

## The complaint

Mrs H complains that Marks & Spencer Financial Services Plc (M&S for short) has not met its obligations in regard to a transaction she made on her credit card to pay for a kitchen.

## What happened

Mrs H, along with Mr H her husband (who is representing her), were looking to have a bespoke kitchen and spent some time liaising with a kitchen supplier ('The Supplier'). They were having other work done on their property separately around that time. They originally considered having a 'supply and fit' service for their kitchen but in the end agreed a contract for the 'supply of the kitchen only' in April 2019.

A deposit was paid for this kitchen supply service on Mrs H's M&S credit card. The rest of the significant cost of the kitchen was financed by a separate party (the 'Finance Provider'). Once the kitchen was supplied Mrs H had the kitchen fitted by a third-party fitter. And from the outset there were issues with the kitchen. So Mrs H complained to the Supplier but was unsuccessful in getting the issues fully resolved for a variety of reasons.

So Mrs H complained to M&S under S75 of the Consumer Credit Act 1974, as she had paid some of the cost with her credit card. Initially M&S didn't think it needed to do anything with regard to this matter. So Mrs H brought her complaint to this service.

There has been a lot that has happened since and a lot of correspondence between parties and our Investigators that have been involved in this matter. Various positions and arguments have been made by all parties.

In November 2021 M&S made an offer to Mrs H which contained three options for bringing the matter to a conclusion. The first two required Mrs H to keep the kitchen in some form with some repairs and or replacements. These were not accepted. The third option within the offer was as follows:

*"to offer a rejection of the kitchen and a full refund of £23,571.90 upon collection of the kitchen. (The Supplier) would arrange for the finance agreement of £20,783.59 to be cancelled with (the Finance Provider) and the deposit of £2,788.31 to be returned via cheque. Should you wish to accept this offer, we would require a removal date within 30 days of acceptance of this offer. Should you require any further time for the kitchen to be collected, this can be discussed upon acceptance."*

Agreement hadn't been reached despite significant attempts by our Investigator to mediate between the parties. I then considered the matter and then issued a provisional decision which outlined my provisional position. That held that the offer was broadly fair, and that M&S should:

- Allow Mrs H to reject the kitchen and provide her a full refund of £23,571.90 upon collection of the kitchen. M&S would arrange for the finance agreement to be cancelled with (the Finance Provider) and the deposit of £2,788.31 to be returned via cheque to Mrs H.

- M&S to pay £250 per day for the disassembly/uninstallation of the kitchen to Mrs H.

Mr H (on behalf of Mrs H) has responded disagreeing with my provisional decision by providing various arguments and restating their wish to have a significantly greater redress for what has happened. M&S has also responded with its position.

### **What I've decided – and why**

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

I should add at this juncture that since the issuance of my provisional decision my investigator, under my direction, has made multiple attempts to get both sides to come to a mutually acceptable position. The parties have come close to agreement for a settlement somewhat different to that outlined in my provisional decision. It has been made clear to the parties that not agreeing terms between them ran the risk of ending up in a position that neither would wish to be in, specifically them both receiving a final decision from me which isn't either parties preferred option. However agreement has not been reached. And finality in such disputes is an important consideration. And I'm satisfied that my investigator, and more broadly this service, has endeavoured to mediate this matter to a mutually acceptable conclusion. But, alas, to no avail.

So, having considered the matter in light of both M&S' comments and Mr H's comments I've seen no persuasive reason to alter my stance from that explained in my provisional decision. I will deal with the arguments made by both sides under the heading '*responses to my provisional decision*'. However I shall restate many of the arguments made in my provisional decision here for clarity.

#### *Arguments and positions from my provisional decision*

I should make it very clear that this decision is not about the Supplier or the Worktop Supplier. This is because these parties aren't within the jurisdiction of this service for this type of complaint. This decision is about M&S and how it has considered Mrs H's S75 claim to it.

Mrs H used her credit card with M&S for the deposit. This means M&S has certain responsibilities to Mrs H which arise from the relevant law, specifically, Section 75 of the Consumer Credit Act 1974 ('the Act'). There is no need for me to go into great detail about how this operates, but in summary Section 75 has the effect of allowing Mrs H to hold M&S liable for breaches of contract by the Supplier, or material misrepresentations made by it in relation to the agreement made. Again without going into a large amount of detail a breach of contract occurs when one party to a contract fails to provide what it has agreed to under that contract. Misrepresentation is when something is said which is relied upon and transpires to be untrue leading to detriment.

This legislation has the effect of meaning that not only could M&S be held responsible for the deposit it was party to, but also the total cost of the kitchen and also any applicable consequential loss suffered by Mrs H. But M&S are only liable if breach of contract or material misrepresentation by the Supplier is made out. It is not responsible for Supplier's conduct wholly, but rather only if either of these two areas are made out. This is the key test here.

But before deciding on whether there is breach or misrepresentation here there are some requirements set out in the Act which also have to be met before these issues can be

considered. One of these tests is around financial limits and having considered these I think on balance that Mrs H's claim meets the financial limits criteria.

Another test in the Act for a valid claim is that there must be a debtor-creditor-supplier arrangement in place. This is often referred to as the 'DCS relationship' or simply 'DCS'. I've considered what has happened here and these joint affairs and I'm satisfied that this dispute regarding this credit card transaction meets the prerequisites for a claim to have the opportunity of being successful.

There is an open offer 'on the table' here from M&S which includes rejection of the kitchen some years after it was purchased. Accordingly I do not propose to recount the facts and arguments about whether the kitchen is of satisfactory quality or whether the installation of the worktops service was carried out with reasonable care and skill. These matters have been addressed and interrogated by both parties extensively. So as there is a suggested settlement on the table I'm going to consider whether it is fair or not. Just because I do not detail every issue and argument made throughout this long dispute in this decision doesn't mean I've not considered them. But rather, that in the interests of brevity and clarity I will only now consider what is a fair solution to the dispute.

#### *So is the suggested settlement fair?*

Having considered the relevant legislation mentioned already and the Consumer Rights Act, along with potential available remedies and what I consider to be fair and reasonable I make the following observations.

#### *Rejection*

Rejection is one of the remedies available in such situations although normally offered/agreed earlier in the dispute. Repair and Price Reduction are other remedies available here. Price Reduction, where benefit has been had from the goods or services is often seen as the fairest solution for such situations. And had it not been for the offer on the table from M&S it's quite possible I'd have considered that the fairest option here considering the length of time the kitchen has been in place and that it is operational to some extent.

However M&S has offered Rejection and it is in essence the unwinding of what has happened. In this case M&S has offered to take back the kitchen and refund the deposit and unwind the finance for the kitchen fully. It would clearly be unreasonable to back-track on this offer now considering the length of this dispute and the evolution of the positions of the parties. And it is welcome that M&S has come in with this offer, albeit some time into the dispute. Considering what has happened here in the round, the clear breakdown in relationship between the Supplier and Mrs H and the 'clean break' nature of this part of the offer I think this element of the suggested settlement is fair.

#### *Disassembly/uninstalling the kitchen*

M&S has offered £250 per day rate for the disassembly of the kitchen by someone who is appointed by Mrs H. But as Mr H rightly points out the contract agreed wasn't entirely "supply only". It included a requirement for worktops to be installed by the Worktop Supplier. Mr H points to a projected overall cost of such removal. I'm not persuaded that because Mr H estimates the total cost will be significant that makes M&S offer based on a day rate unfair. And it is clear that Mr H and Mrs H don't want the Suppliers or Worktop Suppliers back in the house. And it is clear that M&S are happy for this work to be done by a party that Mrs H appoints as that is the offer it has made.

In response to my provisional decision M&S has stated that the Suppliers feel the removal of the kitchen shouldn't take more than a day. So it clarified its offer is the day rate only for one day. Bearing in mind that this removal hasn't happened yet, and I see no persuasive reason to doubt the supplier's position on this only taking a day, so I think this a fair solution to this particular issue.

#### *Consequential loss/Costs of installation of a new replacement kitchen*

Mr H and Mrs H have pointed to what they say are consequential losses suffered here in the form of the need to pay for the installation of a new kitchen in due course, having already paid for this kitchen to be installed (that is now to be removed). I don't think M&S should have to pay towards this for the following reasons.

I should start with the significant issue that Mrs H and Mr H have had the benefit of the kitchen for an extended period of time. And although it is not as they would wish it, it clearly is to some degree an operational kitchen. Mr H has recently described being able to have guests and cook a roast meal for them. This event wasn't without issue; however it does give some indication that the kitchen was operational, to at least some degree. It should also be noted that M&S has made offers to repair the kitchen and that in the past Mr and Mrs H have refused to have the Supplier attend or inspect their kitchen. I don't think that was fair on M&S/the Supplier.

It is also of note that although M&S have made the offer of Rejection to Mrs H it has consistently made clear that it is not persuaded that the extent of the issues with the kitchen are as bad as Mr H says. And Mr H and Mrs H denied them the right to inspect it. I note all the evidence provided by Mrs H on these matters, but also note the Investigator's early concerns about the reliability of the reports provided, which I share. These reports aren't particularly detailed or forensic in my opinion. They do not add significantly to what Mr H has told us and are somewhat vague in places and do not give a detailed account of every facet of the kitchen. And although the other evidence provided by Mr H shows significant issues with the kitchen it appears these could be remedied by Repair or Price Reduction.

I note that shortly before the contract was signed the Supplier raised concerns to Mr H about proceeding without having a pre-fit completed by his installer. It is recommended to Mr H to delay finalising the plans and paying the balance. This is due to the other works that were being done having not been completed and the pre-fit not having taken place. But Mr H didn't follow this advice. The emails concern show there was a phone call as well and Mr H responds to the email prior to agreeing the contract. I appreciate that Mr H was at the time clearly very unhappy with this recommendation and the timing of it (and this doubtlessly remains the case). However at that point Mr H is on notice that that the measurements taken by the Supplier were not performed by its "technical experts" and were "approximate". The contract that was then signed after this clearly states on the page that was signed:

*"Please review your order and confirm that the plan is correct - please pay special attention to the cabinets and appliances to ensure they are the correct models and specifications. Once this contract is signed your order cannot be cancelled and changes cannot be made to your order."*

Also the Supplier has no responsibility for the work carried out by Mrs H's installer. And although clearly there were issues with what was supplied by the Supplier, I'm not persuaded that none of the issues suffered here were as a consequence of the lack of pre-fit being done prior to the contract, or reliance on the measurements done by non "technical experts" when on notice of this, or the decision not to delay when the Supplier clearly advised this in writing and verbally to Mr H. Or that some issues stemmed from the Installation carried out. I appreciate Mr H considers these comments at that time to be

pressurising and as he notes in his written response at the time. And that he was 'at a loss' at that turn of events. And I appreciate that this kitchen fit had interlocking considerations with other works and matters occurring at that time for Mrs H and Mr H. So I can well understand the stress that Mrs and Mr H were under at that time.

But taking all of this into consideration and particularly noting that Mrs and Mr H changed from the preferred type of contract to using his own installer and not delaying when recommended to do so, I don't think it fair in the round for Mr H and Mrs H to not bear any risk as a result of these decisions that were taken. I appreciate when they signed the contract that there was a Supplier representative liaising with them and there may have not been total consistency from the Supplier representatives they were liaising with.

Nevertheless it was made clear that there were risks with such a course of action (including having an external party installing the kitchen) and I think it likely that to at least some extent these decisions have had negative results. Furthermore it hasn't been demonstrated that Mr H's installer completed the installation without fault. And if there were any such failings on Mr H's installer's part the remedy to those should sit with the Installer and not M&S.

I have considered all the arguments and circumstances here. I'm satisfied the kitchen is operational to some extent and furthermore could be repaired to a level not far short of the original concept which would make Repair combined with Price Reduction apparently another fair resolution here. But it is clear even then it would not be perfect or as intended.

And it is clear that Mr H and Mrs H certainly want as little to do with the Supplier as possible. However Mr H and Mrs H have had benefit of the kitchen for a significant time and didn't heed warnings given. So in the round I think some of the issues present in the kitchen are likely not to be the responsibility of the Supplier/M&S and as Rejection is 'on the table' and for reasons I've already given, I'm satisfied that in the round M&S' offer of Rejection of the kitchen without paying the consequential losses Mr H has asked for, but covering the disassembly/uninstalling the kitchen is fair.

#### *Distress and Inconvenience*

Mr H and Mrs H have made significant arguments about the distress and inconvenience of what happened here. And considering what has happened I can well imagine that they have found what has happened with the Supplier to be infuriating.

However M&S liability under S75 is not limitless. The Act clearly sets out the limits of its liability in relation to the Supplier here and that liability revolves around breach and misrepresentation only. It does not cover matters such as customer service provided by the Supplier. So no award can be made regarding the customer service provided by the Supplier against M&S.

I've considered how M&S have dealt with Mrs H and Mr H. It should remember that it is the party holding the liability in this process and not the Supplier under the rules under which I consider this dispute. Nevertheless it has, albeit latterly, offered a resolution which was in excess of what our Investigator originally suggested and sees all monies paid towards the contract and finance agreed returned to Mrs H. And I appreciate this matter has gone on for a long time, but I don't think that its position of not offering distress and inconvenience in its offer is unfair bearing in mind the offer as a whole.

#### *responses to my provisional decision*

M&S has said in its response "I need to make clear, this offer is from (Supplier) not M&S Bank, following on from FOS asking us to contact them as part of their investigations. We've

*merely be liaising between you, FOS, and (Supplier).*" I've described here and in my provisional decision why M&S is liable here under the Act. So I am satisfied it is liable here. It has provided an offer from the Supplier which I think is fair. Ultimately M&S is responsible under this decision. If Mrs H accepts this decision then it will be M&S who are responsible for the suggested settlement being honoured.

Mr H on behalf of Mrs H has provided calls recordings of calls he's made recently to the Supplier posing as a new kitchen purchaser. He has done this with the purpose of trying to demonstrate that there were contractual or pre-contractual comments made by the Supplier in the original calls many years ago which should go in his favour. I've listened to these recent recordings, but I'm not persuaded they should be decisive in my thinking. I say this because these aren't the actual calls he had at the time and there is no persuasive evidence that these calls closely resembled or replicated the actual calls made those years ago.

Mr H didn't raise the issue of the original calls in his original complaint form arguments to this service but rather pointed to the kitchen units design and supply. So if he'd been misrepresented materially he'd have known so by the time he complained to this service but he didn't raise that argument persuasively then. And ultimately the test here is not what the Supplier did or didn't do. The test here is whether M&S has treated Mrs H fairly in its consideration of the s75 claim put to it. And bearing in mind it has offered to unwind everything that has happened here and pay for disassembly of the kitchen I'm satisfied it has treated Mrs H fairly.

Mr H has said that I said *"didn't let M&S into the property"*. M&S is a financial services company and is not expert in kitchens. Here the Supplier is the kitchen fitter and M&S are jointly and severally liable with it for what happened. I think in this situation it is acceptable for inspections to be done by the Supplier on behalf of M&S.

I note that on 13 April 2021 our investigator suggested to Mr H that the Supplier be allowed to inspect the kitchen. That day Mr H said in response *"I am very wary of letting anyone connected to (Supplier) into my property."* Later that day our Investigator said *"I think you do need to put your previous experience of (Supplier) to one side and allow them to come out and make an assessment."* Mr H responded by pointing to independent inspections (which has happened albeit not the most detailed reports as I've described). On the 14 April our Investigator writes to Mr H saying *"While I appreciate that you may have given them plenty of opportunities, they have not come out and seen the issues since you've raised them."* Mr H's reply states *"This is what I think, despite me giving them opportunity to fix it – you are trying to bully me into letting them into my property so they can lie again and say nothing is wrong with it and you can close the case."* In response our Investigator said *"The problem here is that you are not allowing (Supplier) to come back to inspect the issue - in doing so, you're not giving them the opportunity to put matters right. While I appreciate that you have in the past, I think its important that (Supplier) do come out and provide an assessment."*

After this point neither M&S nor the Supplier entered Mrs H's property. So I'm satisfied that Mr H made clear he wouldn't allow the Supplier access to our Investigator. But I do agree independent inspections have taken place albeit with their reports having the issues I've described.

Mr H goes on to then restate his arguments about the extractor and the hob. The offer from M&S is to remove these and unwind the contract and finance so that Mrs H can start afresh. I think that is fair in these circumstances.

Mr H contests my comments that his kitchen is operational to some extent. I've made clear my position is that it is not without fault. However it has been in place for years and Mr H and

Mrs H have clearly had some use out of it as I've described. So I don't think his comments here are persuasive regarding my position in my provisional decision.

Mr H then restates his arguments around the warnings provided to him regarding going ahead with the supply only contract at that time. And I appreciate there was a number of competing issues here and time pressures also. Having reconsidered what he has said here, what happened and what I've said already, but I'm not persuaded that he's added anything new here which I need to address other than to point him to my comments in my provisional decision and what I've said already in this decision.

Mr H says he cannot afford to have a new kitchen installed. That doesn't mean the offer on the table as I've described is unfair. The offer made unwinds the situation including the finance supporting the kitchen cost. If Mr H doesn't wish to accept this fair offer he doesn't have to, and he can continue his dispute through other avenues if he so wishes. But I think M&S offer is fair in the circumstances.

Mr H has also suggested a price reduction as long as the warranties stayed in place. This was put to M&S who were initially amenable to the price reduction but made clear the warranties wouldn't be continued if it accepted the price reduction. Mr H made clear the warranties had to stay valid. M&S stated its original offer remained open. So again, in this long running dispute, we reached stalemate.

It is clear that in agreeing terms between parties, there can be more than one or even numerous agreements made which fall within the ambit of being fair and reasonable. The decision before me is whether the offer set out in my provisional decision is fair and reasonable. And I think it is. The fact that the parties came close to agreeing a different settlement since my provisional decision doesn't change that. And it is clear taking everything in the round that the parties are entrenched. Finality is a key issue for parties in disputes and as the parties are entrenched and my investigator as exhausted attempts to get agreement I know reach this final decision.

Mrs H is free to not accept this decision if she doesn't wish to. But as I've said, this final decision marks the end of this services' involvement in this dispute.

### **Putting things right**

I think in the round what I propose is fair and reasonable solution to this dispute. So in summary and on notice of Mrs H accepting this decision, I direct M&S to:

- Allow Mrs H to reject the kitchen and provide her a full refund of £23,571.90 upon collection of the kitchen. M&S would arrange for the finance agreement to be cancelled with (the Finance Provider) and the deposit of £2,788.31 to be returned via cheque to Mrs H.
- M&S to pay £250 for one day rate for the disassembly/uninstallation of the kitchen to Mrs H.

### **My final decision**

It is my decision that the suggested settlement made by Marks & Spencer Financial Services Plc is fair. On notice that Mrs H accepts this decision I direct it to remedy the matter as I have described above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs H to accept or reject my decision before 28 June 2022.

Rod Glyn-Thomas  
**Ombudsman**