or should, drive. Mercedes asserts that Mrs R drove during the period in question, but it hasn't provided any persuasive evidence in support of this – such as evidence the mileage increased between Mrs R originally booking the car in for the service measure and its breakdown. And given Mrs R's explanation that she drove across country to visit family members, I'm satisfied explanation has been provided for mileage done. I remain satisfied there isn't persuasive evidence Mrs R drove during the period in question.

Mercedes argued the car hasn't been serviced in line with the agreement. The finance agreement we have been provided with is of poor quality and so not all the terms and conditions were legible. But I could see the agreement said:

The vehicle must be serviced and maintained in accordance with smart published service intervals within the Official Workshop network. Details of the required service schedules can be found in the owner's manual supplied with the vehicle. Full details of the locations of smart Official Workshops can be found at www.thesmart.co.uk. Failure to fulfil this obligation may result in a charge to compensate us for the loss we incur as a result of the disposal of the vehicle.

So I accept the agreement says the car should have been serviced at an Official Workshop. But I questioned whether such a term was fair. Many people use independent garages to complete work on vehicles and Mrs R was aware there might be a cost to her if she chose to do so. That Mrs R chose to use an independent garage didn't mean the car hadn't been serviced. Unfortunately, it appeared Mrs R's service records for the car went missing at the dealership.

Mercedes believes there are significant coincidences that call into question the credibility of Mrs R's testimony. It has referred to there being no evidence that Mrs R had her car serviced. Although it noted the comments about the garage being under new ownership and the previous owner passing away, it would still expect there to be some evidence. And it says this only explains one service not the servicing for three years.

I have never previously said, nor has Mr R submitted, that she only had her car serviced once in the garage she used. That appears to be an assumption made by Mercedes. And, whilst maybe coincidental, retail owners do pass away and as a new owner wouldn't be responsible for what the previous owner did, they wouldn't need to keep records. I have previously managed to locate information that Mrs R had her car MOT'd in February 2018 (this information is no longer appearing on the government website). I have no reason to doubt she had it serviced as well. And as Mercedes is alleging she never had it serviced, it would be for it to provide persuasive evidence in support of that.

I have carefully considered the arguments made by Mercedes in response to both of my provisional decision. But nothing has caused me to alter my provisional findings that this complaint should be upheld. My reaching a finding that Mercedes is responsible for bearing the costs associated with the fault in no way suggests that customers can simply ignore recalls or service measures - or that in all those situations a customer would be entitled to reject a car. My findings solely relate to this complaint and its circumstances.

Other matters

Mercedes had said it was confused how it should put this matter right after receiving my first provisional decision which required a repair and a later email which referred to the car being returned.

At the time of issuing my first provisional decision, neither party had made me aware that the car had been returned to the dealership as the agreement had come to an end. And so that wasn't something I could take account of in my first provisional decision. I was made aware of that and other matters, which I felt I needed to comment on. My first provisional decision required Mercedes repair the car at no additional cost to Mrs R. So I found its decision to proceed with the sale of the car extremely unhelpful and disappointing. It knew the content of my first provisional decision and should have ensured nothing happened with the car prior to me reaching a final decision. I'm not persuaded it couldn't have prevented the sale of the car given it was the owner. I was also disappointed that Mercedes continued to send correspondence to Mrs R asking for payment in relation to the damaged condition of the car, and this continued after we had asked it stop. These are matters I took account of in reaching fair compensation, as this had added further to Mrs R's distress about this matter.

how Mercedes needs to put matters right

Mrs R has asked that I require Mercedes to also refund the deposit she paid for the car. In doing so she has referred to other decisions reached by this service.

I would explain that all cases are decided on their own facts and circumstances. That we might have awarded a refund of the deposit in other cases, doesn't mean it is appropriate in all cases. And whether the deposit ought to be refunded was something I had already thought about (if not mentioned) when reaching what I consider to be appropriate compensation. Here Mrs R had done an additional 30,000 miles since acquiring the car. As pointed out by Mercedes that is a fair amount of mileage for a short space of time. Had the car not had many additional miles before breaking down, I might have been minded to award a refund of the deposit. But here, Mrs R has had significant use of car during the time she was driving and so I don't find it would be fair to award a refund of the deposit also.

As I have found that Mercedes didn't provide a car of satisfactory quality when Mrs R acquired it, it needs to put right what has gone wrong. When deciding what's fair I've borne in mind that it's neither parties fault Mrs R had an accident and couldn't get the service measure completed in June 2017. I've also taken into account that Mercedes sold the car. With that in mind, I require Mercedes to:

- Write off any outstanding balance that Mercedes has invoiced Mrs R for in relation to the car. That includes the damage fees.
- Mrs R has been without a working car since 20 May 2018. And although she originally wanted the car repaired and returned that's no longer possible as the car has been sold. So Mercedes needs to refund each car finance repayment Mrs R has made since May 2018. It also needs to add 8% simple interest on each of those payments from the date they were made until the date of settlement.
- Mercedes also needs to pay Mrs R an amount equivalent to her insurance costs for the time the car couldn't be used, on provision of reasonable evidence of those costs.
- Mrs R has been caused inconvenience by not having a working car and I find she should be fairly compensated for the inconvenience. I also find she should be compensated for the distress this matter has caused. It must have been extremely worrying and concerning to breakdown on the motorway and lose all power to the

car. I'm not surprised Mrs R has been traumatised by this given what could have happened. To subsequently find that she hadn't been properly warned of the damage that could have been caused by the defect only added to her worry and concern. And since then Mercedes sold the car and invoiced Mrs R despite being aware of my provisional findings. So I find Mercedes should pay Mrs R £1,000 for the distress and inconvenience this has caused.

my final decision

For the reasons given above, I uphold this complaint and require Mercedes-Benz Financial Services UK Limited to pay Mrs R compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs R to accept or reject my decision before 10 August 2019.

Claire Hopkins
ombudsman