complaint

Mr H complains about Marks & Spencer Financial Services Plc (M&S) decision not to meet his claim under section 75 of the Consumer Credit Act 1974.

background

In June 2016 Mr H and his wife signed a contract and paid a deposit of £2,765 for a home conservatory on Mr H's M&S credit card. I'll call the conservatory company who they arranged this agreement with "Company A."

The conservatory installation was subject to necessary approvals such as local authority planning permission. And when permission wasn't granted from the local water authority, the contract was cancelled. Company A says that in line with its terms and conditions, it kept 10% of the total contract cost from Mr and Mrs H's deposit (£2,304.10) for costs already incurred and refunded the remaining amount (£460.90).

But Mr H says he was told by Company A's sales agent that if the necessary approvals were unsuccessful, the contract would be cancelled and they'd receive their deposit back in full. He says they would never have signed the contract had they known their deposit was at risk – therefore he says there's been a false statement of fact.

So Mr H complained to M&S under section 75. In certain circumstances, this allows a consumer to make an equal claim against the finance provider, as against the supplier, if there's been a misrepresentation (or breach of contract). But it didn't uphold his complaint, as it thinks Company A acted in line with the terms and conditions Mr and Mrs H signed.

Our investigator didn't think M&S had acted unfairly in not upholding Mr H's complaint. Mr H disagreed, so the complaint was passed to me to review.

I issued two provisional decisions on this case. The first was in October 2017 and Mr H responded to this with further points for me to consider. So I issued my second provisional decision in January 2018. The content is detailed below.

First provisional decision

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. I'm not planning to uphold Mr H's complaint and I'll explain why.

I'm required to decide what, if anything, M&S should do to resolve Mr H's complaint. In doing that, I must decide what I think is fair and reasonable, having regard to (amongst other things) any relevant law. Relevant law includes section 75.

Mr H complains that there's been both misrepresentation and a breach of contract by Company A, as it's retained the majority of his deposit for a conservatory build that couldn't go ahead. But he was told the deposit would be returned in full in this circumstance.

I'll look firstly at Mr H's allegation of misrepresentation by Company A. For me to agree that there's been a misrepresentation in this case, I'd need to be satisfied that there was a false statement of fact, and that it led Mr and Mrs H to enter into the agreement.

From what I've seen, Mr and Mrs H signed an agreement that said if the necessary approvals weren't forthcoming (which in this case, permission from the local water authority was declined) then Company A would retain 10% of the contract value (net VAT) – which is what it did. So on the face of it Mr H hasn't been told something by Company A that wasn't true.

Mr H acknowledges that he signed the agreement. But he says that both he and his wife are pensioners, and couldn't read the small print. So they relied on what Company A's agent told them verbally. I understand this, and I've considered these points carefully – alongside Mr H's detailed account of his recollections.

But in the absence of any written confirmation or recording of what Mr H says he was told, I have to base my conclusions on balance of the information available to me. And in order to agree with Mr H, I'd have to think that it's more likely than not the sales agent promised something different to what's written in the contract he signed. But based on what I've seen so far, I'm not persuaded that this was the case.

I say this because, Mr H was aware that the application was subject to certain planning permissions. So I have to think about whether it's reasonable that he wouldn't expect that some sort of cost for this would be retained by Company A if the conservatory build didn't go ahead. It's usual that a deposit secures a booking and covers up-front costs for a supplier. And it's not unusual that (subject to each individual supplier's terms and conditions) a deposit isn't always returned to the purchaser – if the contract they've agreed to has to be cancelled for circumstances outside the supplier's control.

So even if Mr H was told verbally that his deposit was safe, I'd expect him to seek assurance of this point with the sales person. It's clear this was very important to him – as he said that had he known he could lose his deposit he would never have entered into the contract. So I think it's likely he would want to have something in writing to confirm this. But this didn't happen. So on balance of the information I do have, I can't say Mr H was told something different to what's written in the terms and conditions regarding his deposit. And so I don't think there's been a misrepresentation in this case.

Mr H says the terms and conditions were difficult to think about with a high pressure sales pitch and lots of information to consider. But he proactively sought out Company A by means of an online enquiry – so he was sold something it seems he was looking to buy. He also described the sales agent as – 'someone they got on well with, easy to talk to, and someone they could trust.' So it seems likely to me that he would've felt comfortable letting this type of person know if he needed more time to read over and think about the terms and conditions before signing them.

In addition to this, the company representative made a few visits before agreeing a sale. And Mr H negotiated on price a few times, before settling on what he said was a 'One off June Discount' that required them to sign the agreement that evening. But had they wanted to wait, they were also given other options. This leads me to think that Mr H had time to consider the options available to him before agreeing to go ahead. So based on the information I have, I haven't seen enough supporting evidence that shows Mr H was pressured when agreeing to the terms and conditions of the conservatory purchase.

I understand that the deposit was a significant sum of money. And losing this on top of the build not going ahead will likely be very upsetting for Mr and Mrs H. So I asked Company A for a breakdown of costs incurred for their application. And based on what I've seen, the deposit amount it retained is in line with the costs it incurred before the contract was terminated. So in the circumstances of this case, it looks like Company A kept an amount of Mr H's deposit that fairly covered the costs for work carried out. Hopefully this gives Mr H some sort of assurance that his deposit hasn't been retained as some sort of penalty – rather to cover costs that Company A has incurred. Which I don't think is unreasonable in this case.

I'll now look at Mr H's complaint points around Company A breaching its contract with him. As part of the conservatory build process in this case, certain building surveys and drawings had to be completed before Company A applied for the necessary planning permissions for the work to commence. Mr H also says that Company A made some changes to the original drawings for the build and under the contract it should've then written to tell him about his right to cancel. He says this didn't happen so he was effectively denied the right to cancel and keep the deposit.

My reading of the clause Mr H refers to is different. It appears this clause requires Company A to write out to Mr H if it decides the price needs to be modified as a result of the survey. In this case there were some changes to the design but the price remained the same. So I don't think Company A has failed to write to Mr H when it should've.

And even if Company A should've written out to Mr H, I don't think it's denied him knowledge of his contractual rights – as he had a copy of the contract including details of any rights he has. Nor do I think he would've cancelled at this stage anyway. It appears he knew about and accepted the early changes to the design and was happy to progress to the point where Company A applied for the relevant third party approvals to build. So this point doesn't change my current conclusion in this case.

Mr H also raises the point that there are certain laws and regulations that say that 'nobody has the right to build over – or close to a public sewer.' And that Company A knew this was a factor in their application and would trigger a refusal from the water company. Company A disagrees with this. It says it makes applications like this frequently and on most occasions it gains consent. So I've looked at the water company's website to see if it says anything about this. And while it mentions the statement Mr H quotes, it goes on to say that in some cases buildings will be allowed to encroach the public system. And that the decision will depend on a number of factors, with each case being considered on an individual basis.

So it seems unlikely to me that Company A knew this application would definitely be refused. Because from what I've seen, each case needs to be assessed on its own merit before this can be decided one way or the other. And it seems Company A submitted the necessary application for Mr H so that this could be considered. So again this point doesn't change my current conclusion.

For the purposes of M&S's responsibilities under section 75, I don't think there's been a breach of contract or misrepresentation by Company A in this case. So I don't think it would be fair or reasonable to ask it to refund the deposit. I appreciate that this isn't the outcome Mr H is hoping for and that it will come as a disappointment to him. But I hope he can understand why I'm intending on reaching the outcome I've explained above, based on the information that's available to me.

Second provisional decision in response to Mr H's comments

Mr H has given a detailed submission in response to my first provisional decision which I've read and considered. However, I trust that he will not take the fact that my findings focus on what I consider to be the central issues, and that they are expressed in considerably less detail, as a discourtesy. The purpose of my provisional decision isn't to address every point raised in detail, but to set out my conclusions and reasons for reaching what I feel is a fair and reasonable outcome.

Mr H maintains that information which is said or written is binding where the consumer relies on it. He also reiterated that it had been a very pressured negotiation when he agreed to the conservatory build with Company A. I responded to both of these points in my first provisional decision. And after considering his comments again, my findings on these points haven't changed, for the same reasons as I explained previously.

Mr H also disagreed with my finding that I think it's unlikely Company A knew his application was going to be declined by the water authority. He says that the conservatory extension foundations came to within 500mm of the sewer – and also the inspection chamber. And that the water company don't permit applications of this nature. He thinks Company A's sales agent should've known this without need for an application. But he was told it shouldn't be a problem.

Under the terms and conditions Mr H signed, it says that within 14 days of the agreement Company A would arrange for detailed measurements of proposed works to be taken. So I think it could be likely Company A became aware of the proximity of the inspection chamber at this point. So to establish whether this decision amounted to breach of contract I have to consider whether it should've thought it reasonable to still proceed for water board permission – given the consent criteria Mr H mentions.

The terms and conditions of the agreement say that Company A will make any application for Planning Permission, Water Board approval or Building Regulation Consent on behalf of the purchaser. Both Mr H and Company A have said that this wasn't a standard conservatory build. Mr H says he'd been given build over consent to encroach on the public system several years before. And Company A says it's actively obtained consent throughout the UK on many occasions when it can be demonstrated the proposal – albeit not conforming to the guidelines, does actively protect the sewer. It said in this case it submitted an application which instead reduced the impact on the sewer and reinforced the area to make servicing and maintaining of the sewer easier. So it thought it reasonable to proceed on this basis.
My role is to consider the complaint points brought to me by both parties and deliver an outcome that I think is fair and reasonable given the evidence that's available and the wider surrounding circumstances.

Company A is experienced in building conservatory extensions. And I don't have reason to doubt what it's said about obtaining consent on projects similar to Mr H's in the past. From what I've seen, Mr H's application wasn't for a standard build. So I don't think it's wholly unreasonable in this case that Company A thought it might sit outside the standard consent criteria. And tried to progress the application to the specification Mr H was looking for. So on balance, I don't think Company A failed to exercise reasonable skill and care by making this decision in this case, which means I don't think there's been a breach of contract.

And I also don't think there's been a misrepresentation in this case. Mr H says he was told build over approval shouldn't be a problem. As I've already said, I can't know what was discussed during the sale. But I can see that the terms and conditions set out what happens if any third party approvals aren't forthcoming – meaning that approval isn't guaranteed. And even if the sales agent did give Mr H his opinion on permissions, I think it's likely Mr H would still be aware that there's always a risk with any type of building permission that it can be declined. So I'm not persuaded there's been a false statement of fact that led him into an agreement he otherwise wouldn't have entered.

In summary, based on the information I've seen, I still think Company A kept the deposit in line with the terms and conditions Mr H agreed to, to cover the relevant costs it incurred. And for the purposes of M&S's responsibilities under section 75, I still don't think there's been a breach of contract or misrepresentation by Company A in this case. So I'm not planning to ask it to refund the proportion of the deposit that's been retained.

I asked both parties to send me anything else they'd like me to look at before I made my final decision. M&S had nothing further to add. And after receiving my second provisional decision, Mr H said he had no further points for me to consider.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Both parties have no further comments to make, so it follows that I don't uphold this complaint for the same reasons as set out in my provisional decisions. This means that for the purposes of M&S's responsibilities under section 75, I won't be asking it to refund the proportion of the deposit that's been retained in this case.

my final decision

For the reasons set out above I don't uphold Mr H's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 15 February 2018.

Rosie Osuji
ombudsman