

## **The complaint**

Mrs M has complained that Tesco Personal Finance PLC ("Tesco") has unfairly turned down her claim under section 75 of the Consumer Credit Act 1974 ("CCA").

## **What happened**

Mrs M, alongside her partner, bought a timeshare membership from a business I'll call GH in June 2011. At the time they already had another timeshare at another resort, but Mrs M was told that GH would offer a trade in value for their old timeshare and the newer one had better benefits. In particular, they were told that in any year they didn't want to use the timeshare they would only have to pay a non-usage fee of €50 instead of the higher annual maintenance fee. Mrs M and her partner agreed to take out the timeshare and paid a deposit of €1,750 (£1,577.87) using her Tesco credit card, the balance of €1,750 (£1,596.42) was paid by bank transfer.

After a few years, Mrs M said the non-usage fee increased from €50 to €200 and it was being requested in November in advance of the following year instead of in February of the year that the timeshare wasn't used. So Mrs M thought GH misrepresented the benefits of the timeshare. Mrs M instructed a claims management company to represent her in bringing a claim against Tesco saying that, as she had paid for part of the timeshare using a credit card, Tesco could be held jointly liable under s.75 CCA. As the credit card was Mrs M's, this complaint was brought in her name even though she bought the timeshare along with her partner.

Tesco responded to the complaint to say that the agreement with GH didn't explicitly say that the maintenance fee wouldn't rise over time and it was unreasonable to expect the same, and therefore it didn't accept the s.75 CCA claim. It also said that there wasn't the right type of arrangement in place for s.75 CCA to apply, as Mrs M paid a different named company to GH. Unhappy with the response, Mrs M brought her complaint to our service.

One of our investigators considered the complaint and thought that Tesco should not have turned down the claim. They thought GH had said the non-usage fee would be €50 per year, but this had increased to €200. The investigator thought there was a misrepresentation that the fee would stay at €50 and Mrs M had relied on this when deciding to take out the timeshare. They also thought there were the right sorts of arrangements in place for s.75 CCA to apply. So they thought Tesco needed to pay compensation to put Mrs M in the position she would have been, had she not bought the timeshare from GH.

Tesco didn't agree with the view, so the complaint was passed to me. Having considered everything I came to a different conclusion to our investigator, so I issued a provisional decision setting out my conclusions and I invited both parties to set out their responses to that decision.

## **My provisional findings**

Mrs M brought a claim under s.75(1) CCA, which reads:

*“If the debtor under a debtor-creditor-supplier agreement falling within section 12(b) or (c) has, in relation to a transaction financed by the agreement, any claim against the supplier in respect of a misrepresentation or breach of contract, he shall have a like claim against the creditor, who, with the supplier, shall accordingly be jointly and severally liable to the debtor.”*

I noted that in this case Tesco said it wasn't liable under this provision as, firstly, there wasn't the right sort of debtor-creditor-supplier (“DCS”) agreement in place and, secondly, there was no misrepresentation or breach of contract.

I first considered whether there was a DCS agreement in place, so I looked at whether GH and the business named on her credit card bill were associates as defined in s.184 CCA. Having looked at all of the evidence, I thought GH was a trading name of the business that took payment and I thought there was the right sort of link between all of the parties that gave rise to a DCS agreement. It followed that I thought Tesco did need to consider the substance of the complaint.

I considered whether I thought there was either a misrepresentation or a breach of contract that Tesco could be jointly liable for under s.75 CCA. Mrs M's representatives brought the claim on the basis that GH misrepresented the nature of the timeshare, in particular that the non-usage fee wouldn't rise above €50. I thought that claim wasn't correct.

I noted that comments made before someone agrees to enter into a contract can be a number of different things. Some statements don't have any effect, such as ‘sales puff’, but sometimes a representation is made that someone relies on to enter into a contract, but that representation doesn't form part of the contract. And some representations go on to be terms of the contract.

Here I noted that Mrs M said she was told that the annual non-usage fee was €50 and had pointed to a document titled “ANNEX TO CONTRACT”. That was dated 9 June 2011, the date she entered the agreement to take out the timeshare. On that document it said:

*““I understand that no maintenance fee to pay on this week, but the yearly contribution even if we don't use the week will be €50”*

So I said it was a contractual term that the non-usage fee was €50 and I couldn't see that the term was time limited in any way.

I looked at the rest of the contract to see whether there was any provision for this to rise over time. In the main body of the agreement it says the purchaser, here Mrs M and her partner, agreed:

*“To contribute to the financial support of the properties and the services rendered therein or to the owners thereof in general, by paying every year that you use an annual fee to the management company, which will be periodically updated, while the contract is in force, as set under the statutory rules and pursuant to the document relating to the contract's minimum content document.”*

So there was an annual fee that was charged to the timeshare members whenever they used the timeshare. I thought this was the maintenance fee and was something separate to the non-usage fee. But I couldn't see any contractual provision to allow the non-usage fee to be varied.

Mrs M said that it was important to her that she would be able to pay only €50 a year not to use the timeshare and not to have to pay the full maintenance fee, which was nearer to €400

on her earlier timeshare. But I thought the representation that the cost of the non-usage fee was €50 was a term of the contract, so if the fee increased she could bring a claim for breach of contract and not for a misrepresentation.

Tesco said it wasn't reasonable for Mrs M to expect the non-usage fee not to increase over time, especially as the timeshare was set to run until 2058. But I didn't think the reasonableness of the term came into it, rather it was an explicit term of the contract that the non-usage fee was €50 per year. So if she was charged more, there was a breach of contract. So I considered what Mrs M paid each year, and for what.

Mrs M said that they used the timeshare in the first year (2012), but then paid €50 the next year for non-usage. I saw that in November 2013 Mrs M emailed someone at GH to ask why the invoice for "*non-usage management fees for 2014*" had gone up to €200 from the previous €50. The response was:

*"Thank you for your contact about the increased level of your fee for 2014. As mentioned in the letter accompanying the invoice, this is something that has been implemented across the board for this type of contract and has been necessary to ensure all administration costs are met.*

*I do understand that you are unhappy however the contract does not specify that the fee mentioned in the contract will remain unaltered."*

I thought that response meant the person responding accepted the €200 was for non-usage as they didn't question what Mrs M had said. Having considered the response, I also didn't think the contract needed to specify that the fee wouldn't change over time as I thought the contract was clear that the annual non-usage fee was €50 and there was no provision to increase it.

I saw an invoice for the following year that was paid in November 2014. It asked for payment of the "*MAINTENANCE FEE for the period 2015*" and was for €200. It doesn't say that this was a non-usage fee.

In March 2015, Mrs M emailed GH to say that she was unable to travel for the holiday that year, so tried to bank her timeshare week with an exchange company and use it another time. Mrs M said she was told that she couldn't as the annual maintenance fee hadn't been paid. The response was that the €200 was the non-usage fee and if Mrs M wished to use the timeshare she needed to pay a further €285. Mrs M replied to say she was confused as she paid the maintenance fee, not a non-usage fee, and expected to be able to use the timeshare in 2015. I did not see a response to this email

Having looked at the invoice and emails, I said I understood Mrs M's confusion in 2015. The invoice was for a maintenance fee, not a non-usage fee, so I couldn't see that she would have needed to pay more to use her timeshare that year. But it appeared that GH were saying that the non-usage fee had increased to €200.

I also saw an invoice dated 31 October 2015 that said the maintenance fee for 2016 was €200, but I couldn't see that this was paid.

From the evidence I saw, I thought there was a breach of contract when the cost of the annual non-usage fee was increased. I saw evidence that this was paid twice, to cover the years 2014 and 2015.

I thought Tesco were jointly liable for this under s.75 CCA, so I thought it needed to do something further. The remedy for a breach of contract is normally damages to compensate

for that breach, so to put Mrs M in the position she would have been had the breach not happened. In other words, to refund the difference between what she paid and what she should have paid had the non-usage fee remained at €50.

In conclusion, I thought Tesco needed to pay Mrs M the pound sterling equivalent of the two €150 extra payments she made in November 2013 and 2014. It needed to add interest to that to compensate her for the time she had been out of pocket, the rate of that being 8% per year simple.

This was a different outcome to what our investigator suggested, as they recommended Tesco put Mrs M in the position she would have been in had she not bought the timeshare. But that is a different remedy for a misrepresentation claim and, for the reasons I explained, I thought this was actually a breach of contract claim.

Mrs M's representatives also said that Mrs M was told that if she wanted to hand back the timeshare she could by simply not paying the fee of €50, but this was untrue as this had increased to €200. I didn't follow this point as I couldn't see that a change in the fee made a difference, as the fee remained unpaid whatever the cost. Here Mrs M didn't pay the fees demanded, as I understood it on her representative's recommendation, and I couldn't see that she has been asked to pay anything further, so it appeared that the timeshare arrangement had ended. I invited Mrs M to let me know if this understanding wasn't correct.

Mrs M also said that the timeshare was similar to the earlier one she had, so she paid for a product that, in effect, she already had. But the two timeshares were at different resorts, so I didn't agree that they were the same.

Mrs M said that the requests for payment had originally been made at the start of the relevant year, but this had moved to November of the preceding year. I couldn't see that there was any contractual term that dealt with this or any alleged representation when the invoice would have been sent. So I didn't think this made a difference to the outcome of this complaint.

Finally, Mrs M said that GH were in breach of various European Directives that regulated how timeshares were to be sold. I considered those provisions as well as the wider law that dealt with the sale, but I didn't think it made a difference to the s.75 CCA claim that was brought. The substance of the claim brought was about the change in cost of the non-usage fees and I explained what I thought Tesco should do to put things right in respect of that.

Tesco responded to say it had no further comments on what I said in my provisional decision, but it asked for proof that Mrs M paid the increased fees in 2013 and 2014 by way of bank or credit card statement. Mrs M didn't respond to my provisional 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.

As neither party gave me anything further to think about, I see no reason to depart from the conclusions I reached in my provisional decision.

I have thought about Tesco's request to see evidence of the payment made by Mrs M to GH in 2013 and 2014, but I think there is sufficient evidence to demonstrate payments were made. In my provisional decision I set out the correspondence between Mrs M and GH detailing the invoices raised and discussions about what the payments were for. GH emailed a receipt to Mrs M dated 11 November 2014 stating that €200 had been paid. I haven't seen

a similar receipt for payment in 2013, but I have seen the invoice which Mrs M said was paid and the email correspondence doesn't appear to contradict this. Given this, I have no reason to doubt what Mrs M said happened. So, on balance, I think it's fair to conclude that Mrs M paid the €200 in both November 2013 and 2014. I do not have the date of when payment was made in 2013, so for the purposes of this decision I have assumed it was paid on the same date as the following year, 11 November.

### **Putting things right**

If Mrs M accepts this final decision, I direct Tesco Personal Finance PLC to:

1. pay Mrs M the pound sterling equivalent of €150 on 11 November 2013 and €150 on 11 November 2014.
2. add to those payments interest running from 11 November 2013 and 11 November 2014 for each of the respective payments to the date payment is made to Mrs M. The rate of interest is 8% per year, simple.
3. if Tesco Personal Finance PLC by law has to pay tax on that interest, it must provide Mrs M a certificate setting out how much tax was paid.

### **My final decision**

I uphold Mrs M's complaint against Tesco Personal Finance PLC and direct it to pay compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 8 April 2022.

Mark Hutchings  
**Ombudsman**