

The complaint

Mrs B complains that Tesco Personal Finance PLC, trading as Tesco Bank, ("Tesco") has unfairly declined her claim under section 75 of the Consumer Credit Act 1974 ("CCA"). The transactions were made by Mr and Mrs B, but the credit card payment was from Mrs B's account and so she is the complainant. However, I will refer to Mr and Mrs B in this decision.

What happened

Mrs B, along with her husband, attended a sales presentation by a business I'll call "Business E", during which they were told about a way of getting out of their existing timeshare. They say they were told that they could pay Business E to arrange the termination of the timeshare, but at the same time they had to buy some 'credits' they could use with another business I'll call "Business N" that they could use to get discounted holidays. The total cost was £11,250. Mr and Mrs B paid Business E £2,250 using Mrs B's Tesco credit card and the rest was paid by bank transfer from Mr B's account to Business N.

Mr and Mrs B said Business E terminated their existing timeshare agreement, but they got nothing from the agreement with Business N and they didn't get the discounted holidays they thought they'd get through Business N. Mr and Mrs B say Business E either misrepresented what it offered or was in breach of contract for not doing what it should have done under the agreement. As Mr and Mrs B had paid Business E partly using a credit card, they asked Tesco to refund the full purchase price as they felt Tesco was jointly liable for any breach of contract or misrepresentation under s.75 CCA.

But Tesco turned down Mr and Mrs B's claim as it said it thought that there had been no breach of contract with Business E as it had terminated the contract. It said that Mr and Mrs B had signed two contracts and Tesco had not been connected to the payment to Business N. And it said that, as Mr and Mrs B paid Business N by bank transfer and not by using a credit card, it wasn't responsible under s.75 CCA for anything Business N might have done wrong. Unhappy with its response, Mr and Mrs B brought their complaint to this service.

One of our investigators looked into the complaint and thought it should have been upheld. They thought the two agreements were sufficiently linked, and as there was a misrepresentation that Mr and Mrs B would have easily been able to terminate their timeshare, they could claim back all of the monies paid for both agreements. Tesco didn't agree.

I issued two provisional decisions. The first read as follows:

"I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. In this complaint I think it's important to first set out what I find Mr and Mrs B agreed to, with which business and whether they have any cause of action against those businesses for a breach of contract or misrepresentation.

I'll then look at whether that is something Tesco needs to consider given the legal relationships between the parties. Finally, if I find Tesco has to consider any claim, I'll think about whether it has properly done so.

Mr and Mrs B's Agreements

I've looked at the available documents to see what it was that Mr and Mrs B agreed and with what business. I've seen a document dated 4 August 2015 on Business E headed paper. It reads:

"Details of purchase: [Business E] ·Admin cost for the relinquishment of: [timeshare]

Enroll [sic] in Dial & Exchange FOC

Payment £2,250 04 08 2015 "

I've seen an undated agreement on Business N headed paper stating that Mr and Mrs B were buying 25,000 'travel credits' for £9,000 and they were given details of a bank account they needed to make payment to. The account was in Business N's name and was situated in the Isle of Man..

There is a Business N headed document called 'Product Essentials' that gave an overview of how the 'travel credits' worked, including: "Will give discount up to 70% on most [Business N] Holidays, Tours, Car hire and package holidays" There is another letter on Business E headed paper that reads: "Please accept this letter as confirmation that you have the option after 3 years, to market and resell your [Business N] credits. You can do this directly yourselves or we will assist you through our resale network."

Thy were also give a "Product Sales Code" and I have seen a letter from Business E dated 4 August 2015 which states:

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

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

We will remarket them for 55% of the Business N listed price, however as you own the credits, the value you wish to re-market them is entirely at your choice"

Having looked at all of the documentation, there is a degree of confusion as to what each business was supplying given Business E confirmed details of how to market what apparently had been sold by Business N. I don't think it is totally clear what Mr and Mrs B bought or from which business. So I think it would be helpful to set out separately the things Mr and Mrs B thought they were getting, what I find the terms of the agreements were, and whether I think they may have been any breach of contract or misrepresentation.

Timeshare termination

I've carefully considered what Mr and Mrs B said about the agreements when they first made claims. In their first letter of claim, they said:

"We were told by Business E that they could release us from our legal contract with [Old timeshare company] but to do so we had to sign up with them to purchase credits to a beneficial holiday system which was 'Travel 07' and we would also be eligible for a scheme called 'Dial and Exchange'. We said that all we wanted was to be released from our timeshare but they said that in order to do this we must agree to the whole package/contract.

We were told that the cost of the package was £11,250.00 and that we would have to pay a 20% deposit of £2,250.00 immediately, leaving a balance of £9,000.00 to be paid within 14

days. We paid the 20% deposit to Business E with my Tesco credit card on the day (04/08/2015) and the balance of £9,000.00 was paid from my husband's HSBC bank account (16/08/2015) to Business N. We were told that they were one and the same company, with Business E being their trading name."

Having considered everything, I think Mr and Mrs B engaged Business E to arrange for the termination of their existing timeshare and Mrs B paid Business E directly for this using her credit card. However, I am satisfied that they were required to also pay £9,000 to Business N to ensure that Business E undertook the termination of the timeshare agreement. Either that was lie and therefore misrepresentation or was true which means that it was requirement of getting the termination they were seeking.

For there to be a misrepresentation there needs to be an untrue statement of fact or law made by one party to another, which induces the party receiving the statement to enter a contract thereby causing them loss. A statement of opinion can be a misrepresentation if the opinion amounts to a statement of fact and it can be proved that the person who made it didn't hold that opinion or couldn't reasonably have held it.

Travel credits

Mr and Mrs B bought 25,000 Business N travel credits and paid for those by transfer from their joint current account. The documentation that I've seen doesn't make clear which business or legal entity was to provide services under this agreement. Based on all of the evidence I've seen; I think Business E arranged the sale of these points and Business E held itself out as being able to help sell the points again in the future. But I can't see that Business E received any payment, so I don't think it was entering into any contract in its own name to provide the Business N travel credits or the benefits available to buy with those credits. Rather, I think it was likely acting as an agent for Business N to create an agreement between that business and Mr and Mrs B.

Mr and Mrs B say they didn't get what they'd been promised by taking out Business N travel credits. But I think it's clear that anything offered by Business N wasn't actually provided by Business E. In other words, I can't see that Business E could be held responsible for a breach of contract due to Business N's failures. And I don't think Mr and Mrs B's contract with Business E was breached by Business N failing to do what it should have done under the separate contract. It's possible Mr and Mrs B have a claim for breach of contract against Business N, but for the reasons I'll set out below, I don't think that is something Tesco has to answer.

It's been said that Business E told Mr and Mrs B things about the benefits of Business N travel credits when they decided to buy them. In particular it said that they would get cheaper holidays. Mr and Mrs B have provided screenshots to show that they could get the same holidays on the open market for less than they would pay if they used their travel credits.

I've considered whether any misrepresentations were made by Business E about Business N credits. Mr and Mrs B say they were told they could reduce future holiday expenses by 70%. So, I've considered that representation and whether I think there is something further that needs to be considered by Tesco.

I have no reason to doubt the honesty of Mr and Mrs B's memories of what they were told. But I don't think there's enough evidence available to me to say the representations were untrue. The description of how Business N credits worked says there was a discount of up to 70% on most of Business N's holidays, which implies this was only for holidays Business N offered. And although I accept that Mr and Mrs B might have been able to find better deals on the open market for some holidays, I'm not able to say that Business N didn't offer some

sort of discount from the “full price” against its own holidays or others it could arrange, albeit a smaller one. So, based on what I have seen I’m not able to conclude that Business E misrepresented the benefits of Business N credits. I

Is Tesco jointly responsible for any breach of contract or misrepresentation?

S.75 CCA states that in certain circumstances, when a debtor has a claim against a supplier in respect of a misrepresentation or breach of contract, they will have a like claim against the creditor. So here, Mrs B (the debtor) is asking Tesco (the creditor) to answer her claim (on her and her husband’s behalf) for misrepresentation and breach of contract over the problems I’ve set out above.

But this doesn’t apply to every claim Mrs B may have. Tesco is only responsible for claims when there is a debtor-creditor-supplier (“DCS”) agreement in place. This is set out more fully in s.11(b) and s.12(b) CCA, but in short, there have to be arrangements in place so that the supplier of goods or services is paid using the credit card. In Mr and Mrs B’s case, Mrs B paid Business E directly, so it is not in dispute that Tesco could be held jointly responsible for any claim of a breach of the contract with Business E or of a misrepresentation that led Mr and Mrs B into entering into an agreement with Business E.

However, I don’t think Tesco has to answer any claim for breach of contract by Business E. That is because anything supplied by Business N was outside of the arrangements between Mrs B, Business E and Tesco. Under the CCA, it’s possible Tesco would have to answer a claim if it could be shown Business E or N were ‘associates’ (s.184 and s.187 CCA). But nothing I’ve seen makes me think they were associates under the Act. It follows I don’t think Tesco needs to answer any claim for breach of contract by Business N as there isn’t a DCS agreement in place.

But Mr and Mrs B did enter into an agreement with Business E directly as set out above. And I don’t think it is in dispute that there was the right sort of DCS relationship, so Tesco could be jointly liable for any claim. So, I think Tesco are jointly liable for the breach of contract and misrepresentation claims made against Business E.

Has Tesco properly considered the claims?

Tesco has said it didn’t think there was a DCS agreement in place involving Business N. For the reasons set out above, I broadly agree with Tesco and think it acted fairly with respect to the Business N travel credits. But I do think it needed to assess Mr and Mrs B’s claims against Business E.

Mr and Mrs B have asked for a refund of what they paid. That is an outcome that normally follows a successful claim for misrepresentation and not for a breach of contract. For a breach of contract claim, damages are normally intended to put someone in the position they would have been in had the contract been properly performed without the breach. But I’m not sure that would mean Mr and Mrs B would get back what they paid Business E had it failed to perform the agreed services. In a misrepresentation claim, such as the one Mr and Mrs B have also made, the remedy would be rescission of the contract and damages to put

them in the position they would have been in had the misrepresentation not been made.

Tesco has accepted that had Business E failed to deliver it would be liable to refund what was paid to Business E with interest. But having considered everything, I don’t think this is a fair outcome to this complaint.

I believe they were told that they needed to take out the travel credits with Business N too,

and I don't think they would have done that had they not also contracted with Business E. Mr and Mrs B have been consistent throughout that they believed both things they bought were part and parcel of the same deal and I find their recollections honest and believable. I think Mr and Mrs B's decision to enter into any agreement was based on their wish to get out of their existing timeshare and they wouldn't have bought the travel credits if they were available on their own. I consider the payment to Business N was essential to and connected with the payment to Business E and so the two are inextricably linked. Mr and Mrs B have said they didn't use any of the credits, so I can't see that they got any benefit from the Business N agreement.

Putting things right

If I uphold this complaint at final decision, I propose to direct Tesco to Pay Mrs B:

- a sum equivalent to what she paid Business E using her Tesco credit card, plus any fees, charges and interest under the credit agreement as a result;*
- a sum equivalent to what was paid from Mr B's bank account for the Business N contract;*
- add to those sums interest at the rate of 8% per annum, simple, from the date the payments were made to the date Tesco settles this complaint.*

By law Tesco needs to take tax from this amount, so it should provide Mrs B a certificate setting out how much tax has been paid should she ask for one."

Mrs B said she had nothing further to add. Tesco said that aside from Mr and Mrs B's testimony there was no corroborating evidence to support the claim that they were required to take out both contracts. It also said that the timeshare relinquishment had been obtained I appreciate the points made by Tesco and these have caused me to change my view on one matter.

I said:

"I agree that the relinquishment was delivered by Business E and to that extent I do not consider it necessary for Tesco to refund the sum paid to it. Mrs B has said that they could have arranged the release from the timeshare on their own due Mr B's medical condition.

That may be the case, but they chose to enter into an agreement with Business E and it did what it offered to do. I cannot say that there was a breach of contract in respect of that element of the arrangement.

However, I remain of the view that the payment to Business N should be refunded. I am satisfied that they were told that they had to sign up to the contract with Business N in order for Business E to effect the relinquishment process. I believe, from the testimony provided by Mr and Mrs B that this step was not necessary and there was misrepresentation. The reality was that the payment to Business E was sufficient to deliver the relinquishment and the

additional agreement with Business N was sold to them by Business E on a false premise. That means there was misrepresentation.

I consider the two agreements were inextricably linked, but one was not required to obtain the relinquishment Mr and Mrs B were seeking. For that element I consider there was misrepresentation and so I consider the sum paid to Business N should be refunded plus interest and there was no reason why the payment to Business E should be refunded."

Mrs B responded to say she had no further points to make and Tesco said that I proposing to award Mrs B a refund of both contracts which it thought would be unfair as Mrs B would make a gain.

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.

It would appear that Tesco has misread or misunderstood my second provisional decision. I said that it should only refund the payment made to Business N. I did not suggest that a refund be made for the payment made to Business E. It follows that I consider my revised proposed settlement should stand.

Putting things right

Tesco should refund the sum paid to Business N.

My final decision

My final decision is that I uphold this complaint and I direct Tesco Personal Finance PLC trading as Tesco Bank to pay Mrs B:

- a sum equivalent to what was paid from Mr B's bank account for the Business N contract;
- add to that sum interest at the rate of 8% per annum, simple, from the date the payment was made to the date Tesco settles this complaint.

By law Tesco needs to take tax from this amount, so it should provide Mrs B a certificate setting out how much tax has been paid should she ask for one."

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms B to accept or reject my decision before 11 April 2023.

Ivor Graham
Ombudsman