

The complaint

Ms M complains that Clydesdale Financial Services Limited, trading as Barclays Partner Finance ("BPF"), has treated her unfairly in relation to a claim she made about a kitchen she purchased using finance it had provided.

What happened

Ms M is represented by her partner, who I'll refer to as "Mr R", in her complaint, but for ease of reading, I'll mostly refer to everything as if Ms M had said it.

Ms M entered into a regulated fixed sum loan agreement with BPF. The loan was used to pay for a kitchen that was supplied by a third party retailer. I will refer to the retailer as "W". The contract with W was solely for the supply of the kitchen. Mr R is the person who is named as the customer in the contract with W; he paid a deposit of approximately 10% of the total price. The installation work was to be carried out by third party installers.

Ms M complains that some of the kitchen units were not of the required standard when they were supplied. Specifically, she complains that some of the kitchen units were not of satisfactory quality, which is the standard they were required to reach. Ms M considers that this is a breach of contract.

Moreover, Wren sent replacements, but Ms M considered these to be not of satisfactory quality either. Therefore from Ms M's perspective the breach of contract was not remedied. Ms M provided a report from an expert to support her stance; the expert works for a limited company which I will refer to as "K".

Ms M complained to W but got nowhere, so she turned to BPF instead. She made a claim against BPF under section 75 of the Consumer Credit Act 1974. Ms M considers that she has rights against BPF for a breach of contract by W because of that section. The general effect of section 75 is that if Ms M has a claim for misrepresentation or breach of contract against the supplier (here that is W), then she can also bring a like claim against BPF, provided that certain conditions are met.

To put things right, at first, Ms M asked for:

- A full refund from BPF.
- What she sees as foreseeable losses, which at the time she complained she estimated at £40,756.06.
- Compensation for distress and inconvenience for herself and for Mr R.

Initially, BPF declined to uphold Ms M's claim on the basis that W had provided new units to replace the ones that Ms M considered to be faulty. But it seems that BPF was not conceding, in any event, that the original units had been faulty.

Dissatisfied, Ms M complained to our service.

Once Ms M's complaint was with us both Ms M and BPF provided further information.

Ms M provided a great deal of further information which she considered to be relevant, this included a report about the kitchen units from another firm which I'll call "H".

Further, Ms M told us that W had agreed to replace all of the units which she considered to be not of satisfactory quality, including the replacement units. Ms M indicated that by providing replacement units both W and BPF had implicitly acknowledged that there had been a breach of contract. Moreover, by offering to replace the replacement units W and BPF were both also implicitly acknowledging that the breach had not been remedied.

In addition, Ms M told us it was her understanding that Section 75 made BPF jointly and severally liable with W. In Ms M's opinion therefore this means that anything that W did was also done on BPF's behalf and it could be held to account for W's actions.

Ms M gave us pointers about the order in which she thought we should look at information and what further information she thought we should ask BPF or W to supply.

BPF told us:

"W acknowledges that there has been a number of replacement items issues ...caused by several different factors, including transport damage, items damaged by [Mr R's] fitter. Any item that has been reported to W, W have offered to replace without question."

Later BPF added that both BPF and W did not accept that the latest replacements W had sent were not of satisfactory quality. It said the photos Ms M had sent it were not sufficient for it to assess the quality of the goods. It added:

"We would like to respond to the images provided, however, it is hard to determine without there being context to the images. The customer has refused to allow either a jointly appointed independent report to be carried out or allow a Field Installation Manager to attend".

Further BPF questioned the impartiality and robustness of Ms M's expert reports. K seems to belong to H, or *vice versa*. Moreover, H had actually done some work on the kitchen. And the author of one of the expert reports appeared to be a third party limited company which is associated with Ms M and Mr R, rather than with H or K. I'll refer to that company as "R". Miss M is the company secretary of R and Mr R is the director.

BPF asked that it and Ms M jointly appoint an independent expert to determine whether or not the goods supplied are or are not of satisfactory quality.

Ms M responded to BPF's response in great detail. In short, she told us that H was impartial, notwithstanding that it had done work on the kitchen. She did not comment on whether R had authored one of the experts' reports.

Ms M reiterated that the information she'd provided so far was sufficient for an assessment to be made about the quality of the goods supplied.

Ms M added that she thinks BPF has provided inaccurate information in relation to some aspects of her complaint. Especially about when she first complained to W and whether or not she refused to allow the Field Installation Manager to carry out an inspection. In any event, Ms M told us she did not consider that it was necessary to get a report from a jointly appointed expert.

However, Ms M then apparently changed her mind. She decided to appoint a new expert, who I'll refer to as "D". Having appointed D, Ms M asked W if it wanted to jointly appoint D with her; W and BPF declined. Ms M subsequently sent us D's report.

We sent D's report to BPF. It did not comment on it.

One of our investigators looked into Ms M's complaint. Our investigator did not uphold it.

BPF accepted our investigator's decision; Ms M did not. In rejecting our investigator's decision, Ms M reiterated her previous stance and sent further information to support it, including several different versions of her response. She asked that the ombudsman consider only the most recent response. She asked that an ombudsman review her complaint.

One of our ombudsmen, Ms Joyce Gordon, wrote a provisional decision which read as follows.

What I've provisionally 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.

First, I'm very aware that I've summarised this complaint in far less detail than the parties and I've done so using my own words. 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 focused on what I think are the key issues here.

Our rules allow me to do this. This simply reflects the informal nature of our service as a free alternative to the courts. If there's something I've not mentioned, it isn't because I've ignored it. Rather, 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.

Further, the Financial Ombudsman Service is independent of both consumers and the businesses they are complaining about. This means that we don't act for consumers or businesses, nor do we take instructions either from consumers or businesses or allow either party to direct the course of our investigations; were we to do so, it would compromise our independence and impartiality. It follows that it is up to us to determine what evidence we need in order to investigate a complaint. So although I've noted the questions, queries and directions from Ms M, it's not my role to act on those or act as a representative or go-between on this case.

Ms M and BPF disagree about many of the issues that have been raised in this complaint. But one very key issue is whether the goods are of satisfactory quality. Where the evidence is incomplete, inconclusive, or contradictory (as some of it is here), I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances.

In considering what is fair and reasonable, I need to have regard to the relevant law and regulations, regulator's rules, guidance and standards and codes of practice and (where appropriate) what I consider to have been good industry practice at the time.

I think section 75 is potentially relevant to this complaint. I say this because of the type of finance that was used to finance the purchase of the kitchen. That said, it is not enough, by itself, that this type of finance was used; other conditions have to be met. One of these conditions is that there is a very particular type of agreement in place called a debtor-

creditor-supplier agreement. It is not clear if that agreement is in place because only Mr R seems to be a party to the contract with W. Might Ms M be able to explain why it is that only Mr R's name is on the contract with W? Once I have her explanation I will look at this point further.

Even if I was satisfied that there is a valid debtor-creditor-supplier agreement in place here that would permit Ms M to be able to raise a claim under section 75 (and I am not currently satisfied about this), I'd still need to be satisfied that the goods were not of satisfactory quality when supplied. I say this because the relevant law says that goods sold by a business to a consumer must be of satisfactory quality. It would have been very helpful to have an independent expert's report on this matter from a jointly appointed impartial expert. But I don't have such a report to rely on.

In the circumstances, the information I've got so far does not satisfy me that the goods were not of satisfactory quality. The relationship between K and H and the fact that H did work on the kitchen leads me to find that these parties are not impartial. The seeming authorship by R of one of the reports is also significant. I find it telling that R's role was not disclosed before BPF questioned it. Ms M has not denied R authored the report which purported to be someone else's work. This is very irregular. This too has adversely impacted on the weight I've been able to place on these reports.

The circumstances that led to the appointment of D cause me to doubt I can rely on D's impartiality. I don't see why the expert could not have been found and appointed jointly from the get-go, rather than Ms M finding her own expert. Further D's report only answers questions that Ms M set. It does not go to the heart of whether on the balance of probabilities the goods were of satisfactory quality when supplied.

Moreover, in the history section D appears to have reached conclusions, calling the goods "defective," which suggests it had decided in advance what the conclusions were going to be.

For all of these reasons, I therefore have misgivings about relying on this report.

W has supplied replacement goods but that does not mean it agrees the original goods were not of satisfactory quality. Even if W did agree the original goods were not of satisfactory quality that does not necessarily mean it accepts the replacement goods do not meet the relevant quality standard too. On the contrary, W tells us it has replaced goods "without question"; I find that likely.

In the circumstances, nothing I've seen so far persuades me that the goods and the replacement goods were not of satisfactory quality. It follows, I've no proper basis for saying BPF has to take any further action. This also means that Ms M's claims for "foreseeable losses" and distress and inconvenience fall away.

For completeness I'll add that if I had been satisfied there had been a breach of contract (which I am not), I would have looked at what losses flowed from that breach. However, amongst other things, Ms M has made a claim for work done by R. It is not clear what work it has done or how that work flows from a breach of contract. So it is unlikely I would have required BPF to compensate Ms M for these "losses".

My provisional decision is that I do not intend to uphold this complaint.

Responses to the provisional decision

BPF accepted the provisional decision. Ms M did not. In answer to Ms Gordon's question about why only Mr R was named as a party to the contract with W, she said:

- Mr R had booked the initial consultation with the designer, and he had later paid a deposit with his credit card. The designer had told them it didn't matter who took out the finance to pay for the balance. Later, when they paid for the balance with a loan in Ms M's name, they had asked for the order to be put in her name, but they had changed their mind when it was explained to them that this would mean they would lose their summer discount.
- Ms M referred to another ombudsman's decision in another case, in which one spouse's name had been on the supply contract and the other spouse had taken out the loan which had financed it. That ombudsman had said that because the respondent had not raised an issue about that, and also because "*the purchase was part of their joint affairs*," he was satisfied that the criteria for section 75 applying to that purchase had been met.
- Ms M and Mr R had regarded their purchase as a joint purchase, and their section 75 claim as a joint claim. Mr R owns 80% of the property in which the kitchen was installed, and Ms M owns 20% (as tenants in common).
- Alternatively, if there was really no debtor-creditor-supplier agreement, then the loan and the contract with W should both be unwound. W's terms and conditions say that no third party will have any rights under the Contracts (Rights of Third Parties) Act 1999. So if Ms M has no rights under section 75 in relation to her purchase of a kitchen, then it would be fair to unwind both contracts, rather than to strictly follow the law.

Ms M also made a number of corrections and clarifications about what she said had happened. These included the following points:

- When she had complained to W, W had offered to replace all of the kitchen frontals. Therefore it was not right to say that she had got nowhere with her complaint, as W had made a significant concession. However, she had rejected that offer because she had lost confidence in W's ability to supply frontals which were free of defects.
- She provided a revised estimate of her foreseeable losses. She argued that foreseeable losses should include compensation for the time she had spent on dealing with this matter.
- She pointed out that in an email W had acknowledged that some items had been damaged in transport, and she argued that this had included some of the replacement items. (She referred to one of the paragraphs quoted above.) So these items had been faulty, and had not just been replaced without question.
- She challenged the statement that W and BPF had not accepted that the replacement items were not of satisfactory quality.
- She denied that she had refused to allow a Field Installation Manager to attend (but then she went on to explain why his attendance had been unnecessary).
- Neither W nor BPF had asked for an independent report until ten months after she had brought the section 75 claim.
- She had been open about the fact that K had previously worked on the kitchen.
- D had been impartial, because he had found that some of the defects were normal wear and tear and not faults. His report contained a statement of truth and an expert witness's declaration under Part 35 of the Civil Procedure Rules. She had offered to have him instructed jointly with W or BPF, and both had refused.

Ms M added that she had complained about the defects within 30 days of the goods being delivered, and that W had its chance to repair them and had failed to do so. She concluded that she was therefore entitled to reject the kitchen.

My findings

As Ms Gordon is currently not available to write a final decision, this case has been passed to me. I confirm that I have independently considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. I have also had regard to the relevant law, which includes section 75 of the Consumer Credit Act 1974 and Part 1 of the Consumer Rights Act 2015.

Before I consider anything else, it is first necessary for me to decide whether section 75 applies to Ms M's loan agreement. That is because of two reasons. Firstly, I do not think it would be fair and reasonable of me to hold BPF responsible for things that W did (or failed to do), except where the law makes BPF liable for them. And secondly, Ms M's complaint is about BPF's decision to decline her claim for compensation under section 75, so I would not uphold such a complaint if it turns out that section 75 does not even apply.

Ms M can only have a valid claim under section 75 if her payment was made under a debtor-creditor-supplier agreement. If it was, then as long as Ms M could have brought a claim against W for breach of contract or for misrepresentation, section 75 says she could also bring "*a like claim*" – that is, a claim for a breach of contract or misrepresentation by W – against BPF. In those circumstances, BPF would be "*jointly and severally liable to the debtor*", but not to anyone else. Here, the debtor means the person who took out the loan, which is Ms M. So Mr R cannot bring a section 75 claim against BPF in his own right.¹

A debtor-creditor-supplier agreement means a regulated consumer credit agreement in which the debtor (Ms M) borrows money from the creditor (BPF) to finance a transaction "*between*" the debtor and the supplier (W). That transaction is of course the purchase of the kitchen. So now I need to decide if the purchase of the kitchen was between Ms M and W.

It is not in dispute that Mr R entered into a contract with W to buy a kitchen, that he paid a deposit in consideration, that he signed the contract and Ms M did not, and that the terms and conditions of that contract included a clause contracting out of the Contracts (Rights of Third Parties) Act 1999. That means that Ms M has no right to sue W for a breach of that contract, unless she was also a party to it in her own right, in addition to Mr R.

If Ms M contracted with W to buy a kitchen, then Ms M's loan was a debtor-creditor-supplier agreement, and section 75 applies. (It doesn't make a difference that Mr R was a party too.) But if Ms M was not a party to the contract, then the loan was not a debtor-creditor-supplier agreement, and section 75 does not apply.

The fact that Mr R signed the contract and Ms M did not is strong evidence that Mr R and W were the only parties to the contract. In her response to the provisional decision, Ms M told us that at the time of finalising the order, W had told them that the contract had to be in one person's name, rather than in joint names. So leaving her name off the contract was not just an oversight, but was actually discussed at the time. (I accept that Ms M and Mr R had valid reasons for choosing Mr R instead of her, but that does not affect the outcome of that meeting.)

¹ The quotes in this paragraph and the next one are taken from section 75.

I have considered the fact (which I accept is true) that Ms M and Mr R acted jointly during the steps that led up to the signing of the contract. After all, a contract can (usually) be entered into by spoken words or by conduct, not only by signing it. But from the evidence I have just referred to, it seems clear that W only intended to enter into legal relations with one of them, and told them so, and that accordingly only Mr R actually entered into a binding contract with W.

I have considered the other ombudsman's final decision in another complaint, which Ms M has found and provided to us. In that decision my colleague wrote:

"I know that Mr O's wife is on the supply contract and Mr O is on the finance agreement. Hitachi hasn't raised an issue with this. And given the purchase was part of their joint affairs, I'm happy all the necessary criteria for section 75 are met here."

I am sure that that conclusion was reasonably open to him on the facts of that other case. The decision does not elaborate further on the circumstances of what happened when the contract was entered into. But the evidence in that case may well have supported a finding that both Mr and Mrs O had made a joint purchase together, so that although only Mrs O was actually named on the contract, they had nevertheless both become parties to it. But I don't think that conclusion is open to me in this case, given the evidence I have described above about W making it clear that it would only contract with either Mr R or Ms M but not with both of them. So I don't think that other final decision supports Ms M's case.

For all of these reasons, I do not think that BPF was wrong to reject Ms M's section 75 claim.

It is therefore not necessary for me to consider the other points which have been raised, except for one of them: Ms M's argument that the contract with W and her loan agreement should both be unwound. I do not agree that the fact that the loan agreement was not a debtor-creditor-supplier agreement means that it should be unwound. The loan was not mis-sold by BPF. And as I have found that BPF is not liable for anything W did, it follows that I cannot direct that W's contract should be unwound.

My final decision

So my decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms M to accept or reject my decision before 10 January 2024. But apart from that, this final decision brings our involvement in this complaint to an end.

Richard Wood
Ombudsman