DRN-4468051

The complaint

Ms F complains that Creation Consumer Finance Ltd rejected her claim for compensation under section 75 of the Consumer Credit Act 1974 ("section 75") in relation to a boiler replacement.

What happened

On 11 March 2022 Ms F entered into a regulated fixed sum loan agreement with Creation to finance the supply and installation by a third party ("the supplier") of a new boiler in her home, and a new thermostat. The boiler was subsequently installed. Since Ms F immediately reported that she was dissatisfied with the installation, she did not sign a satisfaction note and so the funds were never released by Creation to the supplier. The agreement was eventually cancelled in March 2023. Creation has argued that this means that section 75 does not apply to her loan agreement.

Ms F's old boiler is in her attic, and it is 16 years old. As she is unwell, it is no longer expedient for her to go to the attic, and so she wanted the new boiler to be installed in her garage, and the old one to be removed. The old boiler has a flue which goes through the roof, and removing the flue would require new tiles to cover the hole where it used to be. However, Ms F says that when the workmen arrived, they were unaware that the old boiler was in the attic, and no arrangements had been made for its removal, or to tile the roof. This was despite the fact that the supplier had charged her extra to remove the old boiler and had amended her quote accordingly.

After the installation, Ms F complained about the old boiler not being removed from the attic. She said this was taking up room, and that would be a problem whenever the house was sold. She also complained about the following matters:

- The new thermostat didn't work, which meant that there was no heating.
- It had not been possible to remove the old hot water tank until after new pipes had been installed in the garage; this had resulted in hot water pipes being installed about two feet away from the wall, where they took up space and were at risk of people bumping into them and burning themselves. She provided photos of this.
- Flux had not been removed from the pipes; this will cause corrosion over time if not removed, which will result in leaks.
- The underfloor heating had not been drained and cleaned, because the workmen had not been told that she had underfloor heating, even though she had told the supplier about it at the survey. The supplier denies being told about it prior to the installation.

Later on, Ms F complained that she had to keep topping up the new boiler with water. She had not originally realised that was a fault until she spoke to people who told her it was not normal. As time went by, she had to top it up more frequently, until she was doing this three times a day. As a result of this, she contacted her insurer, who sent its engineer round to inspect the heating system and prepare a report in December 2022 ("the insurer's report"). (This report has since been shared with Creation.) The engineer isolated the underfloor heating, in order to reduce the water pressure loss and improve the heating upstairs. So

Ms F complains that the new boiler is not fit for purpose, because it cannot provide enough heat to both the underfloor heating and to the radiators upstairs, only to one or the other.

Ms F asked first the supplier, then Creation to pay for the cost of resolving these problems. She obtained quotes from two other firms for about £2,700 and £2,940.

At first, Creation did not question its potential liability under section 75. It asked the supplier about Ms F's complaint points. In response, the supplier told Creation the following:

- The boiler had been installed to a good standard.
- The boiler manufacturer had inspected the boiler twice, and had found nothing wrong with it.
- Three different electricians had inspected the thermostat and found it to be in working order.
- The underfloor heating is the most likely cause of Ms F's problems, as it has a leak. The supplier had not installed the underfloor heating, nor carried out any work on it, nor been told about its existence at or ahead of the installation.

Relying on what it had been told, Creation declined Ms F's claim under section 75.

The matter was next considered by one of our investigators. She upheld this complaint. She did not accept the supplier's claim that it had not been told about the underfloor heating, because it was not plausible that this would not have been mentioned or picked up during the survey, or when the hot water tank which supplied the underfloor heating was removed from the garage. The insurer had found that the new boiler was insufficient to heat the whole house. The investigator didn't think that Ms F would have accepted a replacement boiler which would not be able to provide heating to the same extent as the old one.

The investigator said no evidence had been provided to support the supplier's claims, despite her asking to see some. In particular, there was no evidence to corroborate that the manufacturer had inspected the boiler and found no issues with the installation. There was no evidence to show that three electricians had visited the property and inspected the thermostat. She pointed out that as the problems had been reported within six months of the installation, the burden of proof fell on the supplier (and therefore on Creation). She said that Creation appeared to have just taken the supplier at its word, but she thought that the supplier was not credible.

The investigator concluded that the necessary remedial work should be carried out by a third party, at Creation's expense (by the provider of the cheaper of the two quotes Ms F had obtained). Creation should pay Ms F £500 for her distress and inconvenience. The loan agreement should be reinstated on the same terms as originally agreed (twelve monthly payments at 0% interest). And in case any negative information about the loan had been reported to the credit reference agencies, Creation should arrange to remove this from Ms F's credit file.

Following that opinion, Creation argued that section 75 did not apply to the loan agreement, because in the end no money had been paid to the supplier, and then the agreement had been cancelled. Section 75 only applies *"to a transaction financed by the agreement."* But the investigator did not accept that argument, because the agreement (according to its own terms) had taken effect when the goods were delivered, regardless of whether the funds were released to the supplier or not. So she found that the transaction had been financed by Creation's loan.

Because no agreement could be reached, this case was referred for an ombudsman's decision.

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.

Creation's liability under section 75

I'm satisfied that Ms F's purchase of the boiler qualifies as a transaction financed by Creation's loan agreement, even though the funds were never released. That is because paragraph 5 of the agreement's terms and conditions says:

> "This agreement shall be dated on and become effective and binding on the parties from the date of our signature."

That date is 11 March 2022, which was prior to the installation.

Creation's liability under section 75 is for any breach of contract (or misrepresentation) by the supplier. That liability was therefore incurred, and a cause of action accrued, no later than the date on which the replacement boiler was installed (and, if later, by which the old boiler should have been removed but was instead left where it was). The funds were not to be released to the supplier until after the contracted works had been carried out, by which time Ms F already had a claim against the supplier, and a like claim against Creation. So whatever happened (or didn't happen) after that cannot exclude Creation's liability under section 75.

It is not in dispute that Ms F asked for her boiler to be moved from the attic to the garage. I have seen an email which the supplier sent to Creation in which it says it agreed to do that on 11 March, charged Ms F extra for it, and amended its quote accordingly. The extra charge was not added to the loan but was paid separately, so I have thought about whether this constitutes a separate transaction for which Creation would not be liable under section 75. However, as this work was so intrinsically linked to the original contract to replace her boiler, I think it was a collateral contract to vary the works originally agreed, rather than an entirely separate contract for entirely separate work, and I think the extra charge was really a price increase. So I think this variation was still part of a transaction which was part-financed by Creation, and that Creation is liable for any breach of contract arising out of it.

Was there a contractual term to remove the old boiler?

The email I mentioned in the last paragraph does not quite go as far as to say that the old boiler was supposed to be removed from Ms F's property. But I think that is so strongly implied by the term "Boiler Replacement," which is the title of the quote, that if the supplier really never intended to remove the old boiler then it would have made this clear in an express term, rather than leaving it to be implied from silence. I think that any consumer would understand a boiler replacement to include taking the old boiler away and making good the old site. So on the balance of probabilities, I think it was a term of the contract that the old boiler would be removed, and that this wasn't done only because the workmen hadn't realised that this would involve making good the roof and had come unprepared.

Breach of contract

For the reasons given above, I am satisfied that the failure to remove the old boiler from the attic was a breach of contract by the supplier, and that Creation is liable for that.

I turn now to the new boiler and the related issues.

I have had regard to section 19(14) and (15) of the Consumer Rights Act 2015, which say that goods which fail to conform to the contract at any time within six months after they were delivered must be taken to have not conformed to it on the day of delivery, unless it is proved that they did conform. This rule also applies to the installation of the goods by virtue of section 15.

I'm sure that if the manufacturer had carried out two visits to the property to inspect the boiler, and if an electrician or three electricians had carried out three visits to inspect the thermostat, then there would be written records of these five visits. No such evidence has been supplied, despite the investigator asking for it, so on the balance of probabilities I think this is because no such evidence exists, because the visits did not happen. That undermines the supplier's credibility.

The only evidence I have seen of anyone visiting the property and inspecting anything is the insurer's report. That report describes how the engineer looked for a leak in the underfloor heating, using thermal imaging and moisture meter testing. He determined that there was no leak. That contradicts the supplier's assertion that there was a leak; again the supplier has provided no evidence to show that there was such a leak. I accept the insurer's evidence.

That report was shared with Creation two weeks before it provided its final response, but it apparently overlooked it, because its final response said that the insurer had not yet attended the property.

Since there is no leak in the underfloor heating, which I accept was working fine before the boiler replacement, I am satisfied that the installation of the new boiler is the most likely cause of the problems Ms F has been experiencing. I do not think that was carried out with reasonable skill and care, and

I have seen photos of the pipes in the garage. They do stick out from the walls. They also have green patches on them. So I accept Ms F's evidence about these issues, and I find that they were not installed with reasonable skill and care.

Overall I find that Ms F's evidence is more credible than the supplier's, and so I uphold her complaint.

Putting things right

I agree with the investigator's proposed redress.

The cheaper of the two quotes submitted by Ms F is for a total of £2,701.68. But rather than order Creation to pay Ms F that amount, I will order it to arrange for the remedial work described in the quote to be carried out at no cost to her. That is in case prices have gone up since the quote was prepared six months ago, and just in case the work takes longer than envisaged, resulting in higher labour costs.

In the paragraph below, "the remedial work" means the work identified in the quote dated 18 May 2023 (a copy of which is enclosed with this decision for the avoidance of doubt).

My final decision

My decision is that I uphold this complaint. I order Creation Consumer Finance Ltd to:

- Arrange for the remedial work to be carried out at no cost to Ms F;
- Pay Ms F £500 for her inconvenience;
- Reinstate the loan agreement on the same terms as before (*i.e.* 0% APR, twelve monthly payments of £173.91);

- If any negative information about the original loan agreement has been reported to Ms F's credit file, arrange to have that information removed.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms F to accept or reject my decision before 2 January 2024.

Richard Wood
Ombudsman