

complaint

Mr M has complained HSBC UK Bank plc won't pay for the costs associated with a breach of contract by the company that carried out their building survey. Mr M has made this claim under section 75 of the Consumer Credit Act 1974 as he paid for the survey with his HSBC credit card.

background

Mr M is represented in his complaint by his wife. For ease I'll generally refer to Mr M throughout this decision as he paid for the survey.

In July 2015 Mr M instructed a company (I'll call D) to carry out a building survey on the house he and his wife were looking to purchase. On 23 July 2015 the building survey was carried out by a surveyor from S, in its capacity as D's agent.

On 31 July 2015 a building survey report was provided to Mr M. Mr M has told us on the strength of this report, they went ahead and purchased the property paying the asking price.

Shortly after moving into the property, Mr M complained to S about issues he had identified with the property and which had not been picked up in the building survey report.

Following contact from Mr M, S sent round another one of its surveyors. However, despite this surveyor attending the property, Mr M heard nothing further from them.

On 25 July 2016 Mr M instructed (via his solicitor) an expert report on his purchased property to support a claim he was considering bringing against S for professional negligence. In 2016 and 2017 Mr M (and his solicitor) were in communication with S (and its solicitor) in respect of a claim for negligence. These communications didn't result in any payment being made by S (or its agents). No court action resulted.

In August 2018 Mr M made a claim against HSBC under section 75 for a breach of contract by S. He believed this breach had led to him paying for additional works to his property which hadn't been identified by the initial survey.

In August 2018 HSBC turned down Mr M's claim under section 75. They didn't think there had been a breach of contract and/or misrepresentation by S. Mr M then raised a complaint with HSBC.

HSBC didn't change the outcome of their review into Mr M's complaint. Still dissatisfied, Mr M brought his complaint to the ombudsman service.

Mr M's complaint was considered by one of our investigators. She requested further evidence from HSBC about what had led them to declining Mr M's claim under section 75. HSBC kept us waiting for more than six months whilst they consulted internally as well as with S's solicitors. The latter shared documentation which robustly defended their client from Mr M's accusations of professional negligence. This appeared to be HSBC's position.

Our investigator initially confirmed there was a valid D-C-S relationship for Mr M to have been able to make a section 75 claim against HSBC. She went on to say why she felt there had been no breach of contract or misrepresentation by S. She specifically commented on

the following aspects of the property as these had been identified by Mr M in his detailed description of what he felt had been wrong with S's original survey:

Mr M didn't agree with the investigator's view. He pointed out inconsistencies between his expert report and S's initial survey. This included the following points:

- The survey undertook to notify him of *“existing or potential problems and remedial works. If there appears to be a problem a specialist report may be recommended”*.
- No remedial works in respect of the chimney stacks were recommended by S. Yet his appointed expert, from the same vantage point as the surveyor, was able to identify that remedial work to the chimney stacks were required.
- S made no comment on the property roofing. S said that the terracotta copings *“appear to be generally satisfactory with only slight surface weathering”*. However, his appointed expert said; *“front right hand coping is significantly defective and needs attention”*.
- The investigator was wrong to conclude that the gable wall on the right of the property could only be examined by going into the neighbouring property. His appointed expert demonstrated, that the gable wall on the right of the property could be seen from both inside the property and from the public road outside. Furthermore, his appointed expert said that the gable wall on the right of the property needed to be repointed in its entirety.
- The surveyor said that *“there are sections of the right hand side of the property which we have not seen entirely.”* This suggests that S was able to see some of the gable wall on the right of the property. So, given this, and given what his appointed expert says, S could and should have concluded that repointing was required to the gable wall on the right of the property, at least to the areas it was able to see.
- Every single window on the right of the property needed repair or replacing. Yet no reference to these windows was made by S.
- Any broken glass is likely to have been broken at the time of S's survey.
- Despite there being clear evidence of damp problems, S failed to recommend the undertaking of any remedial work, or even the appointment of a damp specialist to investigate further.
- There was clearly a damp issue at the time the conservatory was built because a vent was placed into the skirting board. Furthermore, an issue with the conservatory (whether damp, condensation or something else) has been admitted since the survey was undertaken by S's solicitor. There's no evidence the conservatory was ever rebuilt.
- S failed to reference poor plasterwork that was showing signs of damp when they moved in and which it transpired was put up by the previous owners to block a chimney.
- S failed to reference damp in a cupboard in its building survey report, which his appointed expert concluded was extremely damp.
- S failed to reference damp to the side of the gym window in its building survey report.
- S, in its building survey report, makes reference to a damp proof course and that there might be a guarantee in respect of the same. Yet after he moved in Mr M found that it was unlikely that approval would ever be granted for the installation of a damp proof course. Surely S should have pointed out the latter in its building survey report and noted at the same time that any guarantee issued in respect of any damp proof course would be worthless.

- S failed to reference a wall in the cloakroom in its building survey report which needed replacing. This wall needed replacing due to damp, mineral salts and condensation.
- As well as damp, mineral salts and condensation being a problem in the cloakroom, penetrating damp was a problem also because of the crude mortar that had been placed between and over the external brickwork instead of lime mortar. S, in its building survey report, states “*severe weathering to brickwork although again this will require no attention. Mortar pointing is generally satisfactory.*” However, his appointed expert says that the whole building should have been pointed in lime mortar yet when it was surveyed by S it had been entirely pointed in mortar.
- There are 28 windows in the property (not including the front of the conservatory) yet S only commented on 7 of these. Furthermore, work in respect of many of these windows was required and one of these windows is unacceptable for the type of building purchased.
- S failed to reference in the building survey report all the work that was required to the four stable doors and frames, noting work to one door frame being required only. S also failed to reference the rot present in the lintel above the door to what was to become his wife’s office.
- S should have suggested asbestos testing be undertaken, but it didn’t.
- The main water supply pipe is clearly visible where it enters the property and clearly laid in lead and should not have been missed by S. Yet S, in the building survey report, states plumbing was in modern piping where seen.
- S makes very little reference to the boundary walls in the building survey report, yet extensive repair work was needed to a number of boundary walls.
- The huge misalignment in the floors didn’t need coverings to be removed to be noticed and would have been misaligned at the time of the survey.
- He hadn’t accepted HSBC’s offer of £1,073, the cost of the building survey.
- He raised various legal precedents which state what should be covered under a building survey.

The investigator considered Mr M’s response to her view but wasn’t persuaded to change her mind.

Mr M then made some further points:

- Whether the investigator had seen the 100 plus photographs, supposedly taken by S, which had never actually been shared with him and his wife at the time of the survey.
- Believed the investigator should take note of the relevant RICS guidelines on building surveys before coming to her view.
- Wanted to understand the grounds for our investigator’s disagreement with the other expert report.

Mr M provided additional arguments to show why he believed D failed to follow relevant contract and e-commerce regulations.

It was agreed that an ombudsman should now consider Mr M’s complaint.

I completed a provisional decision on 23 July 2021. I didn’t uphold Mr M’s complaint as I believed there wasn’t enough evidence to show what impact any breach of contract would have had on him.

HSBC continued to believe they had no liability to Mr M and accepted this outcome. Mr M felt otherwise and his wife provided us with a 37-page submission.

The main points from this included:

- A continued belief the law wasn't being applied and I was not considering negligence damages which needed to be applied;
- Unclear why I ignored Mr B's recommendations about the relevant monetary discount which should be applied;
- Detailed information about relevant law on professional negligence and RICS guidance from 2018 on professional liability insurance;
- Providing "*definitive proof*" that Mr and Mrs M would have been willing to walk away from the prospective house purchase;
- Confirmation that S valued the property at £700,000;
- The impact of the financial crash on the value of the property between 2008 and 2015; and
- Personal details about Mrs M's background and expertise.

I now have all I need to complete my final decision.

my findings

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

Having done so, I'm intending to reach the same outcome as I did in my provisional decision. I'll explain why and where appropriate refer to the most recent letter from Mr and Mrs M. But generally my final decision remains similar to my provisional decision and in the main I've repeated the same arguments.

Where there is a dispute about what happened, I have based my decision on the balance of probabilities. In other words, on what I consider is most likely to have happened in the light of the evidence.

When considering what is fair and reasonable, I'm required to take into account: relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. I know Mr M disputes that I've done this but I disagree with him and believe I have met my obligations as an ombudsman by taking these into account.

I'm aware despite the length of the background here that I've still summarised this complaint in far less detail than Mr M's submissions, specifically the latest dated 28 July 2021. I'm not going to respond to every single point made by all the parties involved. No discourtesy is intended by this. Instead, I've focussed on what I think are the key issues here and drive the outcome of this complaint.

This simply reflects the informal nature of our service as a free alternative to the courts. Mrs M has also noted this in their most recent submission. If there's something I've not mentioned, it isn't because I've ignored it. I haven't. I'm satisfied I don't need to comment on every individual argument to be able to reach what I think is the right outcome.

Mr M has provided us with detailed submissions about what happened and why he believes S failed to conduct the survey to the required professional standard. This led to increased costs on the property Mr and Mrs M planned to buy. I've also seen the initial report in dispute dated 31 July 2015 (as well as S's terms of engagement) as well as the later report by an expert which Mr M commissioned. Mr M has provided photographs of the issues that arose on their property as well as numerous quotations for works conducted.

I'm also aware of the detail contained in our investigator's view of 6 November 2020. This covers some of what happened which I'm not intending to repeat. Specifically this responds to Mr M's major areas of complaint: what he doesn't believe was highlighted to him and why our investigator believed these didn't amount to a breach of contract.

Mr M responded to this view and further comments by our investigator in detail. I've reviewed these along with all the other detailed information on the file.

Section 75 of the Consumer Credit Act 1974 allows a customer to submit a claim for breach of contract or misrepresentation by a supplier to their credit provider. This applies when customers use certain types of credit to buy goods or services. In this case Mr M used his HSBC credit card to make a payment of £1,073 to D for a buildings survey.

It's worth clarifying I'm not deciding HSBC's liability under section 75 of the Consumer Credit Act. We consider the relevant law and that includes section 75. But we decide cases by considering what is fair and reasonable, as statute requires us to do. What I'm deciding is whether HSBC did enough in considering Mr M's complaint. And if they didn't, what else should they now do. I stress this point as Mr M believes I am considering a claim for professional negligence which isn't the case. A court would be the rightful place for consideration of those issues.

One of the conditions to be met under a section 75 claim is whether there is a link between the debtor (Mr M), creditor (HSBC) and supplier (S). There's no dispute S provided the buildings survey at the centre of this dispute. Mr M paid £1,073 to D. This could impact any section 75 claim but all parties accept that S was acting as an agent of D so I'm satisfied there's no break in the d-c-s chain.

If there was a misrepresentation or breach of contract in the supply of the goods that resulted in detriment then it's fair to ask HSBC to put things right. It's worth stating that my role is not to penalise businesses for a breach of contract on its own. I'm concentrating on the impact of that breach rather than the fact a breach may have occurred. My role is different from the courts.

what type of survey was conducted?

To help me assess the relevant standard for the building survey that Mr M purchased, I've consulted the Royal Institution of Chartered Surveyors (RICS) website. This provides information on RICS home survey standards and best practice. These have been considerably updated. Those currently on the website came into effect on 1 March 2021. This is considerably later than the survey Mr M purchased. Luckily Mr M provided a copy of RICS 2015 standards to us. I have considered these.

However I can also rely on the subsequent expert report prepared in August 2016 on the relevant standards. The author of this report (who I'll call Mr B) stated the instruction to S was "to carry out a full building survey, which I interpret to be a level 3 survey in accordance

with the guidance notes of the RICS.” Having reviewed the RICS guidance note I also thought Mr M purchased a level 3 survey.

The RICS guidance note states:

“This level of service consists of a detailed visual inspection of the building, its services and the grounds that is more extensive than survey level two. Concealed areas normally opened or used by the occupiers are inspected if it is safe to do so (typical examples include roof spaces and underfloor areas). Although the services are not tested, they are observed in normal operation – in other words, they are switched on and/or operated where appropriate.

The report objectively describes the form of construction and materials used for different parts of the property. It describes the condition and provides an assessment of the relative importance of the defects/problems. Additionally, it should:

- describe the identifiable risk of potential or hidden defects in areas not inspected*
- propose the most probable cause(s) of the defects based on the inspection*
- outline the likely scope of any appropriate remedial work and explain the likely consequences of nonrepair*
- make general recommendations in respect of the priority and likely timescale for necessary work*
- identify and describe the legal implications of ownership in detail; and*
- give an indication of likely costs (this aspect would normally form part of the level three service, but some surveyors may choose to omit it. The terms and conditions must make this choice clear).*

Where a surveyor feels unable to reach the necessary conclusions with reasonable confidence, they should refer the matter for further investigations. However, at survey level three such referrals should be the exception rather than the rule. A survey level three report should aim to provide the client with all the information they need to make a purchase decision.”

I can see S’s solicitors denied a full structural survey was carried out. In fact S confirmed to Mr and Mrs M in their letter of July 2015 with the terms of engagement that they’d be carrying out a *Mortgage Valuation and Building Survey*. The terms of engagement state the surveyor will report upon:

- “a. the main aspects of the Property including assessing the site/location, the design, structural framework, fabric and services;*
- b. the grounds, boundaries and environmental aspects considered to affect the property;*
- c. any requirements for further investigation arising from the inspection.”*

There appears to be a difference between what the RICS guidance says about level three surveys and what they should include as opposed to the terms of engagement for S’s survey. However what S was undertaking to provide does meet Mr M’s mortgage providers’ description of a building survey. This was the third and most expensive option available to Mr and Mrs M.

Overall I think that the survey as commissioned through D was a level three survey.

was there a breach of contract?

Unlike our investigator I'm not going to go through a detailed review of the different aspects of the property where Mr M says the survey conducted failed to identify issues with the property that subsequently required work.

I have noted the points our investigator made, as well as Mr M's robust responses. I've also noted where S's survey differs from the conclusions Mr B reached in his report.

I'm also aware that prior to bringing a case to our service, Mr M had instructed solicitors to sue S for professional negligence and recovery of their costs. I don't know why this didn't proceed or why Mr M felt a section 75 may provide him with a better option for resolution. Mrs M has told us that they were advised by solicitors that their claim against S would potentially be successful. Mr and Mrs M, however, believed making a claim under section 75 was a cost-free way of proceeding. It's not, however, risk free as our role differs from that of the courts.

Mr M has specifically highlighted legal cases that he felt our investigator may not have known or taken account of. As I mentioned at the beginning of my decision I take account of the law and remain satisfied I've done so here.

In an exchange of letters with Mr M's solicitors, S's solicitors maintain Mr M was continually advised to obtain further advice. For example where the gable wall was concerned – which seems to be far and away the most expensive cost (almost £7,000) – S was clear that he was unable to view its condition so Mr M couldn't rely on S's conclusion.

And this is a general thread that runs through S's survey as highlighted below. There are a number of areas where S states that further work needs to be done.

Like Mr B I can see the report is *"reasonably comprehensive in description and general comment together with history but in many respects is quite generic"*.

Specifically there are numerous descriptions which state different aspects of the property *"generally remains satisfactory"* or that S saw *"nothing which we would consider significant"*. I can see why Mr M may believe this isn't useful enough for a level 3 survey where the purchasers are looking to be advised of any likely future works needed. Nowhere in the survey is there any prioritisation of potential works even though there are occasional mentions that certain parts will need attention but no clear idea of any appropriate timespan for this. This particularly applies to the condition of window frames and stable doors; issues with damp as well as the condition at places where newer build abuts older build.

High damp readings were taken in August 2016. There's no evidence from the original report that any damp readings were taken – based on the age of the property Mr and Mrs M were proposing to buy and the type of survey being purchased, I'd have expected this to be the case. It's fair to say that the level of damp can worsen. So there is potential that things had deteriorated in the intervening year. I've made no investigation into the weather and changes in the water level that would have impacted the property in 2015-16.

Mr M has referred to the numerous photos taken by S during their original report. These obviously weren't provided to him at the time the report was shared. I've not seen these either. I have no powers to oblige S to provide these to me.

I see no reason why I can't rely on the independent expert report prepared in August 2016 by Mr B. In assessing whether works or services have been provided to a required standard,

it's normal for our service to rely on other independent experts. But this isn't the only measurement I'm using.

Consumer regulations also dictate that if someone is buying services, like a survey, they have a right to expect it to be performed to a professional standard in line with the value paid.

To show that there was a clear breach of contract – and that S didn't undertake the survey to the necessary standard is a difficult aspect to prove. Mr M is aware that the survey did mention a number of issues that may need attention but confirmed S was unable to see or access everything that was present. I've not seen Mr M took any further advice, despite S recommending this for different aspects of the property.

Having reviewed the terms of engagement as well as RICS guidance, and Mr B's survey; there's no doubt there are areas of difference between those and what was delivered by S. Mr B was specifically requested to *"confirm whether a reasonable and competent surveyor instructed to carry out a full structural survey on a property should have identified all or some of those areas ... which require remedial work"*.

Mr B's report states: *"In my opinion a reasonable and competent surveyor instructed to carry out a full structural survey on a property should have identified those areas referred to, which require remedial work"*.

It is difficult for me to ignore an expert report which states there was a breach of contract. There is no other survey for me to consider so on balance I'm satisfied that a breach may exist.

what is the impact of the breach?

Mr B's report makes it clear that one of the purposes of the survey should be to identify potential issues requiring attention. This gives any potential purchasers – as Mr and Mrs M were – the opportunity to renegotiate the purchase price. This report believes the appropriate value was £45,000 lower than the price Mr and Mrs M had agreed with the sellers (which was I believe the original asking price).

I appreciate Mr M has suggested that the works required to the property will have cost more than £50,000. I've also seen a provisional schedule of loss and damage that Mr and Mrs M prepared in April 2017 to assist in their legal case. This includes a detailed breakdown of the works carried out amounting to £36,274.04 (plus VAT) as well as past and future loss of earnings. Mr M has confirmed further works were needed to be carried out to windows in 2019.

Having considered the different aspects, I believe the right thing to consider in terms of any consequential loss Mr M suffered from the breach of contract is how much money could he have saved on the original purchase price if he'd renegotiated this. Any works carried out to the property subsequently would undoubtedly include some that may have been required but is also likely to include work that adds overall value to the property (*"betterment"* as Mr and Mrs M say in their most recent submission). So, for example the window work carried out in 2019.

This raises a number of factors which include:

- The state of the housing market at the time;
- Other properties that Mr and Mrs M may have been considering to buy at the time and their price;
- Mr and Mrs M's emotional attachment to purchasing this property (and therefore their lack of willingness to walk away from any unsuccessful renegotiation);
- Mr M's ability to negotiate any discount on the asking price and what issues – based on the 2015 condition of the property – would be the key aspects to be relied upon;
- Whether the prospective sellers may have decided to sell the property to another interested party or in fact, taken the property off the market entirely; and
- The potential need for and cost of any further reports to be carried out on specific aspects of the property – damp and condensation issues, condition of chimney stacks and roof, flooring, windows, potential asbestos. Mr B has stated that he'd have recommended various specialist report and quotations to be obtained before any contracts were exchanged.

It's clear that there is a lack of evidence on some of these aspects, despite Mr M's most recent submission. Mr M has said that a professionally-conducted survey pointing out the issues that needed attention would have allowed him and his wife to decide whether to continue to proceed with the purchase or renegotiate the price. He's said the original survey led him to pay the asking price. He's provided evidence that S valued the property at £700,000 (£5,000 more than the asking price). I'm not convinced that the survey is the sole driving factor in Mr M's decision.

It remains entirely feasible that Mr M had no intention of renegotiating the property price and was prepared to buy the property anyway, recognising that further work may be required. I've reviewed the breakdown of the costs that Mr M supplied through his solicitor to S. There were two more substantial costs – for replacing the lead water pipe and for work to the gable wall – but all others were considerably lower. It's possible that Mr M would not have been able to negotiate any discount to account for those aspects.

I say this because what's clear from the start is that Mr and Mrs M were buying an older property which had been built up over different periods. It was never going to need no additional works or renovation. I'm aware Mr B stated that the property was over-valued. However I think it's fair to say the price of any property placed on the market isn't always the surveyed value of the property. I'm also aware that Mr and Mrs M took no steps to explore issues where S's view of the condition of the property was unclear. In their most recent submission Mr and Mrs M stated they were surprised so few issues had been highlighted as of concern but still took no further action.

To take one small example: Mr M has stated S didn't highlight the condition of the windows which included some broken panes. Mr B believed these breakages would have been clear and should have been highlighted. I think in that case it would have been obvious for Mr M to also note these breakages. That could also have highlighted very early on that S's report was incomplete and needed confirmed by further reports. I've seen nothing to suggest Mr M instructed other reports to be carried out.

On the balance of the evidence I've considered, I don't believe there's enough evidence to show the breach of contract has had a material impact on Mr M. I think it remains most likely Mr M would have paid the same amount for the property he purchased.

Mr M doesn't believe I should be making assumptions about what happened. I confirm that I've reviewed all the evidence to come to the conclusion I have. It remains that I've made this decision on the balance of probabilities as I am required to do.

As I concluded S's survey was judged not to do what it should have, it is fair and reasonable that HSBC refund Mr M the cost of the survey. I know they've already offered to do that. Mr M rejected that offer. I leave it to him to decide whether he now wishes to accept it.

I've also looked at the range of other issues Mr M raised about S breaching consumer and e-commerce regulations. I've not reviewed these in detail as overall I don't think any of those aspects would have led to Mr M doing anything materially different.

I'm very aware that Mr M will be disappointed in this outcome. They can continue to take legal action against S to provide a different route to the resolution they require.

my final decision

For the reasons I've given, my final decision is not to uphold Mr M's complaint against HSBC UK Bank plc.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 9 September 2021.

Sandra Quinn
ombudsman