DRN-4157742

The complaint

Mrs S complains Marks and Spencer Financial Services Plc ("M&S") has not dealt fairly with a claim she brought under section 75 of the Consumer Credit Act 1974 ("CCA") in relation to home improvement works.

What happened

I issued a provisional decision on Mrs S's case on 12 April 2023. I outlined the background to the complaint in this as follows:

"Mrs S's home is a rural property at which she was carrying out building works in 2019. Late in the year, an agreement was made with a company ("E") to supply and install glazing including doors, windows and rooflights. Mrs S has referred to E having a separate contract of either £6,000 or £8,000 for other building works, but these are not the subject of this complaint.

A payment was made to E using Mrs S's M&S credit card. Other payments were made to E via other means including a different credit card in the name of someone I'll call "HS", and Mrs S says cash was paid as well. The total amount payable for the works is unclear due to the nature of the paperwork, and is disputed. Mrs S says the original quote was £30,000 but she secured a £1,000 discount making the total price £29,000.

Mrs S was very dissatisfied with E's work, which began in November 2019 and continued until February 2020. She had a long list of complaints relating to their workmanship and the quality of the products installed. Fundamentally, Mrs S also considered what E had supplied and fitted looked nothing like what she had expected having visited their showroom before purchasing.

Unable to obtain redress from E, Mrs S approached M&S, which considered whether it might be liable to her under section 75 of the CCA. M&S wanted to get E's comments so they approached the company with details of the complaint, which E refuted. Mrs S says shortly after this, her cars and home were vandalised by unknown individuals she suspects were linked to E.

M&S asked Mrs S to obtain an independent report into the problems with E's work. She arranged for someone I'll call "DW" to carry out an inspection. DW spoke to M&S while he was at Mrs S's house, and later produced a written report.

At some point during the process, M&S decided to pass the matter to their solicitors. It appears the solicitors pointed out to the bank that the fact Mrs S's name didn't appear on any of the paperwork was a problem for her claim. The name appearing on the paperwork was that of HS (or, occasionally, just a second name, which Mrs S shares with HS). In any event, M&S came to the conclusion that the fact the paperwork with E was in HS's name, meant Mrs S couldn't make a claim under section 75 of the CCA.

Mrs S complained but the bank would not change its position, so she referred the matter to this service for an independent assessment. One of our investigators looked into the case.

She ultimately reached the same conclusions as M&S. Mrs S appealed our investigator's assessment so the case has been passed to me to decide."

In my provisional decision I explained the potential basis for M&S to be liable to Mrs S for what had happened as follows:

"…a credit card provider may need to consider honouring a claim brought under section 75 of the CCA.

Section 75 of the CCA allows a consumer who has purchased goods or services using a credit card to claim against their credit card provider for any breach of contract or misrepresentation by the supplier of the goods or services, so long as certain conditions have been met."

I went on to identify that one of the key conditions was that there needed to be a debtor-creditor-supplier or "DCS" agreement in place. I said:

"What this means is that the person who owns the credit card account needs to have used the credit card to pay a supplier they have a claim against for breach of contract or misrepresentation. This has been a key point of contention in Mrs S's case, as M&S argues that she has no contract with E in respect of which she could make such a claim, and therefore there is no DCS agreement and no claim to be made against the bank."

I looked into this issue and noted that I had some concerns about the consistency of Mrs S's evidence around it. Mrs S had been asked why instead of her name appearing on the contract with E, the name of "HS" appeared instead. She had said when first asked by the bank that HS was her husband or ex-husband. Later on she had described HS as her son, a friend or a fictitious person.

In the end I thought it most likely that HS was Mrs S's ex-husband as this was the first explanation she had given, but I considered it didn't really matter who HS was, because I thought it likely that Mrs S was a party to the contract even though her name did not appear on it. I said this for the following reasons:

- This was a contract for building work to be completed on Mrs S's home. It would be unusual for her not to be involved in the agreement.

- Land Registry records confirmed the property was held in Mrs S's sole name.

- E clearly considered Mrs S to be their customer, and she considered herself to be theirs, based on the correspondence between them, and between M&S and E.

This all meant that, if E had breached this contract with Mrs S, or misrepresented something to her, she could claim against M&S under section 75 of the CCA.

Before continuing with my provisional decision I noted that there were some problems with the evidence. This included what I considered to have been the inconsistencies in what Mrs S had said about who HS was. I said I had needed to treat her evidence with some caution as a result.

I also noted that the documentary evidence of the works which were meant to have been completed by E was quite rudimentary. DW had compared the agreement as being like one which had been "drawn on the back of a fag packet" and that it was so vague E had been "asking for trouble". In other words, where there wasn't a clear and precise contract between Mrs S and E, disputes were inevitable. I said that the vagueness of the agreement meant

that were it was alleged that E had deviated from it, it was difficult for me to say this was a breach of contract without paperwork to show how the work was meant to have been done.

Additionally, I observed there was very little independent commentary on the works carried out by E. The Financial Ombudsman Service was not an expert in glazing or construction, meaning it was reliant on independent evidence for assistance in cases like Mrs S's where allegations had been made that works hadn't been carried out with the level of skill and care expected in the industry. There was the DW report, but this had some limitations which I would get on to later in the decision.

Finally, I noted that I had concerns over the evidence about the price which Mrs S had paid for E's works. Cross referencing E's official invoices for the job with credit card receipts and bank statements appeared to show that £16,511 had been paid to E. This was also the total of E's invoices. However, Mrs S said she had also handed E's managing director £12,500 in cash. The evidence Mrs S produced to support this was a piece of graph paper with E's header on it. There were amounts handwritten on this, including a reference to £12,500 cash, but I didn't think this was good enough to show that Mrs S had paid £12,500 cash to E in respect of the contract for the doors, windows and rooflights. The amount did not appear on any official invoices, and Mrs S had told us previously that she had a separate contract with E for other works, which other payments could have related to. In the end, I didn't think I could say that Mrs S (and HS) had paid any more than £16,511 to E for the doors, windows and rooflights.

I then went on to outline Mrs S's rights under the Consumer Rights Act 2015 ("CRA"). I said the following:

"The contract between Mrs S and E was a contract for the supply and installation of doors, windows and rooflights at her home. This means it was a contract for the sale of goods and supply of services, both of which are covered by the CRA.

One of the effects of the CRA is to cause contracts of this type to be treated as including certain terms. These include that goods will be as described and of satisfactory quality, and services will be carried out with reasonable care and skill. What constitutes reasonable care and skill is not defined in the CRA but has generally been held to mean the level of care and skill to be expected of a competent practitioner of the service in question.

If goods are not as described or of satisfactory quality, or services haven't been carried out with reasonable care and skill, then a breach of contract will have occurred, for which the CRA sets out remedies which are not exhaustive. Ordinarily, consumers have the right under the CRA for goods to be repaired or replaced, or to a price reduction (or rejection of the goods) where this isn't possible or practical. Consumers also have the right to ask for services to be performed again, or a price reduction to reflect the defective performance."

I then went on to consider whether or not there had in fact been a breach of contract by E. I noted that the issues Mrs S had complained about could be summarised under the following general points:

- *The glazing units being poor quality, second hand, or not the models ordered and paid for (e.g. not the right size to fit the openings, or cheaper units than specified being supplied).*

- *A generally poor aesthetic appearance of the works, not representative of what Mrs S had seen in E's showroom. This included poor fit and finish, a corner which was wider than anticipated, scratches, and trickle vents which Mrs S didn't think were meant to have been installed.*

- *Gaps which allowed rain to blow through.*

E had responded to Mrs S's complaint when it was put to them by M&S. It had essentially denied everything. It said that a lot of the issues Mrs S had mentioned related to works which had been carried out by other builders who had worked on Mrs S's project. It also claimed that it had explained that it would be fitting trickle vents prior to supplying them, as well as telling Mrs S where they would be located.

I noted that the only evidence from a third party was the DW report. I had read the report and DW's follow up emails with M&S. I'd also listened to a recording of a phone conversation he'd had with M&S while he was at Mrs S's house. I thought it was clear from these that there was a mismatch between what Mrs S had expected and what E had actually installed. DW was clearly surprised about how vague the paperwork had been and thought there were some issues which were essentially Mrs S's word against E's. However, he did make the following comments or findings:

- The trickle vents had not been fitted with reasonable care and skill. He referred to them having been cut by hand and "fitted to an appalling standard". He provided a photo which appeared to show roughly-cut holes in the window frames.

- The roof lights were not the ones which appeared on the contract.

- The bedroom window (which Mrs S has now described as a curtain wall) was different to the drawings.

DW also referred to there being a poor finish in places, but didn't indicate what it might cost to fix the issues he'd identified. He only suggested, after M&S pressed him for more information, that the windows be replaced or a refund provided.

I felt I had enough evidence to reach a set of conclusions. I thought it was likely E had not supplied the rooflights specified on the contract (they had provided cheaper ones), and the trickle vents hadn't been installed with reasonable care and skill. I didn't feel DW had gone into enough detail about the issues with the bedroom window for me to be convinced there had been a breach of contract in relation to that. However, I was willing to accept that the fit and finish of some aspects of the work was unsatisfactory and not what one would expect from a builder exercising reasonable care and skill.

I then turned to what I felt would be an appropriate remedy. I observed that no costings had been put forward for the work required to correct the issues, so it wouldn't be appropriate to ask M&S to cover the cost of remedial works. I also didn't think the issues were of such a magnitude that Mrs S could simply reject the goods. I thought that would be disproportionate. This left the possibility of a price reduction to reflect the difference in value between what Mrs S paid for and what she had received. I noted this would be a very approximate exercise due to the state of the evidence, and said that I thought a 15% price reduction, based on the price of £16,511, would be reasonable in light of the fact that the evidence of the problems was limited but they were clearly not trivial ones.

I unfortunately then had to turn to another problem, which was that HS had also used a credit card to pay for part of the contract with E. This left the possibility open that he had made a chargeback or section 75 claim of his own, and therefore there was a risk of Mrs S and HS recovering the same losses twice. Mrs S had even referred to such a claim in correspondence with M&S.

I therefore said that, as things stood, I couldn't conclude that M&S ought to have honoured Mrs S's section 75 claim. However, if she could evidence that no claim had been brought

against the other credit card issuer, then my decision would change and I would be minded to award the price reduction I'd discussed earlier.

I asked both parties to the complaint to provide me with any further submissions they wanted me to consider. I specifically highlighted to M&S that it needed to consider and comment on my findings regarding the breach of contract and the redress I had indicated I was minded to award, as if Mrs S provided the evidence I'd requested, I would likely be changing my decision.

M&S eventually got in touch to say that it had nothing further to add. More recently, after learning Mrs S had provided more evidence in relation to claims made elsewhere, M&S said it accepted my redress proposals. Mrs S provided a large amount of further submissions across about 25 emails, however I think I could summarise the relevant main points as follows:

<u>There had been a failure by E to deliver what had been ordered, and its workmanship had been poor.</u>

- Building Control ("BC") had confirmed E should not have installed trickle vents as these were wrong for the type of door/window, or they couldn't be used in that kind of door or with modern thermal glass.

- The windows and the curtain wall (the bedroom window) were not as per the agreed drawings or like in the showroom. The curtain walling was too small and the surrounding opening had needed to be filled in with stone at Mrs S's cost. The windows/sliding doors in the extension were also too small, resulting in ugly packing strips and a corner column which was far too wide. The windows themselves had been second hand.

- The curtain walling was not meant to have opening windows, but opening windows had been installed.

- DW hadn't explained her case well but M&S had chosen him as the expert.

- BC had refused to sign off E's works, and E wouldn't provide a CERTASS certification, just a useless in-house guarantee.

<u>The cost of the contract, and the price paid, was £29,000.</u>

- The price had originally been £30,000 but HS had managed to get a £1,000 discount by suggesting they put cash into the deal.

- E would never have agreed to do such extensive works for £16,511. It was an unrealistically low price so the real price must have been higher. E had never denied the price was £29,000 either.

- As well as the handwritten receipt already provided, there was a set of drawings of all the windows which mentioned a price of £30,000. And on the back of another agreement with E were the words "remaining monies are to be paid starting with the first 25% invoice to be issued at a later date". This suggested money had already been paid, which was the £12,500 cash.

- The reason why there was such a delay between her withdrawing the cash and then paying E was because she'd had issues with a previous builder she had sent too much money to by bank transfer. She'd withdrawn the money

earlier to keep it safe.

HS was not who I had said he was in my provisional decision

- The HS mentioned on the contract was in fact her brother in law ("AS") who had been assisting with her dealings with E. He has a name which, when shortened, sounds like HS's name. So E must have got confused.

The case has now been returned to me to decide.

Before writing this decision I asked that questions be put to E about the price of the contract with Mrs S. It told our investigator that £16,511.40 had been paid to it in respect of the contract and there were no cash payments.

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.

Because Mrs S has now been able to evidence that no claims have been made, my starting point, going into this final decision, is that M&S will need to provide a 15% refund of the £16,511 I believed Mrs S had paid.

Mrs S disagrees with my provisional decision and so I've carefully considered the detailed points she made in her emailed responses. I will cover the main themes separately, starting with the question over the identity of the "HS" on the contract.

I appreciate that Mrs S has now given a different explanation of who the "HS" appearing on the contract with E was. She says he must be "AS", her brother in law. She's also provided information about naming conventions in different cultures and suggested this may have been the source of any confusion.

As I explained in my provisional decision, HS's identity ended up not being important from the perspective of whether there was a valid DCS agreement which would allow Mrs S to make a section 75 claim against M&S in respect of the contract with E. This was because I considered Mrs S to be a party to the contract with E. Ultimately, who HS was didn't matter when answering that question.

However, I did find in my provisional decision that the fact that Mrs S had given very different explanations when asked about who HS was, was troubling and it led me to treat her evidence in general with caution. While I thank Mrs S for providing some further background, it hasn't changed my view on this. Mrs S stated on the phone to M&S, when asked about who the HS was who appeared on the contract, that he was her husband, then clarified that he was her ex-husband. This is different to the explanations she has given subsequently and is different to her position now, which is that HS was "AS", a brother in law.

Turning to the question of the contract price, and what was paid to E for the works, I remain of the view that the amount paid for the works in question was £16,511 and I am unable to conclude that an additional £12,500 cash was paid over to E for them. I say this for the following reasons:

- The official invoices only show a price of £16,511 being paid.

- The bank statements and credit card receipts match the official invoices.

- The only mention of £12,500 cash is on the piece of graph paper referred to in my provisional decision, which also contains other figures and does not appear to me to be a receipt. Even if it was intended to be a receipt, it appears unofficial and unclear.

- E claims that it was not paid any cash in relation to the project.

Mrs S says £16,511 is an unrealistically low price but I do not know how much a project like this would have cost in 2019. A reputable trade website suggests that five aluminium bi-fold door panels could be supplied and installed for between £3,000 and £7,500 plus VAT in 2023.[1] The drawings I've seen from E appear to show five bi-fold door panels, along with three small bathroom windows, the bedroom window (or curtain wall) and two rooflights. A cost of £16,511 doesn't appear unrealistically low to me, and I've not been directed to any evidence (for example from an expert) to suggest otherwise.

The final set of issues relates to the problems with E's work. I've read all of the documents Mrs S has sent but I don't think they support the conclusions she's reached about the project.

For example, Mrs S has referred to Building Control taking issue with E's work, and stating that trickle vents were not to be used with the type of glass or doors installed. She's provided a chain of emails with the Building Control officer as evidence, but all the officer appears to say in these is that there are options other than trickle vents which could be used for ventilation. He doesn't say trickle vents shouldn't or can't be used. And a document the officer provided a link to – "Approved Document F" – also doesn't say trickle vents can't be used.

There are other reports and sets of comments from Building Control within the new evidence Mrs S has sent, and a recent email from the officer confirms he is unable to sign off on the overall building project because there were issues outstanding from a report of June 2020. Mrs S has not supplied a copy of this report, so I don't know what the outstanding issues are or whether they relate to something E has done or not done. Mrs S has however provided copies of reports from September and October 2019. These reports were critical of works carried out on the extension in general. The officer noted there were issues with ponding on the flat roof to the extension, wall insulation, movement in a parapet wall, an inadequate damp proof course, and steel beams which were not to the specification required by the structural engineer.

It appears from the new evidence Mrs S has provided that there *were* problems with works carried out by other contractors who had worked on her project. E claimed, when M&S put Mrs S's complaint to them, that they'd manufactured all of the products to the measurements requested, but ultimately had to work with the openings which had been made by Mrs S's other builders. Unfortunately, I think the evidence Mrs S has provided in response to the provisional decision appears to support E's contention that it was not to blame for some of the issues Mrs S complained about.

Regarding the bedroom window/curtain wall, I've seen various different drawings of this, with different measurements and comments, throughout our file on the case. Not all of these drawings are dated, so I don't know what the final design was meant to look like. Mrs S is clearly unhappy with the end result but there is simply too little information to be able to say that there's been a breach of contract by E in relation to this part of the works.

[1] https://www.checkatrade.com/blog/cost-guides/cost-install-bifold-doors/ [accessed 9 June 2023]

Regarding DW, I've not seen any evidence that M&S appointed him. Having listened to the relevant phone calls, my view is Mrs S appointed DW and M&S accepted her choice of expert. I covered his expert report in my provisional decision and my views on it are unchanged. I remain of the view that the evidence available allows me to draw the following conclusions:

- The wrong rooflights were fitted.
- The trickle vents were not fitted with reasonable care and skill.
- Some aspects of the fit and finish of E's work was unsatisfactory, indicative of a lack of reasonable care and skill being taken.

No figures to indicate what it would cost to remedy these issues have been provided by either party, so I also remain of the view that a price reduction of 15% would have been the most appropriate way to honour Mrs S's section 75 claim. In the absence of any compelling evidence or arguments that this percentage should be changed, I have decided to retain it in my final decision.

Overall conclusions

I thank Mrs S for her additional submissions following my provisional decision. In these she has evidenced that no other claims have been made with another card issuer in relation to the contract with E.

As I explained in my provisional decision, this means I will be saying that M&S should have honoured her section 75 claim and will need to settle in line with the figures I outlined in my provisional decision, which for the reasons explained earlier, have not changed following Mrs S's additional evidence.

This means M&S will need to pay to Mrs S 15% of the amount of £16,511.40[2], along with compensatory interest calculated from when it should have honoured Mrs S's claim. It's unclear if Mrs S paid anything for the DW report or, if she did, if M&S has already reimbursed her expenses. However, if she has paid DW and not been reimbursed, it would be fair and reasonable that M&S covers this cost also.

My final decision

For the reasons explained above, including the extracts from, and summary of, my provisional decision, I uphold Mrs S's complaint in part and direct Marks and Spencer Financial Services Plc to take the following actions:

A) Pay to Mrs A £2,476.71, this representing a 15% price reduction of what she paid to E for the works in question.

B) To the amount in A), add 8% simple interest per year*, calculated from the date the bank first wrote to Mrs S declining her section 75 claim, to the date the amount in A) is paid to her.

C) Reimburse Mrs S the reasonable costs she incurred in commissioning the report from DW, to the extent that it has not already done so.

[2] I have based this on the amount E claims to have received from Mrs S, which is a difference of 40p from my provisional decision.

*If Marks and Spencer Financial Services Plc considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mrs S how much it's taken off. It should also give Mrs S a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S to accept or reject my decision before 14 July 2023.

Will Culley
Ombudsman