

The complaint

Mr F complains about Tesco Personal Finance Plc's refusal to give him a refund.

What happened

In May 2018 Mr F used his credit card provided by Tesco to buy a phone. He bought the phone using his account with an online retailer, a company which I will call "M". It turned out that M didn't have title to the phone. Mr F considered this to be both a misrepresentation on the part of M and a breach of contract. After a year, the phone's true owner claimed the phone back. Mr F complained to M. He wasn't able to make progress with M, therefore he complained to Tesco instead. Mr F relied on the rights he said he had under Section 75 of the Consumer Credit Act 1974.

Tesco looked at Mr F's complaint. It didn't agree that it had to do anything further as it didn't agree that Section 75 applied in this instance. It said this because for Section 75 to apply there has to be a certain type of relationship in place known as a debtor-creditor-supplier relationship. Specifically, Mr F has to be the debtor, Tesco the creditor and M the supplier. However, Mr F had bought the phone for his wife and had it delivered to her. Tesco thought this meant she, not Mr F was the debtor. On that basis it said there was no valid debtor-creditor-supplier relationship.

Mr F was dissatisfied with Tesco's response and he came to our service.

Our investigator looked into Mr F's complaint. He recommended that Mr F's complaint should be upheld. He recommended this as he was satisfied that there was a valid debtor-creditor-supplier relationship. Further, he thought the contract for the phone had been misrepresented and that there had been a breach of contract too. On this basis, he thought Tesco ought to fairly and reasonably give Mr F a refund. But not a full refund. He said, Mr F's wife had used the phone for a year so £100 ought to be taken off the refund in recognition of this use of the phone. He could see that the purchase price was £519.99, so he asked Tesco to refund £419.99.

Mr F accepted our investigator's recommendation, Tesco did not. In summary, it objected because it said the invoice from M, showed that the phone was bought for Mr F's wife not for him. The phone was registered in her name and was intended for her sole benefit. It thought therefore there was no valid debtor-creditor-supplier relationship in place. That being so, it followed, in its opinion, there was no fair and reasonable basis to ask it to refund Mr F. We could go no further at this stage, so I was asked to take a look at Mr F's complaint.

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.

Mr F is relying on the rights he has under Section 75.

I think it's important to set out my role here. In considering a complaint about a financial services provider, I'm not determining the outcome of a claim that a party might have under Section 75. Rather, in deciding what's a fair way to resolve Mr F's complaint, I have to take account of relevant law, amongst other things. Section 75 is relevant law. Therefore, I've taken it into account. But that doesn't mean I'm obliged to reach the same outcome as, for example, a court might reach if Mr F pursued a claim for misrepresentation or breach of contract. Our service is an informal alternative to the courts.

The general effect of Section 75 is that if Mr F has a claim for misrepresentation or breach of contract against the supplier he can also bring that claim against Tesco provided certain conditions are met.

One of these conditions is that there must be a very specific relationship in place that is a valid debtor-creditor-supplier relationship. Mr F says there is one. Tesco says there isn't. This is the only point of disagreement as both parties seem to accept that because M didn't own the phone it sold and therefore had no entitlement to sell it, there was both a misrepresentation and a breach of contract.

I've looked at this debtor-creditor-supplier point. Unless the debtor is a party to the contract, then there can be no debtor-creditor-supplier relationship. In principle, as far as I am aware, there is no difficulty in law with a situation whereby a person "A" contracts with another person "B" to provide goods to benefit a third party "C". So, I think that the point about who benefitted from the contract, raised by Tesco, is irrelevant here. Rather, the question is was Mr F a party to the contract with M?

In looking at this question, I've looked at how the contract was made, the contractual documents, who had the contractual liability to pay for the phone provided by M and the wider circumstances.

My understanding of the contractual process here is that Mr F was only able to contract with M in the first place because he had an online account with it. That's the only way to buy from M's site.

Moreover, I looked at the terms and conditions on M's site. In particular, I looked at what they say how the contract is formed and with whom. I think these make it very clear Mr F was the contracting party. For example, the terms and conditions talk about how by placing the order Mr F was warranting his legal capability to enter into a binding contract with it. Those same terms and conditions talk about how the contract is formed between M and the person who places the order. The terms and conditions say (I have added the bold type for emphasis:

*"After placing an order, we will send you an email acknowledging that we have received your order. Please note that this does not mean that your order has been accepted. Your order constitutes an offer to us to buy a product. All orders are subject to acceptance by us, and we will confirm such acceptance to you by sending you an email that confirms that the product has been dispatched (the Dispatch Confirmation). **The contract between us** (the Contract) will only be formed when we send you the Dispatch Confirmation."*

Further, the invoice that Tesco relies on does not assist its stance that the contracting party was Mrs F. The invoice says, "ship to" and Mr F's wife's name is printed next to this. But the invoice also says, "order and payment" and Mr F's name is printed next to this together with his credit card details. I don't think that merely because the delivery details were noted on the invoice means the recipient is a contracting party in any sense. In other words, Mr F's wife was only on the invoice to give the supplier its instructions as to where to deliver the phone, that's all.

Moreover, to understand who is liable to pay under this contract, and therefore who is the contracting party, it is helpful to consider what the position would have been if the phone had been delivered but no payment had been made, in these circumstances who could M ask to pay it? Certainly not Mr F's wife the mere recipient of the phone. I think the answer is Mr F. I realise that Mr F bought the phone for his wife, so it is not surprising it was registered in her name. This though throws no light on the central question as to who the contracting party was. It just supports what Mr F says about gifting his wife the phone.

For all of these reasons, I am satisfied that there is a valid debtor-creditor-supplier relationship. It follows, I'm also satisfied that it is fair and reasonable that Tesco should refund Mr F £419.99 and it must pay interest on this refund.

My final decision

My final decision is that Tesco Personal Finance Plc must pay Mr F £419.99. It must also add interest on the £419.99 at the rate of 8% simple per year. The interest to run from the date Mr F made the payment to M for the phone until the date of settlement.

If Tesco considers it is legally required to deduct income tax from that interest, it must send a tax deduction certificate with the payment so that Mr F can reclaim the tax if he is able to. Mr F should refer back to Tesco if he is unsure of the approach it has taken and both parties should contact HM Revenue & Customs if they want to know more about the tax treatment of this portion of the compensation.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 10 September 2020.

Joyce Gordon
Ombudsman