

The complaint

Mrs R complains about the way Tesco Personal Finance PLC trading as Tesco Bank dealt with her attempts to recover money she'd paid for services she was unable to use due to the Covid-19 pandemic.

What happened

Mrs R was due to fly abroad for a holiday to celebrate a family birthday. She wanted to visit some of the main tourist attractions at her destination, and bought two city passes using her Tesco MasterCard credit card. The passes were supplied by a third party, "L", and could be used at any time during the 12 months following purchase. The passes were valid for three days after first use.

Unfortunately, after Mrs R bought the passes, her planned holiday was caught by restrictions imposed on her flight and at her destination due to the Covid-19 pandemic. L told Mrs R it wouldn't refund her but offered to extend the starting date of the passes by another year. Mrs R was unhappy that F didn't propose to refund her, so she turned to Tesco Bank to see if she could recover his money through the bank.

Tesco Bank responded to Mrs R to say that it had considered whether she had a valid claim under section 75 of the Consumer Credit Act 1974 ("section 75"). This has the effect that in certain circumstances, a credit provider can be liable for a misrepresentation or breach of contract claim that the borrower might have against the supplier of goods or services. Tesco Bank said it had also considered whether it could recover Mrs R's payment by means of chargeback.

The bank took the view that in either case, Mrs R's claim wouldn't succeed because of the extended availability of the passes. However, it did recognise the inconvenience Mrs R had experienced due to the time it took to deal with the claim, and offered her £35 in that respect. Mrs R didn't accept Tesco Bank's offer and complained to us.

Our investigator didn't think Tesco Bank had dealt with Mrs R's claim fairly. He acknowledged the difficulty of Mrs R making a successful section 75 claim, taking the view that it was more likely the contract had been frustrated by the pandemic rather than breached. The investigator didn't share Tesco Bank's view that an extension of the pass availability addressed the fact that the passes couldn't be used during the period that Mrs R intended to travel. He felt that was something open to Mrs R to accept as an alternative to the arrangement she'd contracted with L to perform, but it was clear Mrs R didn't accept it.

The investigator felt it would have been appropriate for Tesco Bank to raise a chargeback claim, and that its decision not to do so had to some extent prejudiced Mrs R's position. He recognised that the claim was not guaranteed to be successful, so proposed compensation to reflect that uncertainty. He suggested that in addition to the £35 already offered, Tesco Bank should pay Mrs R a further £152.36 representing half the value of the passes.

Tesco Bank didn't accept the investigator's conclusions. It said

- Mrs R suffered no loss arising from any alleged breach of contract on L's part. Any loss she incurred was due to the travel provider cancelling her holiday
- The length of time Mrs R had in which to use the passes was not material to her decision to buy them. Mrs R bought the tickets specifically for the three days for which she'd planned to be at her holiday destination. That hadn't been possible, for the reason already mentioned
- It was unclear what reason the bank could have used to submit a chargeback on Mrs R's behalf. Any chargeback attempt would've been robustly challenged by L, and MasterCard would have found in L's favour if asked to arbitrate. It certainly wouldn't have determined a 50% refund
- L's role in the arrangements was to provide the passes, which it did. L doesn't provide the individual attractions. This would be the basis of a successful defence put forward by L
- The investigator was unqualified to judge whether a court would likely deem a term of L's contract with Mrs R to be unfair. But in any event, it didn't believe a breach of contract had occurred because L had provided the passes and made them available to use. The passes could've been accessed anytime within the year, regardless of what attractions were open or closed, as well being extended, quite generously, by L.

In summary, Tesco Bank said it was confident it had acted perfectly fairly, and so no refund was due.

The complaint has now been passed to me for review and determination.

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.

Mrs R was understandably unhappy that her trip couldn't go ahead as planned. The circumstances of the pandemic at the time she was due to travel were such that she was unable to visit her destination as intended. It's also the case that for at least some part of the 12 months following her purchase of the passes, tourist attractions that would otherwise have been accessible using the passes were closed or operating with significant limitations likely to have affected her ability to use them as planned.

Because Mrs R paid using her Tesco Bank credit card, she can in certain circumstances claim against Tesco Bank as she might otherwise do against L, using the connected lender liability provisions set out in section 75. She can also ask the bank to assist her in recovering money from L by means of chargeback, through the card scheme rules. The circumstances in which Mrs R might be able to claim under section 75 are rather more limited than are available via chargeback, but in the circumstances at play here I am satisfied Tesco Bank understood it was appropriate to consider both avenues.

Tesco Bank is correct to say that L wasn't itself responsible for providing the attractions. But the stated purpose of the contract was to enable Mrs R to be permitted access to her selection of the listed attractions over a three-day period, without further payment, at any time in the 12 months from the purchase date. Any proper analysis would have to conclude that, as things turned out, the passes could not be used *at any time* in the 12 months from date of purchase. There were periods within those 12 months where the passes could not be used, such as when attractions were closed during the pandemic. And that was the period in which Mrs R was intending to travel and use the passes.

I appreciate that in some circumstances, the unavailability of the pass for part of the 12-month period might prove no problem. Provided the user has flexibility to travel on alternative dates, they might simply make use of the passes at a different time. And an extension to the 12-month period (while not provided for within the contract) might also be acceptable to some passholders.

But Mrs R was intending to travel for a specific purpose. It was a milestone family birthday, and that was why they were going away. The inability to travel defeated the object of the holiday and with it the purpose of buying the passes. She has at least an arguable case that because the pandemic meant the passes could not be used *at any time* (including when she wanted to use them), the contract with L was frustrated even if it wasn't breached.

That might well mean an attempt to claim under section 75 – which can only be brought in relation to misrepresentation or a breach of contract – could not be successful, albeit not quite for the reasons Tesco Bank cited. But it still leaves the question of whether Tesco Bank did enough to assist Mrs R with her attempts to recover her money via chargeback.

Tesco Bank has expressed a high degree of confidence in its response as to the position L would have taken had it raised a chargeback claim, and further, what the card scheme would have decided if asked to arbitrate. It hasn't provided any supporting evidence for either position, and I'm not persuaded it would be right for me in the circumstances here to share the bank's confidence in the likely outcome of a chargeback had one been raised.

I say this because the card scheme provides for a chargeback to be raised on the grounds that goods or services are not as described. As I've set out, L held out the passes as being available for use at any time during the 12 months following purchase, and there is clear evidence here that for a significant portion of that time they were not.

Further, in May 2020 (shortly before Mrs R was originally scheduled to travel), MasterCard issued guidance titled *"Dispute Resolution Management During Covid-19"*, which anticipated common scenarios that could arise from Covid-19-related disputes including where goods or services are not provided, or were either not as described or defective. The guidance focused mainly on cancelled services, but indicated that there could be a range of possible outcomes that would likely be fact-specific. Neither the card scheme guidance nor the relevant chargeback rule excludes the possibility of the circumstances in Mrs R's case leading to a claim being resolved in her favour.

With this in mind, it appears that there were suitable grounds on which Tesco Bank could have instigated a chargeback claim on Mrs R's behalf. And while the claim wasn't guaranteed to be successful, it also wasn't bound to fail. Tesco Bank's decision not to submit the chargeback prevented Mrs R from using the scheme as a basis on which she might make her arguments. I don't consider the bank treated Mrs R fairly in this respect.

Whether that treatment caused Mrs R financial loss is debatable. As I've noted, the claim outcome could have gone either way. In an attempt to find a mediated settlement, the investigator suggested Tesco Bank pay Mrs R half the amount by which she was out of pocket. Tesco Bank has said that it is unlikely this would be the sum arrived at had the matter progressed to arbitration by the card scheme, and I understand that perspective.

However, in light of Tesco Bank's comments I should remind the bank that my power to award compensation isn't limited to provable financial loss. I can also make awards to reflect (among other things) distress and/or inconvenience a complainant experiences as a result of a firm's actions. Here, I consider Tesco Bank's failure to treat Mrs R fairly has caused her material distress, and has undoubtedly resulted in her being inconvenienced.

To recognise this, I require Tesco Bank to pay her suitable compensation, which I assess at £200. For clarity, this amount is in addition to the £35 Tesco Bank has already offered in respect of its acknowledged delays, which I consider a reasonable sum in that respect. Further information on how we assess awards for non-financial loss can be found on our website at <https://www.financial-ombudsman.org.uk/businesses/resolving-complaint/understanding-compensation/compensation-for-distress-or-inconvenience>

My final decision

My final decision is that to settle this complaint, Tesco Personal Finance PLC trading as Tesco Bank must pay Mrs R £235 (inclusive of any amount it has already paid).

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs R to accept or reject my decision before 27 July 2022.

Niall Taylor
Ombudsman