

complaint

Mrs C complains BMW Financial Services(GB) Limited won't allow her to terminate her agreement and reject a car she acquired on hire purchase with them in March 2018. She complains the car wasn't of satisfactory quality.

background

Mrs C entered into a hire purchase agreement for her car on 15 March 2018. The car was a brand new car and Mrs C took delivery of it on the same day. On 15 April 2018 Mrs C was driving the car and, after being stationary for a period of time, Mrs C tried to pull away but there was no power. After several attempts to pull away, smoke started coming out of the car. Mrs C had to get herself, her children and a pet out of the car and call the fire brigade. After making the car safe the fire brigade suggested there had been an electrical fault.

Mrs C arranged for the dealership to come and collect the car and it looked into what had happened. It concluded the car hadn't been driven correctly which had caused damage to the clutch. It replaced the clutch and flywheel as a gesture of goodwill. But Mrs C wasn't happy with that, she said she drove the car normally and it wasn't of satisfactory quality. So she complained she should be able to reject the goods.

BMW considered the complaint but didn't uphold it. It explained she didn't have the right to reject the car as events happened outside of 30 days from taking delivery of it. It said there was no evidence of a fault and the car had been repaired as a gesture of goodwill. Not happy with that, Mrs C asked us to look into the matter.

BMW hasn't sent us its file and it hasn't responded to any chasers for its information. So the investigator considered the complaint based on what he had. He explained to Mrs C that under the relevant legislation she didn't have the right to reject the car, but did have a right to a repair or replacement. As BMW had already repaired the car, and Mrs C hadn't provided any evidence to show the repair hadn't worked, he was satisfied BMW had already fairly resolved this matter.

Mrs C remains unhappy. She's explained she and her children are afraid to use the car again and she would still like to reject it. She understands what's been explained about her entitlement under the law but still doesn't think the car was of satisfactory quality. And she says she wasn't asked whether she wants a repair or a replacement.

I issue my provisional decision on 7 September 2018. I said:

I would firstly like to say how disappointed I am that BMW has not seen fit to engage in our process. It hasn't responded to the file request, chasers for information, the view or confirmation the case was being referred for decision. This means that any decision made is without all the necessary information that might be relevant. I thank Mrs C for providing all the information she has and the detailed account of what happened.

Mrs C acquired the car using a hire purchase agreement in March 2018. As the finance provider, BMW is responsible for the quality of the car provided. The relevant legislation is the Consumer Rights Act 2015 and, in summary, this means the car provided using the agreement should be of satisfactory quality.

When deciding whether something was of satisfactory quality, there are number of factors to take into account, such as the age and mileage of the car. This car was brand new and I think any reasonable person would expect it to be free of any faults or defects.

Mrs C took delivery of the car on 15 March 2018 and it was on 15 April 2018 that the car broke down. This is just 31 days later. Under the Act faults or defects which arise during the initial six months are taken to have been there on the day of delivery unless it can be shown otherwise.

I can see from BMW's final response it believed the smoking and damaged clutch occurred because of Mrs C's driving style. But it hasn't provided any expert evidence in support of that position. I understand the car had done less than 1,000 miles at the time of the incident and she'd only had it for four weeks. In the absence of any supporting evidence, I think it more likely than not the car had a fault when delivery was taken and that was the reason for it breaking down.

Mrs C would like to reject the car. There are certain times under the Act when a customer is entitled to reject goods if they don't conform to contract – within 30 days of taking delivery, or a final right to reject if a repair or replacement hasn't resulted in the car subsequently conforming – that is, it now being of satisfactory quality.

Mrs C's car broke down on day 31. It's unfortunate this is just one day outside of the time allowed for a short-term right to reject under the Act, but it is nevertheless outside of the limit allowed. Outside of 30 days a customer is entitled to a repair or replacement and can only reject the goods if the repair or replacement hasn't remedied the situation.

I fully understand why Mrs C no longer wants the car. And I can certainly appreciate why her children no longer want to get into it; smoke coming from the car and having the fire brigade attend must have been upsetting. But I do need to take into account what the law says. Mrs C hasn't provided any expert evidence to show the repair to the car hasn't worked and that it still isn't of satisfactory quality. Because of that she has no rights under the Act to reject the car.

Mrs C has argued she wasn't given the choice to have the car repaired or replaced; it was simply repaired without her agreement. It's my understanding from the Department for Business Innovation & Skills' guidance for businesses that it is the consumer who chooses whether or not to have a repair or a replacement of the goods. It would appear Mrs C didn't get that choice. But I don't think I can hold BWM Financial Services responsible for the dealership (which is a different business) not providing her with that choice.

In the event, I note the Act says a consumer cannot require a trader to repair or replace the goods if that remedy is disproportionate compared to the other of the remedies. I think most people would agree that replacing the car with a brand new car is disproportionate to repairing the clutch and the flywheel.

As Mrs C's car has been repaired and there is no persuasive evidence to show that repair hasn't worked, I'm currently minded to find this matter has already been resolved.

I haven't received any response from BMW. Mrs C has provided a file of information from the dealership. She has said, in summary:

- The information has very little to show the damage was caused by how she drove the car. She continues to disagree with BMW's view this was down to driving style.
- She considers our fair and reasonable remit is a different matter entirely to the Consumer Rights Act 2015. She remains of the view the car wasn't of satisfactory quality when it was acquired. Her issue isn't with the quality of the car now but when it was collected originally.
- Although the law limits the cut off time to 30 days, less than 24 hours later seems unreasonable considering the circumstances.
- She has been left with additional cost as a result of this.
- There are also two different dates of registration for the car, the first date is 7 December 2017 for the key reader and the date on her V5 is 15 March 2018. She has gone back to the dealership for an explanation about this but hasn't received one and believes the car might not have been a new car.

my findings

I've considered all the available evidence and arguments, including the response to my provisional decision, to decide what's fair and reasonable in the circumstances of this complaint.

I would firstly like to explain to Mrs C that I'm am required by the Financial Services and Markets Act 2000, an Act of parliament, to reach a fair and reasonable decision. In doing that I am also required to take account of the law and any regulatory rules, amongst other things.

Mrs C will see from my provisional findings that I have not only taken account of the Consumer Rights Act 2015 but also applied its provisions to her complaint and the circumstances which led to it. I have found that the car she acquired *didn't* conform to contract on the day it was collected as it wasn't of satisfactory quality. And I agreed there is little evidence the damage was caused by her driving style.

But the Act does set out the remedies available to Mrs C depending on when the faults occurred. I do understand and appreciate the damage to Mrs C's car became apparent on day 31, less than 24 hours after her short terms rights under the Act to reject the car expired. But that was where the line was draw and it isn't for me to rewrite the law.

In this case BMW has carried out a repair. Under the Consumer Rights Act 2015 Mrs C is only able to reject the car if, after that repair, the car still doesn't conform to contract – so it still isn't of satisfactory quality. Mrs C hasn't provided any persuasive evidence the car doesn't conform to contract and so she doesn't have any rights under the Act to reject it. I appreciate there has been a cost to Mrs C, particularly as she is continuing to pay for the car. But that's because she has decided to lease another car instead of using this one (albeit I understand neither her nor her children wish to get in it again) and she hasn't provided any expert report or other such evidence the car still isn't of satisfactory quality. Finally, I note Mrs C has raised concerns about the date of registration of the vehicle and she hasn't been able to get an answer about this. I have considered this carefully because if the car had been previously owned then the status of the car as a new one might have been misrepresented to Mrs C.

But having considered the information provided, I don't think the evidence shows that. The information Mrs C refers to is the Key data. And this does show a registration date of 7 December 2017. But this is the registration date of the key not the car, as can be seen by

the information alongside it, also about the key - when it was last updated, when it was read and what key number it was etc. This was a new car that was produced in June 2017 in another country. It would have been inspected, tested and then delivered to the UK, all of which would have required the key. So I'm not persuaded the evidence provided shows the car was registered before 15 March 2018.

I appreciate that Mrs C is understandably unhappy with what has happened. But as BMW has already repaired the car, and Mrs C hasn't shown the repair hasn't worked, I'm satisfied this matter has already been fairly resolved.

my final decision

For the reasons given above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs C to accept or reject my decision before 27 October 2018.

Claire Hopkins
ombudsman