

The complaint

Mr L is unhappy with the outcome of a claim he made to Omni Capital Retail Finance Limited trading as Omni Capital ('Omni') in respect of a service he financed with it.

What happened

Mr L had a driveway installed which he paid for using a fixed sum loan from Omni. Omni made payment to an organisation (who I will refer to as 'K') which then passed payment on to the installer (who I will refer to as 'the supplier') which had the agreement with Mr L for the service.

Mr L was not happy with the installation and raised it with Omni. In summary, he says that the finish of the job is poor, particularly at parts of the edges – this has led to drainage issues and his fence getting wet and possibly causing long term damage. He says that the supplier should have installed block paving around these edges.

Omni considered the claim in respect of Section 75 of the Consumer Credit Act 1974 ('Section 75' and 'CCA'). However, it declined the claim. It said there was not the correct 'debtor-creditor-supplier' agreement for Mr L to have a valid Section 75 claim.

Mr L was not happy with this and the complaint about Omni's handling of the Section 75 claim came to our service to look at.

Our investigator disagreed with Omni and upheld the complaint. In summary, she thought there was the correct 'debtor-creditor-supplier' agreement for Mr L to have a valid Section 75 claim against Omni. She said the supplier had likely agreed to put block paving around all the edges but had failed to do this. She told Mr L to get two quotes for the work to be done for Omni to choose one to pay.

Mr L contacted a company who assessed the driveway and indicated that more extensive work was required to put things right and the driveway needed to be re-laid.

The matter has now come to me for a decision.

I issued a provisional decision on this matter not upholding the complaint which said:

This service resolves disputes informally – so while I have read and considered the evidence I will only comment on the things I consider central to the complaint.

Does Section 75 apply here?

Section 75 can allow Mr L to hold Omni liable for a breach of contract or misrepresentation by a supplier paid using its finance product.

There are certain technical requirements for a valid Section 75 claim. These are set out in law and one is for there to be a valid 'debtor-creditor-supplier' or 'DCS' agreement.

Omni highlights that the fixed sum loan paperwork shows it was arranged between Mr L and K, while the contract for the driveway work was between Mr L and the supplier. It says this means there isn't a valid DCS agreement for a Section 75 claim.

In my role as an informal dispute resolution service I don't consider it necessary to go into this in great detail here. The reason is that I don't think there is a clear breach of contract by the supplier in any event - so the matter of the DCS agreement falls away somewhat.

However, I have given this some consideration. And on the face of it, noting the requirements of Section 75 and the CCA I think there is likely to be a valid DCS agreement here. I say this because, in summary:

- K despite being listed on the finance as a 'retailer' does not appear to be the provider of services here – instead it appears to be a broker set up in such a way as to allow tradespersons (like the supplier) to accept payments from customers via finance agreements;*
- Omni is likely to be aware the nature of K's role – being that it does not provide services itself but acts to effectively process payments on behalf of a range of traders which it has likely approved and vetted; and*
- as a result it would appear Omni would reasonably contemplate that in arranging finance with K it was doing so for the traders which K has an agreement with –and whom Omni would be able to identify in any particular case - should it wish to.*

The above factors point to there being pre-existing arrangements between Omni and the supplier of services in line with the requirements of the CCA. Hence a persuasive argument to support the presence of a valid DCS agreement here. However, as I have already said – based on my findings below this matter falls away in any event.

Has there been a breach of contract or misrepresentation by the supplier?

I don't think that misrepresentation is relevant here– the allegations concern the quality of work and manner in which the contract was carried out (taking into account what was agreed). So I have focused on whether there is a breach of contract. However, for completeness I don't think there is compelling evidence of a misrepresentation in any event.

When looking at the provision of a service a breach of contract can arise either through an:

- Expressly agreed term of the contract; or*
- an implied term which comes about by law.*

In the case of the provision of a service the Consumer Rights Act 2015 implies a term that the service will be carried out with reasonable care and skill. While there is no specific definition of this it is generally taken to be the standard that would be expected in that particular industry. It is also important to note that assessing skill and care is not focused on the results – but the manner in which the service was carried out.

I am not an expert on driveways– but looking at the photos of the work I accept that the finish around certain edges of the tarmac looks somewhat erratic and not neat - particularly around the edges where it meets the fence. I also accept there are questions over the proximity of the tarmac to the fence and the impact that might have over time on the fence.

However, this is not a straightforward case because of evidence which our investigator has gathered and which I can't see that Mr L volunteered originally. This indicates that the agreed finish of the driveway was impacted by other events.

The supplier has explained that it started the job and laid the groundwork then left site to continue the work the next day. On return to the site it said that Mr L had got an electrician in to do work for some feature lighting and there were wires everywhere. The supplier has said this was not discussed at the outset and it told him that the final finish would not now be good around the edges due to the need to avoid cabling. It offered to return Mr L's deposit and not finish the job.

It says that Mr L wanted it to finish the job, but due to his 'interference' it had him specifically agree to this on the basis that there were going to be imperfections and the risk of further damage.

Supporting the testimony of the supplier is what appears to be a disclaimer that Mr L signed to confirm this understanding. It is on the supplier's headed paper and says:

'Disclaimer'

I 'Mr L' agree to sign this disclaimer stating that 'supplier' will not be held responsible for any damages or imperfections to the lights, cables or tar-mac involved in the extra work carried out that was not in the contract agreed.

Mr L has indicated this only covers damage to the electrical work – but I don't think it does. It appears to relate to imperfections to the overall finish of the tarmac driveway too.

What appears to have happened here is that Mr L has discussed and verbally agreed a variation to the contract with the supplier (later confirmed by the signed disclaimer). This dispute is focused on the edging of the driveway – and that appears to be what the supplier's testimony and disclaimer relates to. I also note that several pictures appear to show wires coming out of the ground close to the edges of the tarmac – reinforcing the supplier's account of the situation.

This is not a straightforward case of a possibly poorly laid driveway – but apparently a situation where Mr L was willing to accept imperfections and the risk of damage in the finish due to the work of the electrical contractor he involved without consent of the supplier. Mr L said the supplier knew about the electrical work from the outset – but that isn't supported by the disclaimer he has signed or reflected in the paperwork for the initial agreement. I also question why Mr L had apparently not mentioned the disclaimer or the conversations he had about the electrical work prior to our investigator finding out details about this. It seems of importance considering what has occurred here.

There has been some lack of clarity as to whether Mr L agreed blocking to all sides of the driveway at the outset – it isn't clear if he asked for this and I note K initially indicated that it thought this wasn't agreed. However, K acting as an intermediary in the dispute appears to have focused on there being no blocking accounted/priced for in the paperwork. I accept that the paperwork isn't entirely clear on this so I can see how this might have been the initial conclusion. But whether it was specified or not that doesn't mean that laying down block paving on the edges would not have been reasonably expected as good practice in certain situations. However, the supplier has now confirmed to our investigator that it wasn't possible to finish the edging with block in certain places due to the presence of the electrical work which Mr L's contractor had done. Which takes us back to the conversation that

appears to have occurred between Mr L and the supplier and led to new terms of work being agreed.

Mr L does not accept that it was not possible to do the edging with block paving. He has produced photos which he says show that the cables are not right near the edge of the drive. However, it isn't disputed that there is wiring in that vicinity. And these photos are not useful in showing me the possible unseen obstacles and other considerations that the supplier had in finishing the job and/or providing a finish edged in block paving.

In any event the circumstances the supplier has described and the disclaimer Mr L signed confirming the agreed variation to the contract show at the very least that the parties accepted the job wasn't going to be finished as they had initially planned. It appears the supplier had agreed with Mr L to effectively make the best of a less than ideal situation. I think it likely had Mr L wanted a job priced up with the considerations around the electrics – it would have involved further planning and expense that had not been factored in previously. So it is difficult for me to say it is a breach of contract for the supplier to finish the job the way it has for the originally agreed price.

I also note Mr L appears to have signed a satisfaction note with K to confirm the installation was performed as agreed. Mr L has indicated that he signed this before the work was finished so the supplier could get paid but that isn't clear to me. Overall, it adds further question marks over what happened here and why Mr L was apparently happy to sign a satisfaction note when he claims parts of the job had not been done as agreed – particularly something that would have been as clearly visible as the absence of block paving.

I also don't see where Mr L raised the issue immediately with the supplier or finance company as I would have expected. From the evidence I have it appears that around a week after the work was complete he contacted K about it – K confirmed in an email to Omni that Mr L had said he hadn't yet been in touch with the supplier at that point.

Mr L has now provided a report to state the finish of the tarmac driveway is not up to standard including the edging and other areas. But I find this report to be unpersuasive in showing that the supplier has acted without reasonable care and skill in the particular circumstances here. It appears to lack detail about the issues or the credentials of the person preparing it. Nor does it appear to be an independent report – for example by a trade association or similarly appointed independent contractor. This combined with the circumstances which led to a disclaimer being signed make it particularly challenging using this report to determine a breach of contract by the supplier.

In summary, while I think photographic evidence shows the finish of certain edges is imperfect there is compelling evidence to show Mr L arranged work on the site which interfered with the end finish of the driveway. This is not to say that Mr L doesn't possibly have a valid claim against the supplier regardless of this disclaimer - but it fundamentally muddies the situation here. This service is not able to summon and cross examine witnesses or experts. Nor am I an expert in the particular field. I am left to determine what is fair and reasonable in the circumstances for the financial business to do. And based on what I know, and considering my role I cannot fairly conclude that there is a breach of contract here which Omni needs to remedy via Section 75.

My decision is likely to disappoint Mr L – it doesn't mean he can't pursue the supplier in court if he wishes. And considering the nature of the dispute that might be something which Mr L wishes to explore. It will ultimately be up to him to decide if he wants to do this – and seek any legal advice he considers necessary.

I asked the parties for their responses.

Omni accepted my provisional findings.

Mr L did not accept these. In summary, he says he has given a lot of evidence and had others look at the job and everyone says the same about the work that has been done. He feels ripped off and the matter has caused him a lot of stress.

What I've decided – and why

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

I am sorry to hear about the stress Mr L described in his response. However, I don't think he has submitted any new information which changes my view on what is fair and reasonable in the circumstances.

I consider that I have already addressed everything in some detail in my provisional findings (as copied above) and I still consider these to be fair and reasonable in the circumstances. As a result, my final decision is that I don't uphold this complaint for the reasons already given in my provisional decision.

My final decision

I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 22 August 2023.

Mark Lancod
Ombudsman