

complaint

Mrs N has complained that Marks & Spencer Financial Services plc has not accepted her claim for a refund of her purchase of four plots of land. She paid for the deposits of all four with her M&S credit card and is bringing a claim under section 75 of the Consumer Credit Act 1974.

Mrs N is represented by solicitors.

background

Mrs N bought four plots of land between 2010 and 2011, paying the deposits with her credit card.

In 2012, the company that sold Mrs N the land was wound up in the High Court. In 2013 Mrs N submitted a claim of £81,445 to Marks & Spencer for misrepresentation and breach of contract under section 75. Her claim was rejected on the basis that there was no debtor-creditor-supplier link as required by the legislation. Because of this Mrs N referred her complaint to the ombudsman service.

Our adjudicator confirmed that there was a debtor-creditor-supplier link and went on to say that there had been misrepresentation by the supplier. Our adjudicator recommended that the complaint should be upheld and asked Marks & Spencer to reimburse Mrs N in full.

Marks & Spencer asked that an ombudsman review the case as it does not believe that there is a valid claim under section 75.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. Where there is a dispute about what happened, I have based my decision on the balance of probabilities – in other words, on what I consider is most likely to have happened in the light of the evidence provided.

is Marks & Spencer liable under section 75?

Section 75 provides that, under a very specific set of circumstances, a consumer may seek to recover money paid under a contract with a supplier from his or her credit card provider. Before considering the merits of the claim to determine liability, I must first establish whether the circumstances are covered by section 75.

Marks & Spencer has said it has no liability under section 75. It does not believe the purchase of two of the four plots meet the monetary limits for a valid claim under section 75.

Section 75 states that the cash price value of any single item purchased must be over £100 and under £30,000. I have considered all the available evidence and I broadly agree with our adjudicator's position. I accept the collective purchase price for two plots of land amounts to £38,952. However each plot is given its own reference on the documentation provided by the supplier and is completely separate from each other as shown on the map. I am in no doubt that the individual costs of those two plots is under £30,000 each and therefore this brings Mrs N's transactions within the scope of section 75

Marks & Spencer also said that the payment was not made directly to the supplier and it considered that there was no valid debtor-creditor-supplier link as required by section 75.

So, I have considered whether a valid debtor-creditor-supplier agreement exists, in particular whether there is an association between the supplier and the body that accepted Mrs N's credit card payments.

To assist my decision, I have considered the High Court judgment made on 8 February 2013 about Mrs N's supplier. Paragraph 4(vi) of the judgment states that the directors of both companies – the supplier and the company that accepted credit card payments – have a familial connection. I am satisfied this meets the “*association*” requirement of section 184 of the Consumer Credit Act 1974 and therefore there is a valid debtor-creditor-supplier relationship.

misrepresentation

My role is to make a final decision based on all of the evidence before me and in doing so I have looked at the complaint as a whole and focussed on those elements that I consider to be material to the outcome.

Marks and Spencer has provided detailed submissions to support its position, which I have read and considered in their entirety. But my findings focus on what I consider to be the central issues.

I have examined whether there has been misrepresentation or breach of contract in accordance with section 75. Mrs N argues that there was verbal misrepresentation. Specifically the supplier told her that they would pursue re-zoning and planning permission of the plots of land. This would lead to the plots of land being worth significantly more money than she paid for them. She would then be in a position to sell them to a developer, as arranged by the supplier.

It's worth saying upfront that I am aware of the documentary evidence that contradicts the verbal submissions from Mrs N. However I find her verbal evidence credible. Specifically I can easily see why she believed that the supplier would be managing the whole investment.

In addition Mrs N was very conscious of having her funds tied up in an investment when she had only just sold her home.

I also acknowledge what is stated at paragraph 27 of The High Court judgment. I know that Marks & Spencer believes this does not support individual claims of misrepresentation. However I do not agree. The central aspect of the judgment is not about whether the supplier misrepresented the land to individuals who purchased land as the case was brought by the Financial Services Authority (now known as the Financial Conduct Authority). However the judgment does comment very specifically about how the supplier operated and what sort of statements were being made to its customers about their investments.

I believe the judgment goes a considerable way in telling us about the mis-sale of the plots of land. The judge accepted that investors were told and understood that:

- the supplier would seek to progress planning procedures with a view to the sites being used for housing;
- the supplier would then procure their sale, probably to developers; and
- the investors who sold the plots on the site would be paid a share of the total consideration paid by the purchaser.

I am satisfied that in the light of these wider circumstances Mrs N's verbal submissions are not inconsistent with the documentary evidence provided. I am persuaded that Mrs N had the same understanding as described in the judgment when she agreed to enter into the contract and purchased the plots of land. In other words, it's reasonable that Mrs N did not query the documentary evidence which appeared to contradict what she had just been told. As it was reasonable for her to assume that this was not the whole story. Because the supplier would provide documents at a later date dealing with how the site would obtain planning permission and be developed for the proposed resale.

I would like to highlight the following from the judgment:

"Different investors also had different understandings about quite how the sale of the plots would be organised, but essentially they understood that [XXX] would arrange the sale of all the plots in a site to a developer"

I am satisfied it was that understanding which induced Mrs N to enter into the contract. Had she known that she was simply being sold a plot of land and would in fact be responsible for all of the above I do not believe she would have agreed to purchase it.

And on this basis I am satisfied a misrepresentation has taken place, and that it is fair to hold Marks & Spencer liable. As I believe that there was a misrepresentation, the fair redress is that Mrs N is put in the position she would have been in if she had not entered these contracts at all. Marks & Spencer will need to repay Mrs N £81,445 plus 8% simple interest from the date these payments were made until the date of settlement. They will also need to rework her credit card account as if she had not paid the three deposits – of £1,955, £3,895 and £2,295 – on her card at all.

I know that Marks & Spencer will be disappointed by this decision. However it is not unusual for us to consider that verbal evidence outweighs documentary evidence or to take account of court judgments which directly impact a decision. I am satisfied that this is the right course of action to take in this case.

my final decision

For the reasons set out above, my final decision is to uphold Mrs N's complaint and instruct Marks & Spencer Financial Services plc to:

- a) rework Mrs N's credit card account as if the transactions of £1,955, £3,895 and £2,295 had not been made;
- b) refund £81,445 for the four plots of land she purchased; and
- c) pay simple interest of 8% on £81,445 from the date of payment to the date of settlement. For clarity the simple interest on the transactions at a) should be applied from the date these were repaid to the account in full, to the date of settlement.

In turn, Marks & Spencer may take ownership of the land and can make arrangements to do so with Mrs N at a mutually convenient time.

Sandra Quinn
ombudsman