

The complaint

Mr T complains that Marks & Spencer Financial Services Plc, trading as M&S Bank, deliberately delayed his claim for a refund under section 75 of the Consumer Credit Act 1974 ("section 75") in relation to his purchase of some defective patio tiles.

What happened

In June 2021 Mr T bought some patio tiles for his garden and paid for them with his M&S Bank credit card. The majority of the tiles proved to be defective, and so in August 2021 he asked the bank for compensation under section 75 (a law which makes the bank jointly liable for a breach of contract by the retailer). This claim was resolved in Mr T's favour in November 2022. Meanwhile, in July and October 2022, he had complained that the matter was taking too long to resolve, and he accused the bank of deliberately using delaying tactics. In November he referred that complaint to our service.¹

M&S Bank denied delaying the case, either deliberately or unreasonably. It said the case had been a complex one and it had needed to ask Mr T for further evidence. Our investigator largely agreed with that, although she thought that the bank had caused an avoidable delay by wrongly telling Mr T that it would accept his own architect's report as an independent report, only to go back on that later and ask him for a new report. She recommended that the bank pay Mr T £125 for that error.

Mr T said that £125 did not go nearly far enough to compensate him for all the time everything had taken. He asked for an ombudsman to review this case.

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.

As I've said, Mr T first raised his claim for a refund with the bank in late August 2021, and he was refunded in early November 2022; a period of more than 14 months. That is a long time, so I can certainly understand why he is complaining about it. However, to decide whether it was too long, and whether it was the result of deliberate stalling tactics by the bank, I have had to look into the specific reasons for why the case took as long as it did. There were several different reasons for that.

Initial stages of the claim – August 2021 to February 2022

On receiving Mr T's claim for a refund, M&S Bank sent him a form to fill in, which he completed and returned on 31 August 2021. The bank next wrote to him on 9 September and asked for various information and evidence, which seems to me to be a standard list of requests for this kind of claim.

¹ Mr T's wife joined him in the complaint, but as she does not appear to have been a party to the credit card agreement or a customer of the bank, she is not eligible to complain under our rules.

The bank did not ask for an independent report in this letter, but a report would not be necessary in every case, so it would not have been a routine request. I think that the request for an independent report would have been made once the bank had received the answers to its initial questions and then reviewed the case on its specific facts. It made that request on 7 October in another letter. I think that was a reasonable timescale up to that point.

The request for an independent report seems reasonable to me, since Mr T's credit card purchase had only been for the supply of the tiles, not for laying them. So it was necessary for the bank to make sure that the problem – water pooling on the tiles and not draining away – was the result of the tiles themselves being defective, and not because they had not been laid at the proper angle for draining. The retailer had already stated that the tiles were fine and that the problem was that they had not been laid properly. That evidence, if left unchallenged, would have been fatal to Mr T's claim.

Unfortunately, the letter of 7 October was not delivered. This led to a significant delay, but this was not the bank's fault. I have checked that this letter was correctly addressed, and it was. I would not hold the bank liable for a failure by the post office.

The request for an independent report – February to July 2022

There was no further contact between the parties until 28 February 2022, when Mr T chased the bank, having not heard anything since September. The parties spoke on the phone, and then the bank sent Mr T the 7 October letter again by email.

It was in this phone call that the bank made an error. I have listened to the call recording. At 5 minutes and 27 seconds, Mr T asked if he could get a report from the architect who had overseen his original building work, which had included laying the tiles. He was told that he could. That was clearly a mistake, since there was an obvious conflict of interest involved in the architect evaluating his own work and exonerating himself by stating that the problem was with the tiles themselves, and not with how they had been laid under his own supervision.

That error was apparently not spotted until well after Mr T provided that architect's report in May. It was not until 1 July that the bank said it could not accept the architect's report. That delay has not been explained.

(At the same time, the bank said it could also not accept a builder's quote which the architect had relied on in his report, because it was by the same builder who had laid the patio in the first place. It asked for two more quotes from different builders. By then, Mr T had already provided a second quote from another builder, on 21 June. He provided two more quotes on 16 and 30 September, but these were only updated quotes from the first builder. The bank appears to have overlooked that.)

So it was necessary for Mr T to get a second expert's report, this time from somebody independent, who had not been involved in laying the patio. He obtained such a report on 19 August, and forwarded it to the bank that same day. This report said that 78% of the tiles were defective, and that new ones should be substituted.

From 1 July to 19 August is 49 days. So if the bank had explained to Mr T what he needed to do in the phone call on 28 February, then he could have obtained a suitable report 49 days later, which is 18 April. So I think the bank's error caused a delay of about four months, from April to August. (I think that delay supersedes the bank's delay in asking for a new report, which was between May and July.)

Before I assess how much compensation it would be fair to award for that, and whether it was deliberate, I will first consider what happened during those four months, and whether there were any other delays attributable to the bank.

Claim for consequential losses – 11 May to 15 June 2022

One of the issues in the case was consequential loss, which was more than just the price Mr T had paid for the original tiles.

When Mr T first asked for a refund, the bank gave him a form to fill in, which he returned on 31 August 2021. He did not mention consequential loss in the form. He says this is because there was nowhere in the form to mention it, but I do not agree. At the bottom of page 1 is this question:

“Have you suffered additional losses as a result of the issue with the goods/services being disputed?(These could include additional hotel costs, transfers, or other paid for services/goods that you were unable to use as a direct result of the failure that caused your initial dispute)”

The options were yes and no; Mr T selected no.

Then the next question, on page 2, was:

“Please provide a description of the additional losses that you have suffered below”

There was space for text to be entered, but Mr T left this blank. On page 3 he said he was claiming £1,753, which was the price he had paid for the tiles.

On 11 May 2022 the bank offered to pay Mr T £1,753, which was precisely the amount he had asked for. Mr T responded the same day, raising consequential losses for the first time. He asked for £11,988 plus VAT, and provided as evidence of this cost a quote dated 26 April 2022.² In a later email, Mr T explained that this quote included not only the cost of replacement tiles, but also the cost of removing the old tiles, hiring a skip, and laying the new tiles. On 15 June the bank agreed to cover these extra costs.

That delay of five weeks was not the bank’s fault, since I am sure that it would have taken the consequential losses into account in its original offer if it had been told about them in either August 2021 or in April 2022.

The new tiles – 11 May to 30 September 2022

The quote dated 26 April was for all of the original porcelain tiles to be replaced with new Indian sandstone tiles. On 25 May, the bank told Mr T that it was only willing to pay to replace the defective tiles, not all of the tiles. On 15 June, following further correspondence, the bank clarified that it would also pay to temporarily remove and then relay any non-defective tiles.

(The next events after that were Mr T providing the second builder’s quote on 21 June, the bank’s request on 1 July for a new independent report and a third builder’s quote, and Mr T providing the new report on 19 August.)

² This was the quote which had been provided by Mr T’s own builder. On 21 June, Mr T provided a quote from another builder saying this work would cost £17,365 plus VAT. On 16 and 30 September he provided new quotes from his own builder, both quoting £14,397.60 plus VAT.

On 6 September the bank pointed out that exchanging porcelain tiles for sandstone ones was not exchanging like for like. It said it was not willing to pay for new tiles of a different kind. I think that was a reasonable position for the bank to take, but the delay between May and September has not been explained. The bank had known since April that Mr T was looking to replace the tiles with sandstone ones. However, since the bank had already set out its position in May, when it said it would not replace any non-defective tiles, I don't think this delay is significant, as the bank had not changed its position; it had only reminded Mr T what its position was.

The result was that Mr T obtained two more quotes – the third and fourth – both from the builder the bank had asked him not to use. The third quote, dated 16 September, was for sandstone again; it isn't clear why, in light of the bank's position. The fourth, on 30 September, was for supplying and laying porcelain tiles. The price was precisely the same as had been quoted for the sandstone tiles two weeks earlier. The bank could have questioned that, but it chose not to. The bank could have refused to accept both quotes, because it had already said it was not willing to accept quotes from the builder that had laid the patio in the first place, and insisted that Mr T get a fifth quote from a third builder. But it didn't do that either. I think that by not objecting to or questioning these quotes (other than by insisting on porcelain tiles), the bank avoided the further delay which would otherwise have been the inevitable result. If the bank had really been delaying matters on purpose as a tactic, it had ample opportunity to do so here.

I don't think that this issue caused additional delay to the four months that had been wasted by the bank's error in February which caused the need for a new report.

Final stages – October and November 2022

One week later, on 7 October, Mr T wrote to the bank to complain about how long it was taking. Four days after that, on 11 October, the bank made a revised offer. I don't think eleven days is an unreasonable amount of time for the bank to consider the fourth quote and arrive at a settlement offer.

There was then some back and forth between the parties about how much the settlement figure should be, but on 8 November Mr T accepted the bank's offer of 11 October. Three days later the money was paid into his account. Since this was in full and final settlement of the claim, I am not going to evaluate the bank's part in these negotiations or whether the settlement was fair. I therefore cannot conclude that there was any unreasonable delay during the final stages of the claim.

Conclusion

For the reasons I have set out above, I am satisfied that the bank's only error was in its phone call on 28 February, in which it misinformed Mr T about what it required of him. That caused a delay of four months, out of fourteen. As I have said, I am satisfied that this was not deliberate, based on the stance it took in September. I would add that I have listened to the phone call, and having done so I think on the balance of probabilities that it sounds that the call handler just made an honest mistake.

It only remains for me to decide what is fair compensation for that mistake.

Putting things right

I think the bank's error is mitigated by the approach it took in relation to the third and fourth quotes. It saved time by not objecting to them, even though it had told Mr T on 1 July that it could not accept quotes from the original builder, because there was a conflict of interest. It

also didn't challenge the fact that the sandstone and porcelain tiles appeared to be the same price, even though it had expressed concern about that issue less than a month earlier.

Nevertheless, I think that £125 is still a little low. I think that £200 is more in line with what our service would typically award.

My final decision

My decision is that I uphold this complaint in part. I order Marks & Spencer Financial Services Plc, trading as M&S Bank, to pay Mr T £200.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 31 March 2023.

Richard Wood
Ombudsman