

complaint

Mr H has complained MBNA Limited won't refund the costs of a bespoke wooden gate which is unusable. He made a claim to MBNA under section 75 of the Consumer Credit Act 1974.

background

In March 2017 Mr H paid for a bespoke wooden gate along with rollers and track for it to run along. This was to fit the front of his driveway. He also purchased a pedestrian gate from the same supplier to run alongside. The gate was delivered the following month.

Mr H was always planning to have his own builders complete the installation but found this wasn't possible. The gate was delivered in three parts without any instructions how these would all fit together or on the track. After much discussion between Mr H and the supplier – with the supplier deciding he didn't want to complete the installation himself – Mr H complained to MBNA.

MBNA didn't think anything wrong had happened. Mr H had ordered and received a gate according to the correct measurements. They didn't think the fact the gate was in three parts particularly mattered. As they didn't think the suppliers had broken the contract they didn't consider Mr H had a claim under section 75.

Mr H brought his complaint to the ombudsman service.

Our investigator reviewed all the evidence. This included Mr H's detailed records of his contact with the supplier. He disputed the supplier's view that the gate was never going to work as it was being installed on a 7% incline. He said things had never got that far as it was not obvious how to fit the panels together or how they should be secured to the track. He was concerned about the long-term stability of the panels as they were separate.

Our investigator didn't think there was any obligation on the supplier to say the gate would be supplied in three panels. Nor did any of the detailed information ever say it would only be provided in one panel. Overall she didn't think MBNA had done anything wrong in turning down Mr H's claim.

Mr H disagreed with this outcome. He's asked an ombudsman to review his complaint.

I completed a provisional decision on 20 January 2020. I felt there was enough evidence to show there had been a breach of contract. I asked MBNA to put things right.

Mr H accepted my conclusion. MBNA didn't. After consulting with the supplier, they believed Mr H's complaint had arisen after installation had failed because the gate was expected to operate on an incline.

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've seen nothing which has made me reconsider my findings. I repeat below most of the points I've made previously, taking into account MBNA's response.

Section 75 of the Consumer Credit Act 1974 allows a customer to claim a refund of money for goods or services they paid to a supplier when entering into an associated credit agreement, like Mr H's credit card agreement with MBNA. Specific conditions apply to those claims. MBNA need to consider whether there was a breach of contract or misrepresentation that led to Mr H making this purchase.

It's worth clarifying I'm not deciding MBNA's liability under section 75 of the Consumer Credit Act. We certainly 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 MBNA did enough in considering Mr H's complaint. And if they didn't, what else should they now do.

If there was a misrepresentation or breach of contract in the supply of the goods then it's fair to ask MBNA to put things right.

was there a misrepresentation or breach of contract in the supply of goods?

Mr H brought a bespoke wooden gate that he was looking to have fitted to the entrance to his driveway. There's detailed correspondence between Mr H and the supplier from November 2016 onwards about the measurements and potential materials to be used for this. As Mr H was having significant building work done at the same time, he was pretty price sensitive and negotiated the costs of this gate to be provided without installation.

In fact according to the contract, at one level Mr H was supplied with exactly what he paid for. He got a gate of 6 metres (in three panels) and track to run this along. There's no indication that there was anything else significantly wrong with the gate in terms of material or condition except it was in three parts. Mr H could see no way of how the parts all fitted together for use as an electronic gate. This wasn't just Mr H's opinion. His own builders were unwilling to undertake the fitting either as it wasn't clear how this could be accomplished.

I checked to see whether the supplier really meant for his bespoke gates to be made and installed by himself. I couldn't see anything in the terms and conditions on the website covering this. Although there are unsurprisingly longer-term guarantees if gates are installed by the supplier as well. I can also see videos of electronic gates similar to the one Mr H envisaged on the website. However I couldn't locate anything more than generic fitting instructions.

I do note our investigator also obtained some generic installation instructions from the supplier but I can't see this met Mr H's needs.

Whilst I can see Mr H was surprised by the gate being provided in three panels, this doesn't seem to me to be the main issue. After all, the gate Mr H was buying was 6 metres long. I'd actually have been surprised if this had been supplied in one piece. This may have caused some delivery and storage issues.

One of Mr H's concerns is about the stability of the gate once the three parts are fitted together. I think I may have been similarly concerned about one piece of wood.

However I am concerned at the lack of clear fitting instructions. I've also checked with Mr H. He doesn't seem to have been supplied with a support post. On the videos on the supplier's

website, all wide sliding electronic gates have a post fitted along the back of the gate providing support and generally positioned a third down from the top.

I did consider whether this situation could have been simply remedied by a separate pack – which Mr H hadn't initially purchased – which included instructions and all that was needed to join sections to one another. I can't see this exists on the supplier's website though so have dismissed this.

I've also noted Mr H went back and forth with the supplier's for a while so if there'd been a simple solution to this, I think this would have been reached.

The Consumer Rights Act 2015 means that goods bought must be of a satisfactory quality. This includes goods being serviceable, durable and of appropriate quality according to their age and other aspects. They also need to be fit for purpose. Mr H was being supplied with a bespoke gate which had to be fitted together but I can see nothing was provided which would allow him to get this done. That suggests this gate wasn't fit for purpose. So I think overall there is a breach of contract.

There's been quite a lot of comment about Mr H insisting on having his gate installed on a slight slope. The supplier has always stated this would never work. I suspect this is one of the reasons they refused to complete the installation in 2018. This factor would only be relevant to this case if the gates had been fitted and then didn't operate effectively or broke down. I've got no evidence this has happened (although I note this has been suspected by other parties). Although I'm aware of this issue, it hasn't played a major part in my decision. I can see the supplier has insisted this has happened but I'm not sure that is the case at all.

So what should MBNA do to resolve this complaint? I've considered this aspect carefully. Partly because I don't think it's as simple as instructing MBNA to get the gates fitted by a specialist. MBNA don't have a list of specialists they can immediately draw upon. And I think Mr H has already tried to have the gate fitted by third parties. This has proven unsuccessful. Of course the actual supplier could do this but from what I've seen of the state of the relationship between them and Mr H I suspect that wouldn't work either.

That leaves me with the only option that I think is fair and reasonable. MBNA will need to refund Mr H's costs in full. This will include what he paid for the gate, rollers and track and pedestrian gate – as this was designed to match the main gate. I believe there are three payments showing to the same supplier on Mr H's credit card statement. This includes the deposit of £960, the main costs of £1,909.12 and then a later £405 paid in July 2017. In return MBNA will effectively own the gates. They will need to decide what action they're going to take to remove these from Mr H's premises and confirm this with him.

As far as I can tell from Mr H's statements he doesn't pay his credit card bill in full every month. Neither party provided evidence to the contrary during the period of the provisional decision. MBNA will need to rework what Mr H owes. This must take into account any interest these transactions would have attracted as those will need to be removed.

my final decision

For the reasons I've given, my final decision is to instruct MBNA Limited to:

- Credit Mr H's account with the amounts he paid to the wooden gate supplier for the gates and associated machinery;
- Confirm to Mr H the arrangements they'll put in place to remove these from his premises; and
- Rework Mr H's credit card account to remove interest these transactions attracted.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 14 March 2020.

Sandra Quinn
ombudsman