

The complaint

Mr and Mrs A complain that Tesco Personal Finance PLC (“Tesco Bank”) hasn’t refunded in full payments made when they were misled into agreeing to relinquish a timeshare and exchange it for travel credits. The arrangements were paid for in part using Mr A’s Tesco Bank credit card, so they say that Tesco is liable to meet their claims.

What happened

Mr and Mrs A were timeshare owners through a well-known timeshare and holiday club business, C. They have explained that, whilst they were generally happy with their timeshare arrangements, the management fees associated with them had risen significantly and it was become increasingly difficult to find suitable exchange properties.

In November 2015 Mr and Mrs A were on holiday in Spain, when they were invited to a discussion about their timeshare by someone they initially believed to be linked to C. As a result of that meeting, however, they agreed to relinquish their timeshare with C and to buy holiday credits. In total, they were to pay £13,950 – £2,000 by credit card and the balance by bank transfer. (In fact, the card payment was a little less than that because of exchange rate changes, but that is not directly relevant to the complaint).

By 2018 it became apparent to Mr and Mrs A that their timeshare would not be relinquished or taken over as they had been promised, and it seemed unlikely that the holiday credits they had bought would be repurchased as they had been told they would. In addition, far from entitling them to 70% discounts as they had been promised, Mr and Mrs A found that the holiday credits were worth at most 10% off the price of holidays, less than they could obtain elsewhere.

Mr and Mrs A complained to Tesco Bank, saying that it should refund the full amount they had paid, because part of that sum had been paid by credit card. Tesco Bank agreed to refund the sum paid by credit card and refunded £2,016.46 (the difference again accounted for by exchange rates) but declined to refund the balance of £11,950. That was, it said, because:

- that payment had been made by direct transfer from Mr and Mrs A’s account with a different bank;
- it had been made to a different party from that which took the credit card payment; and
- it was made for the purchase of the holiday credits, which was a different contract from that for the relinquishment of the timeshare.

Mr and Mrs A did not accept Tesco Bank’s offer and, through a representative, referred the matter to this service. One of our investigators considered what had happened and recommended that the complaint be upheld and that Tesco Bank refund the payments in full. She took the view that the agreement to take over or arrange for the relinquishment of the timeshare and the agreement for the sale of the holiday credits were sufficiently closely linked that they were, in effect, a single agreement and that Mr A therefore had a claim against Tesco Bank in the same way he had a claim against the sellers.

Tesco Bank did not accept the investigator's assessment and asked that an ombudsman consider the case.

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.

First, the credit card account was in Mr A's name alone, so this complaint arises from his relationship as a customer of Tesco Bank. That means that only he can bring this complaint and I can only make an award in his favour. I shall therefore refer to him alone as the complainant. I do of course note that Mrs A was a party to the underlying arrangements, but she was not a customer of the bank.

Mr A's claim against Tesco Bank arises under section 75(1) of the Consumer Credit Act 1974. One effect of section 75 is that a customer who has a claim for breach of contract or misrepresentation against a supplier can, subject to certain conditions, bring that claim against a creditor. Those conditions include:

- that the credit financed the transaction giving rise to the claim; and
- that the credit was provided under pre-existing arrangements or in contemplation of future arrangements between the lender and the supplier.

"Credit" includes credit provided through spending on a credit card account. And a merchant which accepts credit card payments does so under pre-existing arrangements with the card issuer – through the card scheme, in this case MasterCard.

Tesco Bank's case here is that Mr A entered into two separate contracts with two different parties and that only one of those transactions was financed with his credit card; it has already refunded the payment made in respect of that transaction, so does not need to do any more.

I have therefore considered the contractual arrangements that Mr A made.

The contractual documents include:

- an invoice in the name of NXG Ltd, an Isle of Man company;
- a request for payment of £11,950 to NXG;
- an invoice in the name of Escapeway SL, a company registered in Spain;
- Appendix A, a Product Sales Code;
- Appendix B, Product Essentials and a Declaration;
- Terms and Conditions of the Holiday Credits;
- A letter of 26 November 2015 about the resale of Travel 07 credits; and
- A letter of the same date about termination of the timeshare.

The invoice in the name of NXG and the payment request indicate that Mr and Mrs A bought 100,000 Travel 07 Credits for £11,950 and that payment was to be made by transfer to that company's bank account in the Isle of Man – as in fact it was.

The invoice in the name of Escapeway indicates that a payment of £2,000 was made for the administrative cost of the relinquishment of the timeshare and enrolment in a timeshare exchange programme. That payment was made by credit card.

The Product Sales Code refers to “Travel 07 and its resellers” and sets out the standards required. It is not clear however which company produced that document. It refers to Appendix B.

Appendix B sets out briefly how Travel 07 credits can be used and includes a declaration signed by Mr and Mrs A. The only business mentioned is Travel 07 – without explanation of whose trading name that is.

The Terms and Conditions include the following definition:

“Our’ and ‘Us’ refers to the seller (vendor) whose trading style appears on your order and invoice...”

The first letter is from Escapeway SL and says:

“Please accept this letter as confirmation that you have the option after 3 years, to market and resell your Travel 07 credits.

“You can do this directly yourselves or we will assist you through our resale network.

“We will re-market them for 55% of the Travel 07 listed price, however as you own the credits, the value you wish to re-market at, is entirely your choice.”

The second letter is an instruction, signed by Mr and Mrs A, giving Leisure Travel permission to arrange for the termination of their timeshare with C. It begins:

“I/We understand that the process of ownership termination will start upon completion of the Purchase Contract.”

It is also signed on behalf of Leisure Travel, on the face of it by the same individual who signed the Escapeway invoice. It instructs Mr and Mrs A to send their membership certificate to Leisure Travel c/o Escapeway SL. It does not say expressly whether Leisure Travel is a trading name of Escapeway SL or some other company.

The invoices and the payments made do in my view seek to give the impression of two entirely separate contracts – one by which Escapeway agrees to arrange the relinquishment of the timeshare and a second by which NXG sells the Travel 07 credits. But in my view that does not give either a full or an accurate picture. And, whether by design or otherwise, the precise role of each company and the trading names they use are somewhat opaque.

Mr and Mrs A have explained that their primary motivation for entering into the arrangements as they did was to relinquish their timeshare. I accept that was the case. I think it unlikely therefore that they would have bought Travel 07 credits unless that had been part of the arrangement for relinquishment of the timeshare. Part of the deal for the Travel 07 credits was that they would be bought back or re-sold. The first letter I have cited above indicates that this was Escapeway’s responsibility.

I think it is clear from the contractual documents – when read as a whole rather than in isolation – that the two parts of the arrangement were inextricably linked. The instructions to arrange for the termination of the timeshare expressly say that the termination will only start on completion of the contract for the purchase of the Travel 07 credits. Put another way, it was a condition of Escapeway starting the termination that Mr and Mrs A buy the credits from NXG. I note as well that it was Escapeway, not NXG, which promised to market the Travel 07 credits. As I have explained, I think the resale option was a key part of Mr and Mrs A’s agreement to buy them in the first place.

For these reasons, I think the reality was that Escapeway SL agreed to arrange for the

termination of the timeshare with C. In return, Mr and Mrs A agreed to pay £2,000 and to buy 100,000 Travel 07 credits from NXG at a cost of £11,950. That was a single transaction. The timeshare was not terminated in line with the agreement, and it therefore seems likely that there was a breach of a contract which was funded in part by Mr A's credit card payment. I note in addition that neither Escapeway nor NXG is still trading, so it seems unlikely that they will be able to arrange for relinquishment of the timeshare or for the resale of the Travel 07 credits.

For the purposes of section 75 liability, it does not matter that the agreement was only funded in part by the credit card payment. It is, for example, sufficient that a deposit is paid by credit card.

I am therefore in agreement with the investigator's recommendations.

For completeness, section 75 can apply where a business which takes a credit card payment is an "associate" of the business with which the cardholder has contracted. Whether companies are associates of each other depends on who controls them. Given my findings about the nature of the contract here, I have not considered that issue any further in this case.

Putting things right

As I have indicated, the effect of section 75(1) here is that Mr A has a "like claim" against the bank as he has against Escapeway. The usual remedy for breach of contract is to put the innocent party in the position they would have been in if the contract had been performed. I do not believe that is possible here, but I am required to determine Mr A's complaint by reference to what I consider to be fair and reasonable in all the circumstances. In my view, the investigator's recommendation of a full refund and interest is fair in this case.

My final decision

For these reasons, my final decision is that, to resolve this complaint in full, Tesco Personal Finance PLC should pay Mr A £11,950, together with interest at 8% a year simple (being the current judgment rate) from 31 December 2015 until payment.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs A and Mr A to accept or reject my decision before 14 February 2023.

Mike Ingram

Ombudsman