DRN-3271273

The complaint

Mr D complains that Tesco Personal Finance Plc treated him unfairly when it declined his claim under Section 75 of the Consumer Credit Act 1974 with regard to an 'investment' he made.

What happened

Mr D purchased what he thought was a marketing and investment software package in 2018 in order to make money on the financial markets. He paid a deposit of £475 towards this using his credit card held with Tesco in December 2018 and paid a further £4,275 by bank transfer from his Tesco account also December 2018. He then paid a further £649 in January 2019 to gain access to daily stock market data which he said was required to use the marketing guide.

Mr D said that he'd been having substantial difficulty with the software and in March 2019 the software stopped working completely. He also said he tried contacting the people he'd been talking to regarding this package and soon began to think he'd been the victim of an investment scam.

So he contacted Tesco to raise a chargeback claim however, as the 120-day limit had passed it said it wasn't able to do so. So it then considered a Section 75 claim under the Consumer Credit Act 1974. After investigating, Tesco initially declined the S75 claim as the initial payment Mr D made on his credit card was processed by a third-party payment processor which I will call 'Firm P'. They said that the involvement of Firm P breaks the required Debtor – Creditor – Supplier (DCS) relationship needed for Section 75. And hence it didn't consider any further whether there had been a breach of contract or misrepresentation in this case. So Mr D brought his complaint to this Service.

Our investigator then issued an assessment pointing to another case where Tesco had accepted this service's position on Firm P, that is specifically, that it didn't break the DCS relationship. Tesco has noted this but then later said it didn't think breach or misrepresentation had been made out. Another assessment was issued saying that DCS was intact and explaining how the Investigator thought Tesco was liable under S75. Tesco didn't agree.

So in December 2021 I issued a provisional decision on this case, giving different reasoning and evidence to the Investigator's but agreeing with the Investigator's conclusion that Tesco should refund what Mr D had paid.
Tesco responded to my provisional decision saying it had received my provisional decision but didn't have any more to add. Mr D accepted my position. Accordingly I now proceed to issue this final decision.

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.

Considering that Tesco has nothing further to add, that Mr D accepts my findings and the nature of my findings in my provisional decision, I see no persuasive reason to depart from my provisional findings. Accordingly this complaint is successful. I shall now proceed to provide the reasoning for my final decision summarising where I can for brevity and clarity. There are two major areas for me to consider each of which will have significant argument therein. For brevity and clarity I will consider these major areas namely S75 /the DCS relationship and whether there has been either a breach or misrepresentation (the liability issue).

Liability

It seems that the real nature of the 'investment' Mr D made wasn't clear to him and apparently not clear to either Tesco or our Investigator when they first considered this complaint. This is not and has never been a regulated company. When Mr D was dealing with this company there was no registered company at Companies House nor any other reliable way of identifying any persons involved within this enterprise. The address given is an office rental space in London. I've not been able to trace the phone number.

In my provisional decision I explained my reasoning for concluding this was a fraud. I pointed to evidence of this externally and freely available. Tesco has not contended any element of this evidence or my reasoning for concluding it was a fraud. Accordingly I am satisfied on balance that this was an elaborate fraud based on a fake website, lots of fake reviews of this 'trading guide' and trading platform and scammers prepared to talk to investors such as Mr D on the phone, often for long periods of time.

Bearing in mind the telephone calls Mr D was a participant in, the documentation and software he received and the elaborate nature of this entire enterprise I can see how he was persuaded into putting money into this deception. And it is clearly a deception/fraud. Accordingly I shall now consider whether Tesco did anything wrong.

authorisation

Mr D accepts he made the deposit transaction on his Tesco credit card for the scam. He doesn't dispute the amount charged or the date it was charged. And it hasn't been argued that it was double charged or applied to the wrong account. Considering what has what happened here and what the parties have said I'm satisfied on balance that Mr D did properly authorise the transaction at the time. And it was correctly allocated to his account by Tesco. I've considered the other transactions and I'm not persuaded that Tesco has done anything wrong there in paying the money Mr D asked it to.

could Tesco challenge the transaction through a chargeback?

In certain circumstances, when a cardholder has a dispute about a transaction, as Mr D does here, Tesco (as the card issuer) can attempt to go through a chargeback process. I don't think Tesco could've challenged the payment on the basis Mr D didn't properly authorise the transaction, given the conclusions on this issue that I've already set out. Tesco has said that it couldn't raise a chargeback request due to the time constraints within the network rules and due to the time between when Mr D paid the amount and when he took his dispute to Tesco. I've looked into what happened here and considered the network rules around chargeback. Bearing in mind the nature of the scam, the timing of events in this case and the position I'm about to articulate in relation to S75 I don't think I need to decide at this point whether Tesco has treated Mr D fairly in relation to chargeback here.

Section 75

Here I must consider what Tesco should do. To do this, I have to decide what I think is fair and reasonable, having regard to, amongst other things, any relevant law. In this case, the relevant law is S75 of the Consumer Credit Act 1974 (the "Act") which says that, in certain circumstances, if Mr D paid for goods or services by way of credit and there was a breach of contract or misrepresentation by the Supplier, Tesco can be held responsible. The Act makes clear the need for this three-party relationship to be in place. And it is also clear that any such liability is not limited to the amount Mr D used his credit card for, it would include other payments made not financed by the credit as well covered by the agreement entered. I do not propose to set the detail of the relevant parts of the Act I'm relying on here as Tesco is more than familiar with it.

In order to consider what happened in Mr D's case fairly we also need to consider case law since then. To aid this it's worth considering how things have evolved since the Act was enacted.

Historically credit cards worked within a commonplace three-party structure. Specifically that there was:

- an agreement between the card issuer (the Creditor) and the cardholder (the Debtor) to extend credit by paying for goods or services purchased by the cardholder from suppliers who had agreed to honour the card;
- an agreement between the card issuer and the Supplier under which the Supplier agreed to accept the card in payment and the card issuer agreed to pay the Supplier promptly;
- an agreement between the cardholder and the Supplier for the purchase of goods or services.

And accordingly this three-way relationship required by the Act is often referred to as "the DCS relationship", or the "DCS chain" or simply "DCS" as it represents the interrelationships between Debtor, Creditor and Supplier (the 'scam' as I shall now refer to it as in this decision).

As time went by a new type of party entered the market and specifically these types of transactions including credit card transactions, known as the 'Merchant Acquirer'. This led to the creation of four party relationships where instead of the agreement being between the card issuer and the supplier, there were two agreements:

- an agreement between the merchant acquirer and the supplier, under which the supplier undertook to honour the card and the merchant acquirer undertook to pay the supplier; and
- an agreement between the merchant acquirer and the card issuer, under which the merchant acquirer agreed to pay the supplier and the card issuer undertook to reimburse the merchant acquirer.

The impact of this development on the application of S75 was considered by the Court of Appeal in the case of Office of Fair Trading v Lloyds & others [2006] ("the OFT case"). The Court of Appeal first considered whether the introduction of the four-party structure meant that the system had evolved significantly beyond the state of affairs to which S75 had been directed. They concluded that it had not, stating at paragraph 55 of their judgment:

"*From the customer's point of view … it is difficult to see any justification for drawing a distinction between the different [three-party and four-party] situations. Indeed, in the case of those card issuers such as Lloyds TSB, who operate under both three-party and four-party structures, the customer has no means of knowing whether any given transaction is conducted under one or other arrangement. Similarly, from the point of view of the card issuer and the supplier the commercial nature of the relationship is essentially the same:*

each benefits from the involvement of the other in a way that makes it possible to regard them as involved in something akin to a joint venture, just as much as in the case of the three-party structure."

They went on to say;

"*It is clear that, whether the transaction is entered into under a three-party or four-party structure, the purpose of the credit agreement is to provide the customer with the means to pay for goods or services. It follows that in both cases the card issuer finances the transaction between the customer and the supplier by making credit available at the point of purchase in accordance with the credit agreement. The fact that it does so through the medium of an agreement with the merchant acquirer does not detract from that because it is the card issuer's agreement to provide credit to the customer that provides the financial basis for the transaction with the supplier*."

Having provided some important context to the circumstances in Mr D's case, I need to now establish the exact nature of what happened as best I can and the relation between the parties involved.

The DCS issue

I have considered the particular facts of Mr D's case. In order for S75 to apply there has to have been 'arrangements' between Tesco and the Supplier (the scam) to finance transactions between Tesco's cardholders and the scam. It's clear that there was no direct arrangement between them, but this isn't necessarily fatal to the application of S75.

I say this because the Judge who heard the OFT case at first instance ([2005] 1 All ER 843) had also considered the meaning of the word "arrangements", as used in section 12, and whether there existed relevant arrangements between creditors and suppliers (the scam here) in the four-party situation. He said that the use of the word showed a deliberate intention on the part of the draftsman to use broad, loose language, which was to be contrasted with the word "agreement". In the Court of Appeal, the creditors argued that arrangements should be given a narrower meaning that took the four-party structure outside the definition. But the Court of Appeal agreed with the Judge that "arrangements" had been used to embrace a wide range of commercial structures having substantially the same effect. They held it was difficult to resist the conclusion that such arrangements existed between credit card issuers and suppliers who agreed to accept their cards, and stated;

"Moreover, we find it difficult to accept that Parliament would have been willing to allow some consumers to be disadvantaged by the existence of indirect arrangements when other consumers were protected because the relevant arrangements were direct."

Accordingly to arrive at a fair outcome I need to stand back and consider the whole network of arrangements that were involved in Mr D's transaction and, in particular, what the roles were of the other parties involved who weren't the Debtor (Mr D), the Creditor (Tesco) and the Supplier (the 'scam' as I've referred to it).

I've considered the card network rules regarding the scheme it operates which was used in this transaction. I note from its rules it describes a number of parties which may be involved in transactions and explains how it treats them and what their obligations are in relation to the network and other parties.

Is the DCS chain broken?

Tesco has pointed to the presence of Firm P in the transaction, albeit latterly moving away from its argument about DCS being broken. This service has been in contact with Firm P previously to ascertain the financial transactional services it provides. Within its terms and conditions is a requirement to follow the rules of the appropriate card scheme (or network). There are also obligations around chargebacks. I note Firm P describes itself as providing "*payment processing*" services. I note that in its final response letter Tesco refers to Firm P as a "*third-party payment processer* (sic)".

In essence I'm satisfied that the Scam had outsourced its' payment processing to Firm P. And I've considered the network rules applicable here and this need to comply with the network rules is mirrored within those for parties such as Firm P.

The legislation here creating S75 was evidently designed to increase consumer protection. So if any business wants to release themselves from potential or actual liability (and it is a party to the relevant transaction and closer to the arrangement in place and the network than the consumer) I think it fair that it supports its arguments about DCS being broken with evidence of what happened specifically in the transaction at the heart of the matter. Rather than simply point to the presence of a party and say DCS is not in place.

It may be that in this case there was a Merchant Acquirer present also. But whether there was a four-party arrangement here or indeed a five-party arrangement present in Mr D's case, either way I'm not persuaded DCS is broken here and I shall now explain why.

The High Court considered S75 in the case of Governor and Company of the Bank of Scotland v Alfred Truman (a firm) [2005] EWHC 583, ('the Truman case'). In this case the High Court held that it's the nature of the role that each party plays and the nexus between the Supplier (the Scam here) and Creditor (Tesco) that's the relevant consideration. I do not propose to recount all the details of the case here. However I would note the following; the Truman case involved the court considering a five-party structure in which the fifth party, had no contractual or other direct relationship with the relevant scheme. But it was held that it did not matter that the card issuers had no direct contractual or other relationship with the fifth party or that the card issuers had no idea of the existence of the fifth party. There still existed "arrangements" sufficient for the requisite DCS link which were not 'too tenuous'.

In Mr D's case, I think there are stronger indications of relevant arrangements than those in the Truman case given that Firm P (and any Merchant Acquirer present) were independently, specifically and publicly in the business of processing or facilitating financial transactions including the transaction in this case. After all, in the Truman case one of the connecting parties was a solicitor's firm who simply had the facilities to enable the transaction.

The solicitors acted for the car company in the Truman case and provided a variety of legal services. The solicitors were only part of the transaction chain in the Truman case because it had a machine to take the payment and had an agreement with the car company that it would provide access to its machine as part of its broader commercial agreement with the car company. Their primary commercial offering was legal services, it was not in the commercial enterprise of providing financial transactional services to all potential customers.

Here Firm P (and any Merchant Acquirer present) is specifically and publicly in the business of providing financial transactional services. The transactional services provided here by these parties are in effect those that have been outsourced to them by the parties involved here as already established in the case of Firm P. And clearly the network in this case had arrangements with Firm P (and any Merchant Acquirer) and Tesco would be able to know of the parties within the arrangement here and the respective offerings provided prior to the

transaction in this case by dint of Firm P and any Merchant Acquirer being users of the network used here.

I should specifically add at this juncture that there is no indication then or indeed more recently that Tesco was aware of what the scam was in reality and what it was doing. But it is clear that within such a chain of parties, as is the case here, the creditor and supplier undoubtedly benefit commercially from the involvement of the other, through the intermediations of Firm P (and any Merchant Acquirer present), in a way that makes it possible to regard them as in something akin to a joint venture. Specifically, by financing purchases from the supplier here (the Scam) Tesco are able to lend money to their customer (Mr D) and make interest and/or other charges for that service, whilst the Supplier (the Scam) is able to obtain payments from Tesco's credit card holders and so benefit from the credit Tesco extended (albeit indirectly). So I am satisfied that Tesco and the Scam were both in this overall 'arrangement' as I've described. But that certainly doesn't mean that Tesco were complicit in what the scammers were doing.

There is no direct relationship here but clearly there is an indirect relationship through the arrangements present. Clearly this legislation was put in place with a consumer protection aim at the heart of S75. It cannot be that Parliament put in place consumer protection legislation which does protect consumers under s75 when things go wrong unintentionally on the part of the supplier to the detriment of the debtor, but it doesn't protect consumers in the situation where things go wrong intentionally by the supplier to the detriment of the debtor. That would be perverse. So although I have no doubt Tesco didn't know that this scam was a scam at the time, it is clear from what I've said above it can be held liable here.

The arrangement here between the creditor and supplier in terms of the number of 'links' between parties (if you will) is commonplace in financial transactional services and the courts have made clear that this number of links between parties such as these in themselves are not too tenuous. Just because the supplier (the scam here) is up to no good doesn't make a difference between the inter-relationships of the parties here or somehow extend the DCS chain. If Tesco could have showed that Firm P was knowingly complicit in what happened here that might make the arrangement too tenuous-but it didn't do so and there is no persuasive evidence of that here.

So all in all having considered the evidence and the responses of the parties to my provisional decision I am satisfied that the services provided by these intermediary parties in this case did not break the DCS chain. I'm also satisfied this transaction fits within the financial limits set out in relation to S75 claims as described in the Act. Accordingly I'm satisfied the DCS chain is intact and a S75 claim can be successful if the other requirements are made out.

As I've explained for Tesco to be liable under S75 a breach of contract or a misrepresentation needs to made out. It's clear that the Scam is no longer operational. It's also clear from what Mr D says that he'd tried repeatedly to engage with it with regard to providing the services promised. I can also see that the scam provided significant materials and assurances with regard to its legitimacy and indeed the likely profitability of the enterprise. In fact it even provided a guarantee to cover losses if Mr D invested a certain amount at certain times. Mr D didn't qualify for this guarantee (contrary to the Investigator's findings and, I do agree with Tesco's submissions around him not qualifying for this guarantee), but I can see why he could see that guarantee as being an inducement to him to put money into this endeavour.

I have considered what Mr D has said. I can see he believed he was putting money into an investment guide and platform in order to have the opportunity to make a profit. So I'm satisfied there is an agreement here Mr D reasonably entered into. As I've described I'm

satisfied that he was both materially misrepresented into entering the arrangement and that the scammers breached the contract entered into. So I think Tesco is liable for the reasons given.

I'm satisfied an agreement was made here which Mr D entered into based on what he'd been told (which turned out to be untrue). And that the contract was for him to invest in this scheme and that by doing so he would have the opportunity to make a profit which would be to his benefit and that there was the downside that he'd make payments and potentially suffer losses. And I think it the case that there was an explicit or implied representation that it was a bona fide operation and the platform itself actually existed. Which I'm persuaded it did not.

So all in all I'm satisfied the DCS chain is intact and that Tesco are liable for Mr D's losses.

Putting things right

Accordingly I direct Tesco Personal Finance Plc to refund Mr D all the payments he made (as listed in the background section) and add interest of 8% simple from the time Tesco declined the claim Mr D made to when it settles his claim.

My final decision

I uphold this complaint and direct Tesco Personal Finance Plc to settle the matter as I've described above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 24 February 2022.

Rod Glyn-Thomas
Ombudsman