

complaint

Mrs F complains that goods and services she bought with credit provided by Marks & Spencer Financial Services Plc (MSFS) were misrepresented and of unsatisfactory quality. She asked MSFS to provide a refund under section 75 of the Consumer Credit Act 1974 (CCA) and she is unhappy with the response.

Mrs F is represented by a claims management company but I'll refer (generally) to anything that's said on her behalf as if Mrs F had said it herself, to keep things simple.

background

The background to this complaint and my provisional findings are set out in my provisional decision dated 11 August 2020. A copy of my provisional decision is attached and this forms part of my final decision.

In my provisional decision I explained what I'd decided about this complaint and what I intended to do – subject to any further submissions from the parties received by 12 September 2020.

Mrs F's representatives asked for some additional time to respond and I allowed more than a month for that. The time set for responses has now passed. MSFS accepts my provisional conclusions but Mrs F does not. Her representatives provided comments over several emails so I've summarised the relevant points below:-

- Mrs F purchased a kitchen from W because she wanted one point of contact, she understood the work would be undertaken by W only - because of statements made at the point of purchase in store and W's misleading advertising – but W blamed sub-contractors when there were issues with the kitchen;
- the Consumer Protection from Unfair Trading Regulations 2008 (the CPRs) (Chapter 7, Regulations 5 and 6 in particular) are relevant here, Mrs F is unhappy that I didn't accept audio and video recordings along with other evidence from different stores (amongst other things), which shows she was clearly misled, I am biased towards MSFS; and
- Mrs F paid W, not the fitters, the kitchen still hasn't been fixed, W is responsible for that meaning she has a valid complaint against MSFS under Section 75 for breach of contract and misrepresentation that should be upheld.

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, whilst I'm sorry to disappoint Mrs F, I am not persuaded that there are sufficient fair or reasonable grounds to depart from my provisional conclusions.

As I explained in my provisional decision, I'm looking at Mrs F's complaint about MSFS. She brings that complaint to the Financial Ombudsman Service under section 75 of the CCA. And, in order to uphold her complaint, I must be satisfied that there's been a breach of contract or misrepresentation.

I've set out already why I'm not persuaded it's right to attach much (if any) weight to the recordings and surveys that the CMC supplied. I have considered the CPRs as well. And I

don't think these take matters much further - in these particular circumstances. For the reasons I've given, I am not persuaded that there's been a breach of contract or misrepresentation here. And I'm unable to reasonably require MSFS to provide a refund or do anything further.

I realise this is not the outcome that Mrs F wanted. She is not obliged to accept what I've said, in which case it remains open to her to pursue the matter through the courts or by any alternative means available.

my final decision

My decision is I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss F to accept or reject my decision before 25 December 2020.

Claire Jackson
ombudsman

copy provisional decision background

Mrs F ordered a new kitchen from a third party supplier (that I'll call W) in August 2016. She wanted one organisation to take care of everything including design, supply, delivery and installation. She says W assured her that it could do this but then used sub-contractors to carry out the installation. Mrs F says she would have gone elsewhere if she had known that would happen. She's also unhappy with the quality of the work and goods provided. She paid for the kitchen using a credit card from MSFS and she wants MSFS to provide a full refund of over £26,000 plus interest.

MSFS doesn't think there was a misrepresentation or breach of contract. It says paperwork supplied at the time stated that installers would be appointed by W and this didn't mean they would be employees. It is satisfied that W rectified some issues and offered to inspect the kitchen and put any further defects right. MSFS considers it was open to Mrs F to get her own independent opinion if she disagreed with W and offered to look at the matter again if she did so. MSFS doesn't think it should have to do anything further.

Our investigator is satisfied the relevant paperwork says approved subcontractors would be used and W offered to go back and fix any issues. She thinks this is a reasonable resolution to Mrs F's complaint and doesn't recommend MSFS should have to do more.

Mrs F doesn't think this is fair. She says further quality issues have arisen and W refused to inspect and rectify faults. She asked for an ombudsman to review the matter.

my first provisional decision

I issued a provisional decision in relation to this complaint on 7 July 2019. I've set out my provisional findings below. In summary, I said:-

I can see that Mrs F is disappointed with this kitchen and the service she got from W. She paid for the kitchen using her MSFS credit card. And she brings this complaint about MSFS to the Financial Ombudsman Service under section 75 of the CCA - which makes lenders equally liable with suppliers in certain circumstances. I make my decision based on what I consider to be fair and reasonable in the circumstances. When considering what's fair and reasonable, I'm required to take taking relevant law into account, among other things. I should make it clear however that it's not my role to apply the law - only a court can do that. Instead, I'm looking here at whether MSFS has taken appropriate steps in response to Mrs F's complaint.

Section 75 says "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."

A debtor-creditor-supplier agreement (for the purpose of this matter) is defined under section 12 (c) of the CCA as "An un-restricted use credit agreement which is made by the creditor under pre-existing arrangements between himself and a person (the supplier) other than the debtor in the knowledge that the credit is to be used to finance a transaction between the debtor and supplier"

I'm satisfied Mrs F is the debtor and MSFS is the creditor. But, the only party named on the agreement with W, the supplier, is Mrs F's husband - Mr F. I've got to consider whether there is a valid debtor-creditor-supplier agreement in this situation. I understand Mrs F was present when the kitchen was ordered and it was installed in the house she shares with Mr F. As such, I'm satisfied that the goods and services Mrs F paid for with her MSFS card were purchased for her benefit - as well as Mr F's. I think it is reasonable to take section 75 into account, in these particular circumstances. So I've gone on to consider whether there's been a breach of contract or misrepresentation.

misrepresentation

For me to uphold this part of Mrs F's complaint I must be satisfied that W said something untrue that induced Mrs F to buy the kitchen. Mrs F has explained that they were keen to avoid a situation where they had to deal with multiple parties and they told W they wanted one company that could take care of the complete project - from design through to installation. Mrs F says the salesperson said W could "handle the whole installation including the electrical and plumbing" and went on to assure them that W had "allocated our best fitter". Mrs F considers this was untrue - because W used sub-contractors. She says W should have said our best "subcontracted fitter" - and she wouldn't have agreed to the purchase if she'd known subcontractors would be used.

I can't be certain what was said exactly when Mrs F and her husband met with W to order this kitchen. And I think it's reasonable to consider anything that was said in context, in this sort of situation. But, even if I were to accept that the salesperson made the statements above, I am not persuaded this amounts to misrepresentation in these circumstances and I'll explain why. I don't think it's unusual for kitchen retailers like W to sub-contract work to specialist tradespeople. And I consider the paperwork Mrs F and her husband received at the time made it reasonably clear that subcontractors would be used to install this kitchen. Amongst other things the documents say:-

"Installer" means the contractor approved and appointed by W to carry out the Installation Works"

"W's Approved Installation Team" means the panel of Installers approved by W to carry out the Installation Works/Specialist works" and

"approved sub contractors hold appropriate registrations and certification to carry out the installation works".'

I realise Mrs F may well say she didn't read this when the order was placed and she relied instead on what the salesperson said. But, this was a relatively large purchase. I don't think it's unreasonable to expect a consumer to check the main points in the relevant paperwork. And, if the use of subcontractors was a key concern to Mrs F and her husband, I'd expect them to have checked that in particular.

As I understand it, Mrs F and her husband wanted one organisation to undertake the whole project - because they didn't want to have to deal with several different trades. By saying that W would "handle" everything, I think the salesperson probably meant W would arrange for plumbing, electrical and other installation work to be done as well as supplying the kitchen. And I'm satisfied that's what happened here.

I appreciate Mrs F feels the salesperson should have been specific about the fact that subcontractors would be used. In recent correspondence, the CMC says Mr F asked W directly if it used subcontractors and the answer was "we do it all". I find it a bit surprising that this particular recollection wasn't mentioned earlier - in light of the detail set out in the initial complaint to MSFS in April 2017 especially. On balance, I think it's probably inaccurate - given the passage of time. And I am not persuaded it's likely the salesperson stated that this work would be done by direct employees of W only.

I am satisfied the salesperson was under no obligation to say that subcontractors would be used - and I wouldn't expect her to do so, in this situation. The CMC says W's website doesn't make it clear that subcontractors are used either - and the installation team wore clothes with W's logo, which misrepresented things further. I don't think it's surprising that the installers wore branded clothing - given they were engaged by W to do this work. And I can't see how this could reasonably have affected Mrs F's decision to make the purchase.

I've seen nothing to suggest Mrs F checked the website before the kitchen was ordered. So, it's difficult to see how information on there could have misled and/or induced her to buy the kitchen. I do not, in any event, find the information referred to by the CMC to be misleading.

I appreciate Mrs F is unhappy with the goods and services - but I don't think that's down to the employment status of the individuals who carried out the installation work. I doubt Mrs F and her husband would have had a significantly different experience if the installers were employed directly by W. Taking everything I've seen into account, I am not persuaded that there's been a misrepresentation and I'm not minded to uphold this complaint on those grounds.

breach of contract

Under the Consumer Rights Act 2015 goods and services like the ones Mrs F paid for should be of satisfactory quality and fit for purpose. Mrs F initially said the installation is of unsatisfactory quality because kitchen units have edging strips missing and are not finished to the floor; they didn't receive an electrical certificate; and they were charged £90 for additional work.

It looks as if the electrical certificate has now been supplied and the £90 was refunded, so I don't need to consider those two matters any further. But, Mrs F says other quality issues have begun to appear. She reported the dishwasher door is fouling the adjacent cabinet, there's damage to cabinet doors, and a kickboard was also stained by leakage from the dishwasher. After our investigator provided her view, Mrs F told us that wooden worktops have separated and split at the ends.

Mrs F has supplied several photographs which I have considered carefully. I think the "fouling" looks similar to the sort of marks often found down the side of a dishwasher that's used regularly. I can't safely say this is a defect on the evidence I have. I accept there seems to be some damage to worktops and I appreciate Mrs F feels this must be due to a manufacturing defect. But, W says it is more likely the worktops have not been maintained properly. There's contradictory evidence from Mrs F about maintenance. She told us that they were never told the worktops had to be oiled (in April 2019). But, Mr F said the worktops were oiled regularly in an email a few months before (dated 26 February 2019).

This kitchen was installed nearly three years ago and I can't be certain about what's happened since. I am sorry to disappoint Mrs F but, based on the evidence I have at the moment, I can't safely find it is of unsatisfactory quality. I understand Mrs F feels they've been left with quality issues and the problem they wanted to avoid at the outset – who is responsible for those - because W used subcontractors. But, I can see W responded and sorted out the problem with the certificate when that was raised. And I'm satisfied W also offered to inspect the kitchen and put right any defects.

I've seen it suggested that this offer may have been withdrawn, but MSFS says Mrs F wouldn't allow W to inspect. As far as I know, the offer remains open. W is entitled to have the chance to rectify faults under the Consumer Rights Act 2015. And I think its offer to inspect and fix any faults found sounds fair here.

In April 2019 Mrs F told us she might appoint an expert to inspect the kitchen and provide a report. I think that probably would have been helpful. I appreciate Mr F may be concerned about the cost of such an inspection but that's likely to be recoverable if faults are found.

As things currently stand, for the reasons I've given, I don't have enough evidence to reasonably conclude that there's been a breach of contract and/or a misrepresentation here MSFS says it will look at Mrs F's claim again if an independent report is provided and there's evidence of fault. I think that sounds reasonable. And, if Mrs F is unhappy with the response she gets from MSFS then, she may be able to bring another complaint to this service. For the reasons I've given, I am not currently persuaded that MSFS has treated Mrs F unfairly overall and I am not minded to uphold this complaint.

I invited the parties to consider my provisional conclusions and let me have any further information and comments by 11 August 2019. I said I would look at all of the evidence available after that and make my final decision.

the parties' responses

MSFS hasn't objected to my provisional conclusions but Mrs F is unhappy with my provisional findings. The CMC supplied additional evidence and made detailed comments which I've summarised below:-

- the fact the paperwork says installers would be appointed doesn't prove they would be sub-contractors;
- all of the evidence from the relevant time - including W's website, sales and marketing materials and sale terms and conditions - refers to "we, our and us", there's no mention of sub-contractors and nothing would lead anyone to conclude that sub-contractors would be used;
- the word sub-contractor appears only twice in the 10 page sale contract yet the words "our, us, we've, we, we'd and we'll" appear over 28 times suggesting this is the "norm" not the exception and that was confirmed to Mrs F by the salesperson who said W would "do it all" when Mrs F stated that she didn't want to use a company that sub-contracted work to others;
- Mrs F checked and was shown W's website before placing the order (as detailed in the second complaint letter to MSFS sent in May 2017) which proves there was misrepresentation;
- it's pedantic to suggest that W's promise to "do it all" was not mentioned previously as this was highlighted in the first complaint letter to MSFS in May 2017 and the first complaint letter to W in January 2017 - albeit by saying the retailer "can handle the whole installation including the electrical and plumbing", which means the same thing when taken in context;
- the CMC carried out its own survey of over 50 people and the responses show the average consumer reasonably assumes that subcontractors will not be used where it is not stated in writing that subcontractors will be used;
- W is aware that UK consumers don't like the use of subcontractors so it doesn't tell customers they are used;
- there's an inherent problem with W's sales and marketing process - the CMC spoke to sales people at several of W's branches, they all misrepresented the nature of the installation workforce which shows that W routinely misrepresents the position. This mis-information could impact on any customer's purchasing decision and it would have changed Mrs F's mind about placing her order if she had not been misled;
- by considering "what is most likely to have happened" I have given a personal opinion and taken the side of W and MSFS without good reason - based upon nothing written or factual, just a gut feeling or assumption; and
- Mrs F has been let down badly, she paid a lot of money for a kitchen, that she was wrongly told would be fitted by W, which has not lasted as long as a reasonable consumer would expect and is unfit for purpose.

my provisional findings

I've re-considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. I am sorry to disappoint Mrs F but, having done so, I remain of the view that it would not be fair or reasonable to uphold this complaint.

I want to assure Mrs F that I have considered everything that has been sent and said on her behalf very carefully. If I don't address every single point that's been raised, this is because I've concentrated on what I think is relevant and material to reaching a fair and reasonable outcome overall.

This service provides informal dispute resolution for individual disputes between financial businesses and their customers. We are impartial and we investigate complaints and reach our conclusions (without interference from anyone else) on the civil standard of the balance of probabilities. This means, where facts are in dispute and evidence is incomplete, inconclusive or contradictory - as some of it is here - I make my decision based on what I think is *most likely* to have happened, in light of the available evidence and the wider circumstances.

As I've explained already, for me to be satisfied there was a misrepresentation in this case, I would have to be persuaded that W told Mrs F something that was not true which induced her to place this order and Mrs F suffered loss as a result. Amongst other things, the CMC says Mrs F was misled because the salesperson was asked the direct question "do you use subcontractors" at the point of purchase and the answer was no.

I think this exchange goes to the very crux of the misrepresentation that's alleged so (as I explained in my provisional decision) I would have expected it to have been mentioned much sooner, in this situation. The CMC says it was mentioned earlier and referred me to complaint letters sent to W and MSFS in 2017. I've checked this correspondence and I'm not persuaded it references the exchange in question. To be clear, I don't think the reference in the correspondence in question to the salesperson saying W would "handle" the whole installation amounts to the same thing as a salesperson saying no if asked directly whether subcontractors would be used.

The CMC sent us recordings of several telephone calls and visits that CMC staff members made to a number of W's branches. The CMC says these show that W routinely misleads customers about its use of sub-contractors as part of W's wider selling practice. The CMC also produced a survey it undertook of about 50 consumers where the consumers were asked about their expectations in relation to kitchen fitting. The CMC says the results show most consumers would not expect subcontractors to be used - unless it said so in writing.

It's clear the CMC went to some trouble to provide this information but I think it is of very limited value in this situation. I am not persuaded that the various recordings provided take matters much further. I've seen nothing to show that W requires its salespeople to follow a script - or otherwise avoid the mention of subcontractors. And I think the recordings provided suggest, in any event, that the salespeople the CMC spoke to did *not* follow a script - because each salesperson responded differently to the questions. I also think it's unlikely that W instructs its sales force not to mention subcontractors - given at least one of the salespeople the CMC contacted made it very clear that subcontractors are used.

I know very little about the nature of the survey undertaken by the CMC - I can't see if it was randomised, for example. I am unable to check whether the results are unbiased. And I don't think it would be appropriate to give a survey like this any weight, in these circumstances. I'm not persuaded, in any event, that the survey subject is relevant. The CMC says it surveyed consumer's views on what information should be provided about the use of subcontractors to fit a kitchen *when it's not stated in writing* that subcontractors would be used. For the reasons I've already explained, I'm satisfied that the written installation terms and conditions here do say that installers other than direct employees might be used. And I remain of the view, on balance, this was not misrepresented.

Aside from my concerns about the recordings and surveys set out above, I should make it clear that my role here is to look at the individual circumstances of Mrs F's complaint in order to decide if MSFS did anything wrong - and, if so, what MSFS should do to put things right. If the CMC and Mrs F have concerns about W's marketing and sales practice generally it is open to them to raise these with any relevant trade body or trading standards organisation. The Financial Ombudsman Service is not a regulator however and it's not within my remit to tell any financial business (or retailer) how to operate on a day to day basis.

I have given some thought about what the CMC says in relation to the use of the word subcontractor in the paperwork Mrs F received at the relevant time. In the ten or so pages the CMC refers to, there is one page that's headed "sale" terms. I accept this page doesn't mention subcontractors and the words we etc is used numerous times. But I'm satisfied this is because the page in question sets out the terms and conditions relevant to the sale and supply of goods by W.

The terms and conditions in respect of the installation can be found elsewhere in the relevant paperwork, headed "installation" terms and conditions. These provide (insofar as it's relevant) that "goods" are "products supplied by W... to be installed by the installer" and "installer" means "the contractor approved and appointed by W". Just below that there's also a reference to a panel of

installers. I find it difficult to see why the installation terms would make the distinction between W supplying the goods and appointing an installer if W was both supplier and installer. It's hard to see why W would need a panel of installers if it carried out that work itself. Overall I think the paperwork makes it reasonably clear that W might appoint third parties to install the goods it sold and supplied. And I am not persuaded that Mrs F should reasonably have believed that W did not use subcontractors.

I remain of the view there are no fair and reasonable grounds to find there was a misrepresentation here. For the reasons I've set out already, I'm not satisfied that there's been a misrepresentation or breach of contract. I don't think MSFS has acted unreasonably or treated Mrs F unfairly. And I see no reasonable grounds to uphold this complaint.

I now invite the parties to consider what I've said and let me have any further submissions by the date below. After that date I'll look at all of the information and evidence available and make my final decision.

my provisional decision

Subject to any further submissions I may receive from the parties by 11 September 2020, my provisional decision is I do not intend to uphold this complaint.