

The complaint

Mrs B has complained that Tesco Personal Finance Plc (“Tesco Bank”) has unfairly declined her claim under section 75 of the Consumer Credit Act 1974 (“CCA”).

What happened

Mr and Mrs B had an existing membership with C and were invited to Tenerife for a “*free holiday*” on condition that they attend a welcome meeting. As a result of this meeting Mr and Mrs B purchased a one-year Prestige membership for a total cost of £8,000.99 in September 2011. Mrs B paid £2,459.99 on her Tesco Bank credit card and the balance was funded by a bank transfer, again from her account. As Mrs B part paid on her credit card (giving rise to a potential s.75 claim) the complaint is in her name and I’ll refer throughout to Mrs B.

Mrs B says the welcome meeting which took place was a “*high pressure*” meeting where the sales representatives wanted almost instant decisions. She’s said her main incentive to purchase the membership was that she was told she’d receive a guaranteed cashback payment of £5,750 after 36 months which never materialised. Mrs B also received a voucher entitling her to seven nights free accommodation for up to four people and two return flights of up to £50 per flight.

Mrs B has said she was told they would receive cheap holidays and be able to use the membership to travel anywhere in the world. However, when Mrs B booked flights to India she says she found the cost to be no different to what she could’ve sourced independently and when she tried to book flights to the Maldives she was told this destination wasn’t covered.

As Mrs B paid on her Tesco Bank credit card she asked Tesco Bank to refund the full purchase price, as she felt Tesco Bank was jointly liable for any breach of contract or misrepresentation under s.75 CCA.

Tesco Bank considered her claim but declined it. Initially, Tesco Bank didn’t agree Mrs B had the correct debtor-creditor-supplier (‘DCS’) relationship in place to make a s.75 claim. This was because Mrs B paid another company, I’ll call S, using her credit card and not C directly. Tesco Bank subsequently concluded that due to the relationship between C and S, the DCS relationship remained intact. (This will be explored further in this decision.) However, Tesco Bank still didn’t uphold her claim. It argued that Mrs B had taken out a one-year membership and based on her testimony, had utilised this. Any further membership would’ve been a new contract requiring additional payment and so Tesco Bank could not be held liable as a result of her initial credit card payment. In addition, Tesco Bank said Mrs B was unable to demonstrate any reasons for failing the cashback promotion or how she initially registered for it. Unhappy with Tesco Bank’s response, Mrs B referred her complaint to our service.

One of our investigators considered the complaint and upheld it. To summarise, they also thought the right DCS relationship was in place and they thought that the benefits of the membership and the cashback incentive had been misrepresented to Mrs B. They

concluded that if it had been made clear to Mrs B that there were no guarantees of discounts on flights and accommodation through her one-year membership, it's unlikely she would have spent just over £8,000 to purchase it. In addition, they concluded that the cashback had been presented to Mrs B in a way that suggested it was guaranteed.

Tesco Bank disagreed with the investigator. It argued that what represents good value to one person isn't necessarily good value to another as this is a very subjective test. And that there is no conclusive evidence to show Mrs B wouldn't have paid this for her membership, which she used when travelling to India. In addition, Tesco Bank reiterated that Mrs B was unable to demonstrate any reasons for failing the cashback promotion or how she initially registered for it. As an agreement couldn't be reached, this complaint has been passed to me for a decision.

I issued a provisional decision in April 2022 where I explained that I was minded to uphold the complaint. I have included an extract of my provisional decision below, anonymising the various businesses referenced which aren't party to the complaint.

There are a number of parties who were involved either in the purchase of this membership or what was provided as part of the purchase. Therefore, I think it would be beneficial to set out which businesses Mrs B contracted with and on what basis – and if this is something Tesco Bank should have considered given the relationships between the parties. If I think it should have, I'll then go on to consider if Mrs B has a course of action against any of these businesses for breach of contract or misrepresentation. And finally, if I think it does, I'll think about whether Tesco Bank has properly considered the claim.

C Membership

I've reviewed a copy of Mrs B's membership agreement. This details Mrs B purchased "Prestige 1 Year Membership" for a total cost of £8,000¹. The copy I have is of a poor quality and I can't see any branding or details to indicate who sold the membership to Mrs B (to determine if this was C direct or a third party.) However, I have noted that Mrs B has signed this document to:

"confirm that the details provided are accurate and correct, and that I have fully read, understand and agree to the terms and conditions attached hereto"

Having reviewed the accompanying terms and conditions (which are also difficult to read in part, particularly on the left-hand side of the page) I can see under the section entitled "Liability" it says:

"1. I understand that the company who contract with ourselves is an independent entity to C"

It goes on to say:

"...contract is with A whose business address is..."

and further on:

"I/we understand that A is an independent intermediate for C.

¹ I've noted this is slightly different to the total paid (£8,000.99). However, given the difference is marginal, this doesn't impact on my findings. I will consider the actual amount paid when awarding any redress where applicable.

In addition to the above terms, I've summarised below what I think are the other key terms of the membership agreement. As I've detailed above, the copy I have is of a poor quality but below is what I've been able to conclude from the document.

Under the heading "C Terms and Conditions of Membership" it explains that Prestige membership is administered by C. It says 28 days prior to the expiry of the one-year contract, C will contact Prestige members about entering a new contract. It also outlines that C will endeavour to ensure the membership benefits are available and will dispatch the membership documents. Under the heading "Services" it sets out the services offered by C and its liability to its members. I think it's key to highlight here that A isn't mentioned in this section. Most notably it says that C can withdraw any of the services at any time.

Under the section entitled "Liability" (and in addition to the quoted terms above) it states C will use its best endeavours to provide the services with reasonable care and attention. It states that C is solely responsible for the membership and disputes relating to this are against C. A accepts no liability in relation to the member's entitlements and C can vary the terms and conditions. There are also additional sections which summarise the benefits including the additional benefits the membership offers.

I think it's clear from the above terms that Mrs B had a contract with C to supply her with C membership. All the terms and conditions relate to what C was providing and as I've explained above A isn't mentioned within services section of the terms and conditions. C was responsible for the membership and resolving disputes, providing membership documents, availability of the membership benefits and so on. Furthermore, the contract seeks to exclude A from any liability relating to the membership entitlements.

However, the terms make it clear that Mrs B has also contracted with A (who it states is separate from C) on some basis otherwise there's no reason for A to be referred to in the documentation. Typically, the agreement would set out the role of A on it, but that's not been done on the copy I've seen. However, my understanding is that C used various third parties to market and sell its memberships as C didn't typically market directly to customers. I'm also aware that A operated as a marketeer for C, speaking with potential customers and selling memberships on behalf of C. So I think it's most likely that's what happened here – A acted as agent for C to market and sell C's membership to Mrs B.

Taking all this into consideration, I think that when Mrs B took out her membership she entered into two contracts at the same time. I think she contracted with A directly to procure her membership. And, I think it's also clear that Mrs B contracted with C to supply the membership. But Mrs B didn't have any direct dealings with C so the only way it could've entered a contract with C was through the use of an agent – A.

So to summarise, I think A marketed the membership, together with other associated benefits. But the actual membership and associated benefits were then supplied by C.

I'll now consider whether or not Mrs B has a valid s.75 claim in relation to either of these contracts.

Do these contracts meet the requirements for a s.75 CCA claim?

Section 75 makes the provider of credit (Tesco Bank in this case) equally liable

where there is a case of misrepresentation or breach of contract by the supplier of the goods or services. For s.75 to apply there are several criteria that need to be met, one of which is a valid a debtor-creditor-supplier (DCS) agreement between the parties (this is set out more fully in s.11(b) and s.12(b) CCA). However, to summarise, there needs to be arrangements in place so that the supplier of goods or services is paid using the credit card.

As explained above, the payment Mrs B made using her credit card wasn't made directly to A, it was paid to another party – S. Taking the example of the contract directly between Mrs B and A to procure the membership, I would need to see that there were sufficient arrangements in place between S and A to allow the DCS to remain intact. One way this could be achieved is if S and A were “associates” (outlined in s.184 and s.187 CCA). Section 184 CCA sets out the various definitions of “associates” and includes circumstances involving two body corporates. It says that a body corporate can be an associate of another body corporate if they are controlled by the same person/people.

Section 189 CCA defines “controller” as is essentially someone who wields control over a body corporate either by being able to instruct the directors on actions/decisions to take or who has over one third voting power at a general meeting.

I have seen a copy of a trust deed which dated 10 August 2010 which names a person I'll call R as the sole beneficial owner of A. I've also had sight of Spanish company records from October 2010. This details that S commenced operations on 10 September 2010 and its sole shareholder was also R. I think this is sufficient to demonstrate that these two body corporates were associates at the time Mrs B took out the membership (and associated benefits) through the connection of R.

So all this means that when considering the contract with A to procure membership, I don't think the payment being made to S breaks the DCS. And so Tesco Bank would need to consider a potential claim arising from this contract.

However, with regards to the contract with C to provide the ongoing membership and associated benefits, I still don't think there is DCS despite A and S being associates. This is because I've seen nothing to suggest that either party are “associates” of C. Furthermore in 2011 the Secretary of State for Business, Innovation and Skills petitioned the High Court for C to be wound up (the “Petition”). C was one of a number of linked companies who were subsequently wound up in October 2012, however, neither S or A were named in that petition. So because I've not seen the types of arrangements I need to involving C, I don't think Tesco Bank needs to answer a claim for breach of contract or misrepresentation about the underlying membership which was supplied by C in relation to this contact.

Breach of contract and misrepresentation

As I've explained above, Mrs B does meet the requirements for a like claim in relation to the contract she made with A directly to procure membership. However, from everything I can see A provided her with the membership which is what it was required to do. So I've seen nothing to suggest A breached its contract with Mrs B.

Mrs B has said that she didn't get what was promised through the membership. As explained above, she's said she was promised cheap holidays and that she would be able to use the membership to travel anywhere in the world. However, she's said when she booked a trip to India it was no cheaper than what she could've obtained

without the membership. She's also said she tried to book a trip to the Maldives, but found this destination wasn't included. Mrs B is therefore arguing that A misrepresented the membership to her. So I've considered the representations and whether I think this is something which needs to be considered further by Tesco Bank.

I don't doubt that Mrs B has provided her honest recollections the sale. However, Mrs B hasn't presented any supporting evidence to show that these representations were untrue. For example, she's not provided anything to demonstrate she couldn't book a holiday to the Maldives or that the trip to India didn't attract the discounts she was told it would. And whilst Mrs B was able to find a particular holiday package was cheaper elsewhere, this doesn't mean that C didn't offer some form of discount on the full price. So, based on what I've seen, I can't conclude that A misrepresented the membership to Mrs B.

The cashback incentive

It's clear that the membership terms I've detailed above don't include everything which was agreed when Mrs B took out her membership. This is because there's nothing in these terms which relate to the cashback incentive. I've therefore needed to carefully consider everything Mrs B has told us about it and all the other evidence available to determine what was agreed.

Mrs B has said her main incentive to purchase the membership was the that she was guaranteed a cashback payment of £5,750 after 36 months. She's provided a document which she's signed and which is dated the same date as the membership agreement. It states that "it is agreed that [Mr and Mrs B] have applied for new C Prestige membership." It then details the European Freestay Travel Vouchers before detailing the cashback incentive:

"a E certificate of £5,750 has been awarded to you ... redeemable in either 59 or 36 months depending on the terms and conditions of todays Cashback offer."

It goes on to say that the cashback incentive:

"is subject to terms and conditions imposed by E. E accepts full liability with regard to the settlement of your cashback claim....C are not liable with regards to your Cashback clam and any dispute regarding your Cashback Certificate will be between yourselves and E."

The following two pages detail a number of declarations relating to the cashback cheque payment and a manual registration form for the cashback incentive.

I think it's clear from everything I've seen that the cashback incentive was only available as a result of taking out the Prestige membership (marketed by A) and so was linked to that membership. I therefore think it's most likely that A procured Mrs B's enrolment to the cashback incentive alongside procuring the membership (and other associated benefits). Mrs B's testimony is consistent with this. She's said that the cashback was her main incentive for taking out the Prestige membership (suggesting it was presented to her as one package) and that this was sold to her by A. And this is supported by the membership agreement and documentation relating to the cashback being signed on the same day. In addition, as described above, the initial payment for the membership (and associated benefits) was made to S who was an associate of A and I've not seen anything to suggest S was also an associate of C or E.

So I think a similar process took place with the cashback as it did with the membership. Mrs B had a contract directly with A to procure her membership and procure her enrolment into the cashback incentive. However, A wasn't responsible for the administration of the cashback incentive or the eventual payment. The limited terms I have available show that E was responsible for paying the cashback sum and the cashback was subject to the terms and conditions imposed by E. Therefore, I think Mrs B also had a contract with E who ran cashback incentive. However, as I can't see that she had direct contact with E the only way she could've contracted with it is through the use of an agent – A.

So to summarise, I think A procured Mrs B's enrolment into the cashback incentive. But the actual cashback incentive was supplied by E.

Do these contracts meet the requirements for a s.75 CCA claim?

As I've explained above, the payment for the membership (and associated benefits including the cashback incentive) was made to S. And whilst I think S and A were "associates" I haven't seen anything to suggest either were "associates" of E. So in relation to the contract with E to supply the cashback incentive, I don't think there's DCS relationship in place. So I don't think Mrs B meets the requirements for a s.75 CCA claim in relation to that contract. Turning to the contract Mrs B made directly with A to procure enrolment into the cashback incentive, I think there is DCS (through A and S being "associates"). So I think Tesco Bank does need to consider a claim in relation to this which I've gone on to consider below.

Breach of contract and misrepresentation

The contract between Mrs B and A to procure enrolment into the cashback incentive was to do just that – facilitate her enrolment. I don't think it was A's responsibility to administer the incentive or pay any future payments. But I think it did need to give her information about how to enrol (or facilitate this with E) to fulfil its obligations under the contract. And from everything I've seen, I think it did this. Mrs B has said she was able to register online for the cashback. She's also provided a copy with documents about the cashback incentive (detailed above and dated the same date as the membership agreement) and a manual registration form. So I think it's most likely A met its obligations and therefore it didn't breach the contract.

I'll now consider Mrs B's arguments that A misrepresented the cashback to her. In order to agree there's been a qualifying misrepresentation I would need to conclude that A told Mrs B something that was untrue during the sale or sale negotiations (as per s.56 CCA). And that this statement induced Mrs B into entering the contract – in other words it's unlikely Mrs B would've still entered the contract if this statement hadn't been made.

Mrs B has said she was told the cashback incentive was guaranteed and that this was her main incentive to purchase the membership. Mrs B has also provided a document which details various payment options available to fund the membership. The document is titled "CLIENTS SUMMARY" and lists the "departure date" of 2 October. Under the first option which is hand written on the document, it details loan options for funding the membership. The relevant figures have also been added by hand. It then goes on to detail the second option which is titled "ALTERNATIVE OPTION" and was to self-fund the membership without taking out a loan. On the document it looks like the second option was selected which is consistent with how Mrs B chose to fund the membership.

As explained, this document was designed to explore and breakdown the various ways of funding the membership. So I think it's clear that this was a sales document Mrs B (the "client") was taken through when she purchased the membership. And given that I think it was A who sold the membership to Mrs B, I think it's most likely that A completed this document with Mrs B as part of the sale.

Looking at the second option (which was the one selected) it details the cost of the membership (£8,000) with notes next to it saying £2,400 paid and £5,600 to pay. This is broadly consistent with the initial payment Mrs B paid on her credit card at the time she took out the membership and the balance outstanding which she subsequently paid through a bank transfer. It then goes on to detail the cashback certificate of £5,750 with a 36 month term and then circled just below this is "Total £2250". £2,250 is the difference between the overall cost of £8,000 for the membership and the cashback incentive of £5,750. I accept there are other calculations on this document (predominately when addressing the loan calculations) that aren't completely clear. However, with regards to the option Mrs B selected, I think it is clear from this document that Mrs B was told the membership would cost was £8,000 minus the full cashback amount of £5,750 (totalling £2,250). And as I've explained above this figure was circled on the document to give it prominence. This is also consistent with what Mrs B has told us about how the cashback incentive was presented to her.

So taking all of this into consideration, as I think A sold Mrs B the membership and associated benefits including the cashback incentive, I think its most likely A told Mrs B the cashback amount was guaranteed after the 36 month period. I'll now consider whether or not this statement was untrue.

As I've explained above, in 2011 the Secretary of State for Business, Innovation and Skills petitioned for C and several other companies to be wound up ("the Petition"). I've seen a copy of the Petition that was presented to the Court. It names a number of companies that were linked with the principal activity of selling membership to C. The Petition alleged that the companies were linked by the involvement of the same individuals, but the overall structure of the group was difficult to decipher and that meant the controlling parties had remained hidden. The Petition was presented on the basis these companies were involved in misleading customers, this included presenting a complex and potentially insolvent cashback incentive to customers. C was subsequently wound up by the Court in October 2012.

The Petition describes the cashback incentive requirements to retrieve any funds as "onerous and calculated to ensure that only 32% of all applicants successfully register and can therefore expect to receive a payout". It was also estimated that a successful applicant would likely only receive around 17% of the voucher value due to the lower than required levels of funds that E held (and therefore as described above, the petition doubted the solvency of this incentive scheme). And when Mrs B came tried to claim she received nothing.

I think the information contained in this Petition makes it very clear that Mrs B was never likely to recover the full cashback sum as she was told. In fact, given that it was designed that only 32% of applicants could ever successfully register and so qualify for a small portion of the cashback sum, it was far more likely that she wouldn't receive any (or very limited) funds. So I think in presenting the cashback incentive as a guaranteed sum, A did make a statement which was untrue. Mrs B has told us that this induced her into taking out the membership and on the facts, I don't doubt this was the case. The cashback incentive would have resulted in a substantial saving of over 70% of the total cost being paid back to her, so I don't think she would have proceeded with the purchase if she'd known this wasn't guaranteed.

I appreciate, as Tesco Bank has argued, Mrs B hasn't evidenced she registered correctly for the cashback and is unable to provide a reason for why she was unsuccessful. Mrs B has said she was able to register, but when she came to claim she wasn't able to. She has speculated that this might be because after she struggled to submit a claim online, she tried to post a claim which may have been too late by this stage. However, I think her testimony is consistent with the grounds raised in the Petition regarding the cashback incentive. The Petition detailed that it was set up to make registration difficult, so only a third of applicants could successfully register, and that it was unlikely to have funds available to meet the potential claims. So I don't think it's surprising that Mrs B wasn't able to successfully claim and can't provide clear evidence as to why.

So to summarise, I think A did misrepresent the cashback incentive to Mrs B – I think it's most likely she was told she'd receive the full cashback amount back during the sale, which wasn't true. I see that cashback was described as "an incentive awarded to you (not available for purchase)", so I think this was part and parcel of the package of things sold by A. It follows, I think this induced her into purchasing everything, including the membership and associated benefits. As Mrs B part paid for the membership (and associated benefits including the cashback) on her Tesco Bank credit card, Tesco Bank is jointly liable under s.75 for the misrepresentation made by A and I think the required DCS relationship is in place. So I think Tesco Bank should have upheld Mrs B's claim and as such I don't think it fairly considered the claim.

I have noted that Mrs B has raised allegations of being pressured into taking out the membership (and associated benefits including the cashback). But as I'm already upholding this complaint for other reasons, I don't intend to explore this issue further or reach a finding on it.

I invited both parties to provide anything either they would like me to consider before I reach a final decision. Neither party has provided anything further.

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.

Having done so, as neither party has provided anything further, I see no reason to depart from my provisional findings. So it follows that for the reasons set out in my provisional decision (and repeated above) I think Tesco Bank should have upheld this claim and so I don't think it fairly considered the claim.

Putting things right

Given I don't think Mrs B would've purchased the membership had the misrepresentation not induced her to do so, I think Tesco Bank should put Mrs B back in the position she would've been had she not purchased the membership. So Tesco Bank should:

- Work out what Mrs B would owe on her credit card today, or at the date the card was closed if applicable, if she hadn't paid anything to S on 28 September 2011. So it needs to remove the £2,459.99 paid, plus any interest charged on that sum. It should also remove any charges that were caused by the payment being made to S, as well as any interest added to those charges.

Tesco Bank should then pay Mrs B the difference between her credit card balance and what it would have been as worked out above.

If, when Tesco Bank works out what Mrs B would have owed without paying S, she paid more than she needed to because of the payments to S, Tesco Bank should also pay compensatory interest on the extra she paid. The interest rate is 8% per year simple from when the extra payment was made to the date of settlement.*

- Pay Mrs B £5,541 for the balancing payment which was paid to a party I'll call H, by bank transfer on 18 November 2011, along with compensatory interest at the rate of 8% per year simple to the date of settlement.* My understanding is H is an accountancy firm associated with the timeshares industry. This payment is consistent with the amount outstanding to be paid under the contract after considering the total cost and the amount already paid. It was also paid around the time the final payment was due and Mrs B has highlighted this as being the balancing payment. So I'm satisfied it is the correct payment.

* HM Revenue & Customs requires Tesco Bank to take off tax from any compensatory interest awarded and it should let Mrs B know how much tax has been deducted.

My final decision

I uphold Mrs B's complaint and direct Tesco Personal Finance Plc to put things right in the way I've described above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 10 June 2022.



Claire Lisle
Ombudsman