DRN-4601075

The complaint

Mr T complains about Clydesdale Financial Services Limited trading as Barclays Partner Finance's response to a claim he's made against it under connected lender liability provisions set out in section 75 of the Consumer Credit Act 1974 ("CCA").

What happened

In 2010 Mr T used a fixed-sum loan from Barclays Partner Finance to have a conservatory constructed. He contracted with a company "W" to supply and construct the conservatory for a cash price of £15,652. The contract terms between W and Mr T included an insurance-backed guarantee in relation to specified aspects of the construction and materials.

Mr T says that in 2020 he was aware that the guarantee was due to expire shortly, prompting him to inspect the condition of the conservatory. He describes finding several issues that he raised with W, which he has described in some detail in his correspondence. After making some efforts to rectify Mr T's concerns W later declined to carry out any further work. I understand W has since entered administration.

Mr T initially sought to refer a complaint to us about W. We were unable to assist with that dispute, as our jurisdiction covered W only for its credit broking activity. Mr T referred his concerns to Barclays Partner Finance on the basis that the lender was potentially liable for a breach of contract claim in a similar way to W.

Barclays Partner Finance declined to meet Mr T's claim citing the Limitation Act 1980 and complaint-handling rules set out in the DISP section of the Financial Conduct Authority ("FCA") Handbook. The lender considered both of these supported that Mr T had raised his concerns out of time. Mr T was dissatisfied with Barclays Partner Finance's response and asked us to look into his complaint.

After our investigator reviewed Barclays Partner Finance's arguments about the timing of Mr T's claim, the lender accepted that the claim was within time. It said it would arrange for an independent inspection to establish the condition of the conservatory and likely cause of any problems. Barclays Partner Finance contacted "Q", a trading standards-approved body, who in turn instructed "M" to carry out the inspection.

Q provided a summary of M's findings, which has been shared with Mr T and Barclays Partner Finance. Overall M found the issues Mr T had reported were related to general age deterioration and weathering, combined with a need for general maintenance. M's findings did say that there were four double-glazed units that would require replacing if within W's warranty period for glass. But it concluded that the other problems didn't relate to a product fault or installation failure.

Our investigator didn't think that in light of M's findings she could recommend that Barclays Partner Finance was liable to meet Mr T's claim. She found that the only documented evidence on the issue with the windows was M's inspection, noting Mr T hadn't provided anything to show he'd raised the window faults with W during the guarantee period.

Mr T didn't accept the investigator's conclusions. He said he'd provided contemporaneous correspondence with W mentioning the fault – including two of the sealed window units – along with photographs. He expressed the view that the report, or its conclusions, were flawed and possibly biased, questioning Q's independence.

Mr T further objected to the exclusion within the guarantee of deterioration due to wear and tear, saying it should not apply to items that were not touched and did not move. He also said that he'd undertaken regular cleaning of the parts of the conservatory he was able to access, but that moss had grown on the inside of the roof panels due to failure of breathable tape that was inaccessible. He's asked for this review.

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 certain situations section 75 of the CCA provides a useful mechanism for a cardholder to pursue a claim against their lender rather than the supplier of goods or services. But it's by no means guaranteed that such a claim will be successful. I've reproduced the relevant CCA wording here:

> *"75 Liability of creditor for breaches by supplier.*
>
> *(1) If the debtor under a debtor-creditor-supplier agreement falling within section 12(b) or (c) has, in relation to a transaction financed by the agreement, any claim against the supplier in respect of a misrepresentation or breach of contract, he shall have a like claim against the creditor, who, with the supplier, shall accordingly be jointly and severally liable to the debtor."*

Here, Mr T is the debtor, Barclays Partner Finance is the creditor and W is the supplier. I'm satisfied Mr T's credit agreement meets the section 12 definition, and that this was used to finance at least some of the transaction between Mr T and W.

I can follow Mr T's line of argument, and I'm conscious that he has provided detailed correspondence and photographs of the problems with the conservatory. I don't doubt that those problems exist. Whether that is in itself sufficient to demonstrate a breach of contract is another matter.

Mr T's claim can't be founded in his arguments over whether the materials used in the construction of his conservatory were fit for purpose. That would be an action founded on simple contract arising from the point installation of the conservatory was completed, and Barclays Partner Finance would be entitled (as it did) to raise the defence of the time limit in the Limitation Act to such a claim. I appreciate Mr T may hold the view that this should not be the case for items required to last for many more years, but as I understand it, that is the legal position.

But whether the materials used were fit for purpose isn't Mr T's only claim in breach of contract. He argues that certain aspects of the conservatory's construction and condition have failed within the period covered by the guarantee given by W and which forms part of the contract between Mr T and W, and that the failure to address these problems satisfactorily is a breach of contract.

I've reviewed the wording of the Guarantee section (section 9) of the contract between Mr T and W, along with the Guarantee document W issued following installation. This says that the PVCu profile used in the frame construction is guaranteed for 20 years (provided that regular maintenance is carried out), and that sealed glass units, fixtures and fittings carry a

10 year guarantee – the same time period that the roof structure and glazing materials are guaranteed against insect or moisture ingress. There are also shorter guarantees applicable to electrical items, foundations, walls and flooring, though I do not understand any of these to form part of Mr T's claim.

The difficulty here is that the guarantee doesn't prescribe a remedy if any of these aspects fail to last or do not perform as W said they would. Had W warranted as part of its guarantee that it would repair or replace such items and then failed to do so, it would be relatively straightforward to establish the validity of Mr T's claim in breach of contract. But this isn't set out in either document, and I can't simply infer this or decide to interpret the wording in that way. As Mr T's breach of contract claim is founded in a failure by W to undertake remedial action, I think he would need to have rather more in order to demonstrate that this was a contractual obligation on W's part.

That's not to say Mr T wouldn't be able to persuade a court that the contract should be read as conferring on W this obligation. He might want to take independent legal advice in this respect. But based on the situation as it stands, I'm not persuaded that the claim in breach of contract is fully made out.

I've thought about the position were Mr T able to overcome this difficulty. But I note that the guarantee wording also contains provisions that exclude any liability on W's part for faults arising from (among other things) fair wear and tear. I appreciate Mr T feels that this shouldn't form part of the guarantee. Be that as it may, this is an exclusion and it's not for me to rewrite the agreement to remove that wording.

That's important, because Q's summary of M's findings identified many of the problems – including the failure of the breathable tape – as being matters of ordinary wear and tear. That doesn't include the two sealed window units Mr T says he raised with W. If he can overcome the problem with the guarantee wording, he may be able to successfully claim the cost of replacing these units. But that is by no means certain, and I can't tell Barclays Partner Finance to meet that claim on that basis.

I don't share Mr T's opinion of the independence or neutrality of either Q or M. Q is a Trading Standards-approved entity deemed competent in assisting with disputes in the field of house maintenance and improvements. I see no reason why Barclays Partner Finance should not have asked Q to arrange the inspection, or why I should not be entitled to place reliance on the summary findings.

I appreciate that Mr T feels strongly about this matter. His response to our investigator makes this clear. I've read what he's said, but I don't consider he's put forward enough of a case to overcome the expert opinion set out in Q's assessment. Although Mr T expressed the intention to obtain an alternative report from another independent source, despite extending the timescale for him to do so, he hasn't submitted such evidence.

It remains open to Mr T to obtain his own report, and my consideration of this complaint doesn't prevent Mr T from pursuing his claim by alternative means, such as legal proceedings, should he wish to do so. It is simply that on the evidence made available to me, I'm not persuaded that I can fairly require Barclays Partner Finance to meet his claim in order to resolve his complaint.

My final decision

My final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or

reject my decision before 30 April 2024.

Niall Taylor
Ombudsman