

complaint

Mr P complains that Marks & Spencer Financial Services Plc (trading as M&S Bank) declined his claim under section 75 of the Consumer Credit Act 1974 for a refund of £5,000 he paid for insulation materials.

background

In June 2018 Mr P was about to have some building work done on his house. Before the work started, the builder told him that a third party, which I will call J, had some insulation material, and that if Mr P paid J then J would hold the material until it was needed. So Mr P paid J £5,000 using his M&S credit card. But afterwards, the builder became insolvent and ceased trading, and so the building work was never done. The insulation was never supplied, and J did not refund the money either.

In November, Mr P raised a section 75 claim with M&S, asking for a refund. But M&S said section 75 did not apply to the payment, because Mr P had never had a contract with J, but had only paid J on behalf of the builder. This was proved by the fact that J had applied the money to the builder's trade account. So the only contract to supply the insulation material was between J and the builder. This meant that the necessary legal relationship between Mr P, M&S, and J did not exist, and that Mr P had no claim against J – or against M&S – for breach of contract.

Mr P brought this complaint to our Service. (His wife also signed our complaint form, but she is not an account holder on Mr P's credit card account – it's not a joint account – and so she is not an eligible complainant under our rules. I am therefore treating this complaint as solely Mr P's complaint. That has not affected the outcome.)

Our investigator did not uphold this complaint. She agreed with M&S's analysis.

Mr P did not accept that opinion. He said he'd had a contract directly with J, independently of his contract with the builder. It was a verbal contract to supply insulation materials. He had not agreed to his money being applied to the builder's trade account, and had not been told this would happen – as far as he was concerned, he had only been making a payment directly to J, for a purchase directly from J. If there really had only been a contract between J and the builder, then the cost of the insulation would have been added to his monthly bill from the builder. He asked for an ombudsman's decision.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. I regret to tell Mr P that I don't think I can uphold his complaint. I will explain why.

I have considered whether M&S should have raised a chargeback claim for Mr P. But by November it was too late, under Mastercard's rules. So Mr P's only remedy (as far as M&S is concerned) would be under section 75.

I don't think it would be fair or reasonable to hold M&S liable for what a third party did, except in circumstances where section 75 makes them liable. I appreciate that it is unfair if J gets away with keeping £5,000 for which nothing was received in exchange. But it would

also be unfair if I ordered M&S to pay compensation to Mr P for something that isn't M&S's fault and where section 75 does not apply.

Where it applies, section 75 gives a consumer (Mr P) the same right to bring a claim against the provider of credit (M&S) as he already has against the supplier of goods or services (J), if there has been a breach of contract or a misrepresentation by the supplier. So to uphold Mr P's complaint, I would have to find that there has been a breach of contract or a misrepresentation by J. A misrepresentation means a false statement of fact by which caused Mr P to enter a contract with J. So I must first be satisfied that Mr P had a contract with J.

It has to be a contract with J, and not just with the builder, because in section 75 "the supplier" means the party Mr P's credit card payment was made to. (That is the effect of section 12(c), which is referred to in section 75 and identifies which credit card payments section 75 applies to.¹) It's not in dispute that the payment was made to J.

If Mr P also paid the builder with credit, then he might also be able to bring a section 75 claim against the relevant credit provider about a breach of contract or misrepresentation by the builder. But that is outside the scope of this complaint, because when Mr P asked M&S for a refund, he specifically asked for a refund of his £5,000 payment to J. So the only issue I am considering is whether M&S was right or wrong to decline his section 75 claim about that payment.

I have no doubt that Mr P believed he was entering into a new contract with J, separate to his existing contract with the builder. I accept that nobody told him otherwise at the time. But I also accept that J did not intend to enter a contract with Mr P. The evidence for that is that the money was paid directly to the builder's trade account with J. (J didn't even accept the payment to some central account and then, subsequently, transfer it to the builder's trade account. The builder's name appears next to J's name on Mr P's credit card statement.) So it's clear that – as far as J was concerned – J was not entering a contract with Mr P, but accepting a payment from him on the builder's behalf. J had a contract with the builder, and the builder discharged its contractual obligation to pay J by arranging for Mr P to do it.

That seems to me like sharp practice by the builder. But that is not the same as a breach of contract or a misrepresentation by J. I don't think there was a contract between Mr P and J, despite what Mr P believed and intended at the time, because there can only be a contract if both parties intend to enter a contract. J's actions at the time strongly suggest that J did not intend to form a contract with Mr P, but only intended to supply the insulation to the builder.

That is not to say that Mr P has no legal remedy. I can't give him legal advice, but he may still be able to get his money back from J in court, and he may wish to seek independent legal advice about that. But I'm afraid I don't think he can get his money back from M&S under section 75. I am sorry that this decision will disappoint him.

my final decision

My decision is that I cannot uphold this complaint.

¹ Section 75 also mentions section 12(b), but that is not relevant to credit card payments.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 3 March 2020.

Richard Wood
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