

The complaint

Mrs B has complained that Marks & Spencer Financial Services Plc trading as M&S Bank ("M&S Bank") rejected her claim against it under Section 75 of the Consumer Credit Act 1974.

What happened

Mrs B bought a solar panel system ("the system") for her home in 2012. The purchase was funded in part with an M&S Bank credit card, and that business is therefore liable for the misrepresentations of the installer under the relevant legislation. In this case, that relates to the installer misleading Mrs B into believing that the panels would be self-funding, which they weren't.

M&S Bank agreed to uphold Mrs B's claim and offered redress. Essentially, M&S Bank offered to work out how much benefit (in Feed in Tariff (FIT) payments and savings on energy bills) Mrs B's system would generate over a 10-year period and ensure she pays no more than that. But M&S Bank didn't want to include the interest Mrs B had paid on her mortgage account in its redress calculation. It also wanted Mrs B to provide bills and statements to help it work out (if any) losses she had suffered.

Our investigator felt M&S Bank needed to consider the interest Mrs B paid on her mortgage account to fully compensate Mrs B. She also asked Mrs B's representative for updated bills and FIT statements to help M&S Bank work out redress. Initially, the representative said M&S Bank should use reasonable assumptions to work out redress but later did not respond to our investigators request for information.

As an agreement couldn't be reached, the case was passed to an ombudsman.

In my provisional decision of 6 November 2023, I set out why I was minded to upholding the complaint but only if Mrs B could evidence her loss. I invited both parties to provide any further submissions they may wish to make before I reached a final decision. Both parties replied and I've sent further correspondence since then. I will address both M&S Bank and Mrs B's concerns below.

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.

In my provisional decision I explained the following:

M&S Bank as well as Mrs B's representative are familiar with all the rules, regulations and good industry practice we consider when looking at complaints of this type, and indeed our well-established approach. So, I don't consider it necessary to set all of that out in this decision.

Bearing in mind that both parties have accepted that the system was mis-represented to Mrs B, I don't need to consider that as part of this decision. It seems clear, the only matter left in dispute is how to put things right which I'll consider as part of this decision.

Determining fair compensation is not always an exact science and it is all the more difficult in a case like this where solar panels have been installed at a property. Usually, if I'm persuaded that a consumer wouldn't have purchased the system but for the misrepresentation, I'd have to consider whether M&S Bank should unwind the credit agreement. M&S Bank would have to remove the solar panels (at its expense), give Mrs B a refund of any payments she's made less actual benefit she's received. M&S Bank would also have to make good any damage to Mrs B's property caused by the installation and removal of the solar panels. This would be the position Mrs B would be in had the misrepresentation not taken place.

But the removal and disposal of a working system would be disproportionately costly for M&S Bank and may also lead to other problems such as damage to Mrs B's roof and internals leading to further costs for M&S Bank. And of course, this also leads to a perfectly working solar panel system being disposed of. This is why we have an established approach to redress in these types of cases. We ask financial businesses to work out what benefit (usually including savings and FIT payments) consumers are likely to achieve over a 10-year period and charge them no more than that for the system. The aim of our redress is to be fair to both parties. It minimizes costs for M&S Bank and minimizes disruption to consumers and puts them in a position where they suffer no financial loss. Mrs B has also indicated she would settle the case on that basis rather than insist on a full unwind.

Working out what Mrs B has paid

I understand Mrs B paid £3,750 on her M&S Bank credit card and £11,250 on her off-set mortgage account. Our investigator asked M&S Bank to calculate the amounts Mrs B paid on her credit card account including interest and add that to the amounts Mrs B paid on her off-set mortgage account (including interest) to work out how much she has been charged in total.

She then asked M&S Bank to work out Mrs B's self-funding amount (i.e. the amount of benefit Mrs B will likely receive over a 10-year period). M&S Bank would then pay Mrs B the difference between the two amounts including 8% interest.

I've thought about M&S Bank's comment but if M&S Bank doesn't include all the amounts Mrs B has paid, in its assessment of loss, then it does not put Mrs B in a cost neutral position. So, the aim of the alternative redress is not achieved. Its offer therefore does not ensure the Mrs B suffers no financial loss so, I don't think its offer is in line with our established approach to these cases. It should, therefore, include the total amount Mrs B has paid for the system and work out her compensation on that basis. This will put her in a position where she suffers no financial loss because of the misrepresentation. This is still more cost effective for M&S Bank than a full unwind and ensures that Mrs B suffers no financial loss. So, I think the redress I intend to order in this case is fair and reasonable considering all the circumstances of this case.

Mrs B's case specific data

M&S Bank has asked Mrs B to provide copies of her energy bills, FIT statements as well as an updated meter reading to enable it to work out her self-funding amount. Mrs B's system was sold and installed in 2012, and the 10-year period expired in 2022. So, M&S Bank should be able to work out the actual amount Mrs B has received and paid to work out her loss.

I understand her representative says that given how long ago the system was installed, Mrs B can no longer provide pre or post installation bills. It feels we have an established approach to redress where bills are not submitted, and M&S Bank should use such assumptions to work out loss.

This service has in other cases (where bills are not available), asked businesses to estimate the savings consumers have achieved based on a range of assumptions. To calculate any electricity savings, businesses were asked to use a self-consumption rate of 37% of the energy generated, and a default electricity price of 15p per kWh (this was the average price of electricity around the time of sale). For clarity, the self-consumption rate is the amount of electricity generated by the solar panels that the consumer is able to use or self-consume whilst they are at home.

While we have, in cases where bills aren't available, allowed the use of assumptions to work out loss – this is only where data is not available for example, where utility providers have become insolvent, and bills aren't available. And even in these cases consumers were still expected to provide up to date meter readings and FIT statements.

Since this system was installed in 2012, I can understand why pre and post installation bills may be unavailable. But that doesn't explain why current bills or updated FIT statements and a meter reading cannot be submitted. I think it's fair for M&S Bank to ask for and use actual available data to work out what loss Mrs B has suffered and compensate accordingly. And I've been given no reason why that cannot be submitted.

Given what we know about these types of cases, I think it's likely Mrs B has suffered some loss and it's reasonable for the complaint to be upheld on that basis. But I also think it's fair for M&S Bank to ask for and rely on actual data to calculate the loss she has suffered and unless these are submitted, I don't think M&S Bank needs to do anymore.

Putting things right

*To clarify, **subject to receiving the information necessary to work out loss**, I think that it would be fair and reasonable in all the circumstances of Mrs B's complaint for M&S Bank to put things right by doing the following:*

- 1. Calculate how much Mrs B has paid for the system including:*
 - the amounts paid on her M&S Bank credit card (including interest and charges)*
 - the amounts paid on her off-set mortgage (including interest)*
- 2. Calculate Mrs B's self-funding amount over a 10-year period by:*
 - Calculating actual benefits received to date based on available data*
 - Using reasonable assumptions for any periods where data is actually unavailable.*

M&S Bank should pay Mrs B the difference between what she paid in total and what she should have paid based on the self-funding amount with 8% interest.

In the event the calculation shows that Mrs B has paid more than she should have, then M&S Bank needs to reimburse her accordingly. Should the calculation show that the misrepresentation has not caused a financial loss, then the calculation should be shared with Mrs B by way of explanation.

As explained above, M&S Bank can use reasonable assumptions, for any periods that data isn't available rather than a failure of Mrs B refusing to or simply failing to submit the data.

I'm satisfied that there was sufficient information available at the time that Mrs B first contacted M&S Bank that means the claim should have been upheld and matters should have been put right in line with our established approach to redress. I intend to direct M&S Bank to pay £100 compensation for the trouble and upset caused.

Mrs B should submit:

- *Up to date FIT statements to show what benefit she has been paid to date*
- *A current meter reading to see generation*
- *An MCS certificate if available*
- *Any electricity bills she does have including recent ones.*
- *A copy of her off-set mortgage account statements or any document showing how much she's been charged, and/or she's paid.*

If Mrs B doesn't submit the documents requested, I don't think M&S Bank needs to do anymore, as I think it's fair for redress to be worked out based on the actual losses Mrs B has suffered (if any). Mrs B is of course free to provide an explanation as to why that information isn't available by the deadline set below, which I will consider prior to issuing my final decision on the matter.

Mrs B (through her representative) replied sending in her utility bills, FIT statements as well as an updated meter reading. She said she'd also sent in mortgage statements, but these were not received.

M&S Bank maintained that it didn't think it should consider any interest on her off-set mortgage as the payment for the solar panels would have been made from her current account rather than the mortgage account.

In an email of 19 December 2023, I explained the following:

M&S assumes the bank transfer to pay for the solar panels came from the customers bank account not the mortgage account directly – so it doesn't feel any interest incurred on the mortgage account is a relevant consideration.

I disagree and I'll explain why. If the funds used to pay for the panels came from Mrs B's mortgage account and she has paid interest on those amounts, we would expect M&S to take the interest into account to ensure everything Mrs B has paid for the panels is included in its redress calculation (this is even if the actual payment was made from a current account). This will put Mrs B in a true cost neutral position which is the aim of the redress. This is no different to cases where customers take out personal loans separate to the credit card agreement to pay for the panels – the loan funds are usually paid into a bank account and then transferred onto the supplier. However, we would still expect the loan funds and the interest charged on that loan amount to be considered. So as explained in my provisional decision, any interest Mrs B has actually paid on her mortgage account in relation to the funds used to pay for the solar panels must be included in the redress calculation to ensure Mrs B is left in a cost neutral position.

However, we have yet to see any evidence of how these amounts were actually paid and any evidence of the financial losses Mrs B may have incurred.

Documentary evidence

I would expect to see a clear documentary trail of the funds leaving the customers mortgage account to the supplier. Mrs B's representative says it has sent in the requested documents to enable M&S Bank to work out what loss Mrs B has suffered.

I confirm we have received the following which is attached to this email so M&S can review the evidence:

- *Utility bills*
- *A meter reading of 44,677.4 kWh taken on 13 November 2023*
- *FIT statements*

Mrs B's representative says it included mortgage statements in this batch of evidence however this has not been received. Without copies of the mortgage statement and the linked off-set account(s) – M&S cannot work out what if any interest Mrs B has paid. So, as I've said in my provisional decision, Mrs B needs to send M&S any evidence to show what interest Mrs B has actually paid for the solar panels. My understanding is that if Mrs B had savings in her current accounts (or savings accounts) linked to the off-set mortgage, then this would reduce the overall interest she was paying on her mortgage. So, M&S would need details of how the payment was made, what if any interest was paid on the mortgage account, and when these amounts were paid off by Mrs B to enable it to compensate her for the financial losses she's incurred.

Without this evidence, as I said in my provisional decision, I don't think M&S can consider the interest. If Mrs B cannot substantiate a loss, I don't think M&S can be expected to compensate her for it.

Mrs B has now provided all the evidence she has of the benefit she's received. And M&S should have what's needed to work out what benefit amounts she's received over the 10 - year redress period. For any periods that data isn't available, I would expect M&S to use reasonable assumptions to work out loss.

Regarding any interest paid on Mrs B's off-set mortgage account, I still think M&S should include everything Mrs B has paid as long as she can substantiate that she's used her off-set mortgage account to pay for the panels (even if it went through a current account), as well as evidence what (if any interest) she's paid on it.

Mrs B subsequently sent in copies of her mortgage statements still retained as well as copies of the current account statements linked to her off-set mortgage account. Having reviewed these, I sent a further update in January 2024 explaining the following:

The December 2011 to 2012 current account statements show a payment of £11,250 was made on 15 June 2012 – in line with Mrs B's testimony so I'm satisfied that the current account linked to the off-set mortgage account was used to pay for the solar panels. I've seen invoices from the supplier and the system was installed and remained at the property for many years since. So, I think these amounts were paid in the way Mrs B has always asserted.

Her mortgage statement shows that Mrs B's savings balance was reduced by £11,250 – so the "savings balance" with which her mortgage provider used to work out how much interest she would be charged on her mortgage for that month was £11,250 less due to the payment made for the solar panels. So, I think she was likely charged more interest than she otherwise would have been – so there has been some impact.

I can see a mortgage statement for July 2012 which was submitted with her original

submissions and the **off-set benefit** was reduced from £7.001037 to £6.081980 from 15 June 2012 until the end of June 2012. So, my understanding is that her off-set benefit would have been around £15 more for the month of June but for this payment.

However, M&S would have to work out how much she would have paid with her current account (linked to the off-set mortgage) for the panels after the self-funding amount has been worked out (based on the FIT payments plus savings). Mrs B's losses would then be the difference between what she did save due to the payment of £11,250, and what she would have saved had she made a lower payment from her savings account due to the new self-funding cost of the solar panels. So, Mrs B's "losses" would have been even less than £15 for the month of June and therefore the compensation for this element of loss, is unlikely to be significant.

Additionally, there are no further mortgage statements for the remainder of 2012 to enable M&S to work out any further losses. The next mortgage statement available is from December 2013 – and by then the savings balance is significantly different to the July 2012 statement. I've seen a letter from Mrs B's mortgage provider dated February 2019, that it's records only go back for 6 years (so to 2013) and I can see Mrs B has made considerable efforts to locate as much evidence as she can. So, it looks like no further evidence is available.

So, unfortunately, we don't have enough evidence to work out any further impact Mrs B had due to the solar panels beyond June 2012. And a payment of £7,000 was made in December 2012 into the current account which would have changed the off-set benefit amount again – but without a corresponding mortgage statement we cannot know by how much. Any further payments into the current account would have again further limited the impact of the £11,250 debit made due to the solar panels but we don't have all the statements to demonstrate when the savings balance recovered to the pre - June 2012 levels.

As explained in my provisional decision and subsequent email – M&S cannot compensate Mrs B for losses that she cannot evidence. Based on the documents submitted, she has only been able to show that her off-set benefit was reduced by around £15 from 15 June until the 30 June 2012 due to the payment of £11,250 made for the solar panels. And she would only receive from M&S the difference between this £15 and the amount she would have saved on her off-set mortgage for a lower payment made from the current account due to the self-funding amount. I think she likely experienced a similar loss each month until a payment of £7,000 was paid into the savings account on 24 December 2012.

Beyond that, I don't think there's sufficient evidence of any further losses that M&S can be expected to compensate for. I think it's reasonable to assume that Mrs B did incur some loss, in that her off-set benefit was less than it should have been. But there simply isn't enough information to work this out with any certainty.

The purpose of our redress methodology is to try to ensure that the solar panels are cost neutral to Mrs B, so she suffers no loss. But I'm afraid, where the panels were purchased so long ago, it is not always possible to work out in exact amounts what those losses were. In the interests of bringing matters to a resolution, given the extremely complicated nature of any proposed calculation for this element of loss, and the loss Mrs B has been able to evidence being insignificant, I think M&S should pay an additional £100 in recognition of the impact Mrs B has suffered on her off-set mortgage account due to the solar panels. I think this is a reasonable solution to recognise that Mrs B's mortgage account was impacted by the purchase of the solar panels. But it also recognises that those losses cannot be evidenced beyond the 15 days the mortgage statement shows. I'm also satisfied that the losses are also unlikely to be significant.

So having reviewed this complaint again, I think the proposed redress should be adjusted as follows.

Putting things right

I think that it would be fair and reasonable in all the circumstances of Mrs B's complaint for M&S Bank to put things right by doing the following:

- 1. Calculate how much Mrs B has paid for the system including:*
 - the amounts paid on her M&S Bank credit card (including interest and charges)*
 - the amount of £11,250 paid from the current account (linked to her off-set mortgage)*
 - an additional £100 to recognise the loss of the "off-set benefit" due to the payment of £11,250 from the current account linked to the off-set mortgage*
- 2. Calculate Mrs B's self-funding amount over a 10-year period by:*
 - Calculating actual benefits received to date based on available data*
 - Using reasonable assumptions for any periods where data is unavailable.*

M&S Bank should pay Mrs B the difference between what she paid in total and what she should have paid based on the self-funding amount with 8% interest.

In the event the calculation shows that Mrs B has paid more than she should have, then M&S Bank needs to reimburse her accordingly. Should the calculation show that the misrepresentation has not caused a financial loss, then the calculation should be shared with Mrs B by way of explanation.

As explained above, M&S Bank can use reasonable assumptions, for any periods that data isn't available.

I'm satisfied that there was sufficient information available at the time that Mrs B first contacted M&S Bank that means the claim should have been upheld and matters should have been put right in line with our established approach to redress. I intend to direct M&S Bank to pay £100 compensation for the trouble and upset caused.

Neither party have made any additional submissions following my most recent email. M&S Bank initially requested more time to respond but didn't provide any reasons why it required additional time. We explained it should make any submissions by the deadline already set or explain why it needed further time. It has since not made any further comments. So, I've completed my review of this case and find no reason to depart from my most recent findings. I summarise my findings below.

Summary

M&S Bank and Mrs B both agree that the system was misrepresented to her on the basis that it would be self-funding, and M&S has already agreed to uphold this complaint and put things right.

While M&S feels that any losses associated with Mrs B's off-set mortgage account shouldn't be a relevant consideration – I've explained why I disagree. Namely, that I think Mrs B has evidenced that the payment made from the current account was linked to the off-set

mortgage account, and the level of interest she paid on the off-set mortgage account was impacted by the payment for the solar panels. Therefore, the interest Mrs B paid was higher than it should have been, and M&S Bank should take this into account.

However, given how long ago the sale happened, Mrs B has only been able to evidence the impact on her mortgage account for 15 days. She cannot show how her mortgage account was impacted beyond that, and we cannot see from the evidence when she paid sufficient funds back into the current account and the impact of the solar panel payment ended. Because of this, I recommend that M&S Bank pay a sum of £100 in recognition that Mrs B likely did pay some extra interest associated with the solar panels, but the amount of loss cannot be substantiated.

Mrs B has now provided the bills, FIT statements and meter readings she has to help M&S Bank work out the benefit she's received for the 10 years following the sale. And M&S Bank can use reasonable assumptions for any periods that data is unavailable.

Having reviewed this complaint again in its entirety, for the reasons set out above, I uphold this complaint and M&S Bank should put things right as I've set out below.

Putting things right

I think that it would be fair and reasonable in all the circumstances of Mrs B's complaint for M&S Bank to put things right by doing the following:

1. Calculate how much Mrs B has **paid in total** for the system including:
 - the amounts paid on her M&S Bank credit card (including interest and charges)
 - the amount of £11,250 paid from the current account (linked to the off-set mortgage)
 - an additional £100 to recognise the loss of the "off-set benefit" due to the payment of £11,250 from the current account linked to the off-set mortgage
2. Calculate Mrs B's **self-funding amount** over a 10-year period by:
 - Calculating actual benefits received to date based on available data
 - Using reasonable assumptions for any periods where data is unavailable.

M&S Bank should pay Mrs B the difference between what she paid in total and what she should have paid based on the self-funding amount with 8% interest.

In the event the calculation shows that Mrs B has paid more than she should have, then M&S Bank needs to reimburse her accordingly. Should the calculation show that the misrepresentation has not caused a financial loss, then the calculation should be shared with Mrs B by way of explanation.

As explained above, M&S Bank can use reasonable assumptions, for any periods that data isn't available.

I'm satisfied M&S Bank should have upheld the claim and agreed to put matters right in line with our established approach to redress when Mrs B first raised her complaint. I direct M&S Bank to pay £100 compensation for the trouble and upset caused.

My final decision

For the reasons explained, I uphold this complaint. Marks & Spencer Financial Services Plc trading as M&S Bank should put things right in the way I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 7 February 2024.

Asma Begum

Ombudsman