

The complaint

Mrs E complains that Tesco Personal Finance PLC, trading as Tesco Bank, has not met its obligations in regard to her dispute with a timeshare relinquishment company.

What happened

In September 2015 Mrs E had owned a 'Timeshare' type agreement for some years she didn't necessarily want to keep. Around that time she came into contact with a company who said it provided Timeshare Relinquishment services and it could get her out of the timeshare agreement for a fee. I'll call this company 'Firm 4'. So Mrs E paid Firm 4 by credit card £917.89 as a deposit for the services to get out of her timeshare and to pursue a claim against the timeshare company for compensation. She also made a bank transfer in relation to this service for £5000 to complete the fee charged by Firm 4. And she says because of what she was told and had paid she believed Firm 4 were working on getting her out of her timeshare and pursuing a claim on her behalf.

In April 2019 she received a termination notice from the timeshare company that she had the timeshare with. It had decided to exit her from the agreement as she'd not been paying the fees due each year. So she contacted Tesco in order to get her money back from Firm 4 as she felt that Firm 4 had breached its contract with her and also had made misrepresentations to her which she had relied on to her detriment.

Tesco considered the matter and decided that it didn't have any liability in these circumstances and told Mrs E it wouldn't be giving her any refund in relation to the money she paid to Firm 4. Tesco says that Mrs E paid a different company to that she had the contract with (Firm 4) and this meant Tesco couldn't be liable. Her card statements show she paid a separate company using her credit card the £917.89 and I'll call this company "Firm 7".

Tesco says that to be held liable under the Consumer Credit Act 1974, specifically Section 75 of that Act, that there is a requirement for a specific type of relationship to be in place, known as the Debtor-Creditor-Supplier relationship often shortened to "DCS". Tesco says that as DCS isn't in place here the requirements of the legislation aren't met and thus it cannot be responsible for the loss Mrs E has suffered.

Mrs E feels this is unfair, so she brought her complaint to this service. Our Investigator considered the matter and found that Tesco hadn't treated her fairly in its handling of the matter. The Investigator felt that DCS was in place due to Firm 4 and Firm 7 being linked and that Section 184 of the Act namely around "Associates" applies here. Tesco didn't agree with the position of the Investigator and accordingly this dispute came to me to decide.

I issued a provisional decision earlier this month to both parties. Mrs E accepted the decision. Tesco said it had no further arguments to make.

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 both parties have received the decision and neither has chosen to make further comments I see no reason to depart from the findings in provisional decision which are set out below. Mrs E's complaint is successful for the following reasons and will be remedied in the following manner.

I should make very clear that this decision is not about Firm 4 or other firms Mrs E dealt with in her efforts to extricate herself from the Timeshare. This is because these companies aren't within the jurisdiction of this service. It is solely about what Tesco did or didn't do and what obligations it has under this legislation. And it should be remembered that Tesco are only involved in this issue because it manages Mrs E's credit card account which she used to make this transaction originally.

I've considered the transaction in itself. Mrs E has made clear she attended a meeting regarding timeshare relinquishment and was willing to pay the fees Firm 4 put to her to get out of the timeshare agreement she had. She didn't challenge the transaction contemporaneously and in fact did raise the transaction as an issue with Tesco until some years after the transaction. So I think Mrs E authorised the transaction and it was correctly applied to her account by Tesco.

could Tesco challenge the transaction through a chargeback?

In certain circumstances, when a cardholder has a dispute about a transaction, as Mrs E does here, Tesco (as the card issuer) can attempt to go through a chargeback process which is through the card network. I don't think Tesco could've challenged the payment on the basis Mrs E didn't properly authorise the transaction, given that Mrs E freely accepts she made part of her overall payment for this 'service' to be provided by Firm 4 by using her credit card with Tesco.

Secondly the Card Scheme used here has rules as to how and when Chargebacks can be raised to challenge disputed transactions. The rules are clear on these timeframes in which Chargebacks can be raised and I can see that between when Mrs E made the transaction in 2015 and when she raised the issue with Tesco in 2019 there is a substantial amount of time that goes by. And this timespan is significantly outside the timeframes set out in the card scheme rules regarding raising chargebacks. As it is so far out of time and didn't have a reasonable prospect of success I don't think Tesco has treated Mrs E unfairly by not pursuing a chargeback once it was on notice of a dispute here. So I don't think Mrs E has lost out here because of what Tesco did in relation to the chargeback process.

how about the Consumer Credit Act 1974? (CCA)

As Mrs E used her credit card with Tesco for this transaction, this means that Tesco has certain responsibilities to Mrs E which arise from the relevant law, specifically, Section 75 of the Consumer Credit Act 1974 ('the Act'). In summary Section 75 has the effect of allowing Mrs E to hold Tesco liable for breaches of contract by Firm 4, or misrepresentations made by it in relation to the agreement made. And without going into a large amount of detail a breach of contract occurs when one party to a contract fails to provide what it has agreed to provide under that contract. Misrepresentation is when something is said or written which is relied upon and transpires to be untrue leading to a detriment.

It is clear that Mrs E is very much of the opinion that Firm 4 breached the contract made and she particularly argues that it made misrepresentations to her which led to her losing out. But before deciding on whether there is breach or misrepresentation here, there are some requirements set out in the Act which also have to be met before these issues can be

considered. One of these tests is around financial limits, and having considered these, I think on balance that Mrs E's claim meets the financial limits criteria.

Another test in the Act for a valid claim is that there must be a debtor-creditor-supplier arrangement (DCS as I've explained) in place. It is clear that although Mrs E has provided the contract she had with Firm 4 she actually paid a different company (Firm 7) the money using her credit card. The fact that she paid Firm 7 is supported by her Tesco credit card statement which shows Firm 7 and not Firm 4. So clearly there is a fourth party here and so DCS appears on the face of it to not be in place.

However the Act also provides under Section 187 that *"consumer credit agreement shall be treated as entered into under pre-existing arrangements between a creditor and a supplier if it is entered into in accordance with, or in furtherance of, arrangements previously made between persons mentioned in subsection (4)(a), (b) or (c)."*

And subsection 4 states goes on to explain that persons are:

*"(a) the creditor and the supplier;
(b) one of them and an associate of the other's;
(c) an associate of one and an associate of the other's."*

And "Associates" are tightly defined in section 184 of the Act. This definition includes:

*"A body corporate is an associate of another body corporate—
(a) if the same person is a controller of both, or a person is a controller of one and persons who are his associates, or he and persons who are his associates, are controllers of the other".*

Our Investigator considered Firm 4 and Firm 7 to be Associates due to an individual being involved in both firms. I'll call this person "Person X". Tesco have said that this isn't made out. And I think this issue is crucial here because if Firm 4 and Firm 7 aren't Associates under the terms of the Act then Tesco cannot be held responsible for Mrs E's losses irrespective of whether breach of contract or misrepresentation is made out.

Tesco has said:

"the individual (Person X) was in no shape or form a controller of (Firm 4) and (Firm 7). And, what you've presented to us does not demonstrate (Firm 4) and (Firm 7) were associates. We can't accept that this passes the associate's test and we don't think it's fair or reasonable to reach the conclusions that you did, given that the role of FOS is to determine what is fair and reasonable to both parties - not just to the customer."

So this decision turns on this. But before I explain my thoughts on the matter I should observe that Tesco has not pointed to any evidence it has gathered on this matter. It has been furnished with evidence we've relied upon but chosen not to provide evidence on the matter that it has sourced or indeed any detailed argument about what has been provided by this service to it. It has agreed with the application of the Associates test, it just considers that Person X hasn't been shown to be a controller of Firm 4 and Firm 7 and hence the firms aren't Associates.

So does Person X make Firm 4 and Firm 7 'Associates'?

In making findings in decisions such as this, the test I'm required to follow is the civil test of 'balance of probabilities', so whether something is more likely than not. I've considered the following evidence, in drawing my conclusions here.

- The commercial registry certificate issued by the Companies House equivalent in the country where Firm 7 is registered shows Person X as the only person listed under the list of 'management' of that company. It gives the total capital holding amount of Firm 7 and it lists Person X as being a "partner" and the "holder" of that entire capital holding. No other individuals are listed in relation to Firm 7 in such terms. I have not seen any persuasive evidence through our investigations or submitted by Tesco which is contrary or inconsistent with this. So, I consider it persuasive that Person X is a 'Controller' of Firm 7.
- The Gazette in this country (the official record of such orders and notices) lists Firm 4 is for winding up and associated notices. Firm 4 isn't a UK company and is registered in a country where the names of controllers of the company are not made public. Accordingly, no names are listed on the winding up order. However, the Gazette does give a registered company address for Firm 4 in the UK in these notices. On the CCJ register there is a listing of Person X who is listed registered at the same company address as given in the winding up order for Firm 4. So, we have a clear link between Person X being linked with the same company address of Firm 4.
- I've considered Firm 4's website. It has been taken down but historic versions of it are still available. The website shows it has an office at the same address in the UK as I've described above. It also shows another address as listed on the Firm 4 contract that Mrs E agreed to and has supplied to this service. So, this shows that the contract Mrs E signed is registered to the same address on Firm 4's website which shows the same UK address that Firm 4 and Person X are linked to.
- Since 2009 domain owners of websites where Firm 4's website is registered have been hidden. However, prior to that the information about domain owners is available and I can see it was owned by a company. I've searched that Country's equivalent of Companies House and I can see that Person X is listed as one of two Joint Legal representatives of that company that owned Firm 4's website.
- In January 2018 the press reported a case at County Court which concerned Firm 4. It is reported that Person X was a witness before the court and was examined. During this examination it was reported that Person X disclosed he was a "director" of Firm 4.
- So in summary it's clear to me that Person X was a controller of the company that owned Firm 4's website, is registered at the address of Firm 4's UK address and has described himself as a director of Firm 4.

Having considered all of the above and noting Tesco hasn't provided any contrary evidence I'm satisfied on balance that Person X was a director and hence controller of Firm 4. I am also satisfied on balance he was a controller of Firm 7. And accordingly I'm satisfied on balance that Firm 4 and Firm 7 were "Associates" as per the definition provided under the Act. It therefore follows that as they're 'Associates' here and Mrs E contracted with Firm 4 but paid Firm 7 that the DCS relationship is found to be intact and accordingly Tesco can be liable for any breach of contract or misrepresentation by Firm 4.

Breach and Misrepresentation

Mrs E has told us she was told by Firm 4 that she'd have a claim against her Timeshare company under the law in that country and that Firm 4 could dispose of the timeshare on her behalf. She has provided a document entitled "*potential compensation claims*" which suggests she could be entitled nearly £33,000. She has also provided the contract between her and Firm 4 which sets out that the service Firm 4 provides is the service of pursuing compensation claims on the basis of mis-selling and misrepresentation of timeshares and assisting in the disposal of unwanted timeshares. Since then Mrs E's

timeshare agreement was clearly ended by the timeshare company itself. There is no persuasive evidence of Firm 4 being involved in that agreement ending.

We have found no persuasive evidence of any court action being taken in relation to this claim for compensation being started in the appropriate jurisdiction. Nor indeed any persuasive evidence of wrongdoing by this timeshare company on which to mount such a claim. Nor is there any persuasive evidence regarding the supposed breaches of local rules that Firm 4 represented to Mrs E regarding the original sale of her timeshare to her and supposed claim for redress it said she was entitled to. There is no persuasive evidence of Firm 4 providing either service to Mrs E that it represented to Mrs E when they met and entered into this contract.

I note that there was some initial letters she received soon after entering this contract purporting to be involved in the matter, however I consider those not to be persuasive evidence any material services being provided to her. It appears they were (either wittingly or unwittingly) representations which had the effect of delaying Mrs E's appreciation that all was not as it appeared to be with Firm 4.

In short I'm satisfied on balance the contract has been breached as no material service has been provided and Firm 4 went into winding up procedures some time ago. So it cannot provide this service now. Furthermore I'm satisfied that the representations made to Mrs E when she agreed to this contract were false and she relied on these to her detriment (namely the payments she made). I think had she not been misrepresented to about the potential of a successful claim and not misrepresented to about exiting her existing timeshare and the services she was to be provided, she wouldn't have entered the contract or paid the sums she did that day.

I also note that Tesco hasn't contended that there was no breach and no misrepresentation here when provided with those findings by the Investigator. Tesco has focussed on whether DCS is made out through the application of 'Associates' and 'Controller'. In those arguments it has said:

"we don't think it's fair or reasonable to reach the conclusions that you did, given that the role of FOS is to determine what is fair and reasonable to both parties - not just to the customer."

For S75 to apply and thus Tesco to be potentially liable there has to be pre-existing arrangements in place, such as Tesco being part of the card network that was used here. Mrs E isn't in that pre-existing arrangement, Tesco is. So it seems fair to me that if Tesco wishes to say DCS is not made out in a specific case, it ought to provide evidence that DCS isn't made out. I'm not persuaded it is fair to expect all consumers, who by dint of the relationship between them and card providers are one step removed from these pre-existing arrangements to have to demonstrate DCS is in place in every such complaint. And as the onus is often on consumers to demonstrate (on balance of probabilities) either breach or misrepresentation, then I think if businesses wish to argue DCS isn't in place then they should properly consider, argue and importantly evidence their position on this considering their crucial position in such pre-existing arrangements.

Tesco, in this case, hasn't put forward any persuasive evidence regarding who was controlling Firm 4 or Firm 7 from the relevant public bodies in any of the jurisdictions which are involved here, or other types of persuasive evidence for that matter. I've not seen any significant evidence that its original investigation considered whether Firm 7 was either an Associate of Firm 4 (or a payment processor or other form of outsourced financial transaction service provider) when Mrs E made her claim to it.

I think if it had done such investigation at the time it would have discovered the evidence this service has since provided to it. And if it had done this I think it likely it would have realised that Firm 4 and Firm 7 were associates (in the absence of any yet unseen persuasive contradictory evidence) and would have redressed the matter at that point. So I'm far from persuaded that Tesco has been treated unfairly here by the conclusions of the Investigator or these my conclusions.

Accordingly and in summary I think Mrs E hasn't been treated fairly here and I think Tesco should compensate her for her loss under s75 of the Act and for the reasons I've set out above.

Putting things right

As such I direct Tesco to:

- Re-work the credit card account as though the amount of £917.89 had been refunded from the point Tesco Bank declined the section 75 claim, and for this to include refunding any interest, fees or charges which Mrs E incurred as a result of this transaction remaining on her account.
 - If the re-working results in a credit balance, then Tesco Bank should pay 8% simple interest per year on any credit balance from the date it would have arisen to the date it would have ceased to exist
- Refund Mrs E the payment of £5,000 she made by bank transfer, as it relates to the above transaction, plus 8% simple interest per year from the date the section 75 claim was declined (and she should have had her money back) to the date of settlement.
- Remove any negative credit file information it has logged on her file

HM Revenue & Customs requires Tesco to take off tax from any interest amounts it pays here. Tesco must give Mrs E a certificate showing how much tax it has taken if she asks for one.

My final decision

I uphold this complaint about Tesco Personal Finance PLC, trading as Tesco Bank. I direct it to redress the matter as I've described above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs E to accept or reject my decision before 15 April 2022.

Rod Glyn-Thomas

Ombudsman