DRN-4048710

The complaint

Mrs B complains that Tesco Personal Finance PLC trading as Tesco Bank didn't fairly or reasonably deal with her claim under Section 75 of the Consumer Credit Act 1974 (CCA) in relation to a holiday product she purchased, with Mr B, in 2013.

The claim, which is the subject of this complaint, is Mrs B's, because it relates to a credit card in her sole name. But as the holiday product was in Mr and Mrs B's name, I'll refer to Mr and Mrs B throughout much of this decision.

What happened

Mr and Mrs B purchased membership of a holiday club from a third party (the 'Supplier') in June 2013. The total purchase price, including fees was around $31,000 (equivalent to around £20,000 based on average exchange rates for the time). They part funded the purchase with Mrs B's Tesco Bank credit card.

Mr and Mrs B say that when they were on holiday the membership was marketed to them and they were told they had a four-day cooling off period. They agreed to the acquisition of the membership and paid the deposit (making two payments on Mrs B's Tesco Bank credit card and a payment on Mr B's credit card provided by another bank). They were transferred from their apartment to a villa and provided with additional services. After two days they decided they no longer wanted to continue with the purchase of the membership and contacted the Supplier. They say they were told that if they wanted to exit the agreement, they would need to pay £15,000 for the use of the villa and services. They say they felt they had no choice but to continue making payments towards the membership. They say they returned home and have never made use of their membership. Mrs B wants a full refund.

Tesco Bank considered Mrs B's claim under Section 75 of the Consumer Credit Act 1974 (CCA). It noted that for a valid claim under Section 75, there needed to be a valid debtor-creditor-supplier (DCS) agreement. It said that the parties Mrs B paid using her Tesco Bank credit card were different to the holiday club membership provider and so there was no valid DCS agreement. Because of this it didn't progress Mrs B's claim.

Mrs B didn't agree with Tesco Bank and said evidence had been provided to show a valid DCS agreement was in place.

Following this, Tesco Bank issued its final response saying that Mrs B had said they were provided with a four-day cooling off period but evidence of this hadn't been provided. And that although Mr and Mrs B hadn't used the holiday club membership, as this was available to them it couldn't say this constituted a breach of contract. As it didn't find evidence of misrepresentation or breach of contract it didn't uphold Mrs B's claim.

Mr and Mrs B didn't agree with Tesco Bank's outcome and raised a complaint that was referred – through a third-party representative – to the Financial Ombudsman Service.

Our investigator issued a view in February 2022. He noted that Mrs B's credit card payments were to two different companies. He was unable to establish the exact nature of the

relationship between the two entities Mrs B's payments were made to and the Supplier and didn't think he had seen enough to say that the necessary DCS agreement was in place for Mrs B to be able to bring the claim. However, he said that even if he was to assume the required DCS agreement existed between the relevant parties, he still wasn't minded to uphold the complaint, as he didn't think Tesco Bank's overall decision to decline the claim was unfair.

Mr and Mrs B didn't agree with our investigator's view. They reiterated that the DCS agreement was in place.

My provisional conclusions

I issued a provisional decision on this complaint. My findings are set out below:

Was the right arrangement in place?

Under Section 75 of the CCA, a "debtor-creditor-supplier agreement" is a precondition to a claim under that provision. And given the facts of this complaint, that's also the case when claiming under Section 140A of the CCA.

Tesco Bank said there wasn't the required DCS agreement as the payments Mrs B made using her credit card weren't to the Supplier. Mrs B made two initial payments using her credit card: one on 16 June 2013 and one on 17 June 2013. She then made a number of subsequent monthly payments. The payment on 16 June 2013 was to one entity (entity 1) and the payment on the 17 June 2013 and the subsequent monthly payments were to another entity (entity 2). Neither entity 1 nor entity 2 have the same name as the Supplier.

Having looked at the membership agreement with the Supplier there's a box at the bottom that says payment should be made in favour of an entity which appears to be entity 2. This suggests that the initial payment and subsequent monthly payments were being made to an agency rather than directly to the Supplier. However, Mr and Mrs B have sent us a 'conditional membership certificate' that, confusingly, refers to both the Supplier and entity 2, and indicates that they jointly admit Mr and Mrs B to membership of the holiday club. The certificate is 'signed' (with equal prominence) by both companies. The reason for payment to entity 1 is even less clear – and it's not clear what its relationship is with the Supplier or entity 2. Given the lack of clarity, it's possible that the required DCS agreement wasn't in place.

However, given the overall outcome I've reached below, I don't think it's necessary to make a formal finding on the DCS agreement for the purpose of this decision because I don't think the complaint should succeed.

Section 75: Misrepresentation or breach of contract

For a claim to be upheld under Section 75 of the CCA, there needs to have been a breach of contract or misrepresentation. Mr and Mrs B said that they were told they had a four-day cooling off period but when they contacted the Supplier after two days, they were threatened with a bill for £15,000. I can see how upsetting this must have been. However, based on the information available I haven't seen details of the four-day cooling off period. I also note that Mr and Mrs B said that they were told if they exited the agreement, they would need to pay for the villa they had been upgraded to. I cannot say that this charge was linked to the purchase agreement or that based on this comment they were told they couldn't exit the membership agreement. So, while I can understand how upsetting this must have been, I do not find I have evidence to say the cooling off period was misrepresented or the approach

taken by the Supplier when Mr and Mrs B asked to exit the agreement constituted a breach of contract.

Mr and Mrs B have said they haven't made use of their membership. Unfortunately, while I appreciate this means they have spent money on something they haven't used, as I have nothing to suggest the membership wasn't available for their use (and it was a choice of Mr and Mrs B not to make use of this), I cannot say the contract has been breached.

Section 140A: Unfair Relationship

While I note the comments that have been made about the pressure Mr and Mrs B felt under in regard to their holiday product purchase, I can't see that Mrs B ever asked Tesco Bank to consider a complaint under Section 140A of the CCA or that Tesco Bank has had a chance to investigate this. So, if Mr and Mrs B wish to complain that there was an unfair relationship under Section 140A, they will need to contact Tesco Bank separately.

Conclusion

While I can understand why Mr and Mrs B may be unhappy with the membership product they purchased, the evidence available does not appear to support their claim for a refund under the CCA.

Mr and Mrs B's representative responded to my provisional decision on their behalf. It said:

Misrepresentation under Section 75 of the Consumer Credit Act 1974

Mrs B entered into a contract with the Supplier after an extremely arduous and frightening sales pitch. Mr and Mrs B signed an agreement in order to be able to leave and they did this on the basis that they had four days in which to cancel. However, they were then told that they could not cancel the agreement and that they would not be allowed back their passports unless they honoured the contract.

The representative said there was clear evidence of breaches of contract and systemic misrepresentations made by the Supplier and in accordance with Section 75 of the CCA, Tesco Bank was liable for the full amount paid being £3,942.23.

Cooling Off Period

Mrs B was not given the requisite time for 'cooling off', being 14 days in the UK and 10 days under the Timeshare Act 2010. They tried to cancel within two days but were not allowed to do so.

Deposits taken before the Cooling Off period has expired (Timeshare Act 2010)

The regulations make provision about when consideration may be accepted in relation to regulated contracts and state that no person may accept any consideration from the consumer before the end of the withdrawal period in relation to the contract.

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.

When doing that, I'm required to take into account the relevant law and regulations; regulator's rules, guidance and standards; and codes of practice and what I consider to have

been good industry practice at the time.

When evidence is incomplete, inconclusive or contradictory, I've made my decision on the balance of probabilities – that is, what I think is more likely than not to have happened given the available evidence and wider circumstances.

This complaint was raised six years after Mr and Mrs B purchased their holiday club membership. Based on the dates of the information available it appears not to fall outside of the timescales for the Limitation Act 1980. Therefore, I have considered whether Tesco Bank acted fairly and reasonably by declining Mrs B's claim under the CCA.

As I set out in my provisional decision, and was further noted in the representative's response to that decision, Mrs B made two initial payments using her credit card and then a number of subsequent monthly payments. I haven't seen any further evidence in regard to the DCS agreement and as I noted previously there is a lack of clarity regarding the relationships between the parties and, it's possible that the required DCS agreement wasn't in place.

However, as I mentioned in my provisional decision and I reiterate here, given the overall outcome I've reached below, I don't think it's necessary to make a formal finding on the DCS agreement for the purpose of this decision because I don't think the complaint should succeed.

Misrepresentation under Section 75 of the Consumer Credit Act 1974

In response to my provisional decision, Mrs B's representative reiterated the experience Mr and Mrs B had previously noted in regard to the sales process. The representative said that Mr and Mrs B were told they had to honour the contract or they wouldn't get their passports back. While I note this comment, in the initial information provided by Mrs B, she explained that they were upgraded from their apartment to a villa and given other additional services but when they said they wanted to withdraw from the holiday club membership they were told they would need to pay £15,000 for the use of the villa and services. As I have previously stated, I can understand how upsetting this must have been and I note the comments about the threats made regarding the payment. However, for me to say that a misrepresentation occurred I would need to show they were told something that induced them into the agreement that wasn't true. In this case the issue appears to be that Mr and Mrs B benefited from additional services when they agreed to the membership and then were told these would need to be paid for when they asked about withdrawing. Based on what I have seen, I do not find I have enough to say that this shows the agreement was misrepresented to them.

Mrs B says they agreed to sign the membership agreement because they were told they had four days to withdraw without any costs. I haven't seen all the terms and conditions of the agreement Mr and Mrs B entered into so I cannot say it the terms included a withdrawal period. However, as noted previously, it appears the issue arose in regard to the costs for the additional services being charged when the discussion about withdrawal occurred rather than the withdrawal not being accepted. Therefore, based on what I have seen I do not find I have enough to say that the agreement was misrepresented to Mr and Mrs B.

Cooling off period and payments made

Mrs B's representative has said that Mr and Mrs B weren't given the required cooling off period and were required to make payments straight away. As I have previously noted this decision relates to Mrs B's claim under Section 75 of the CCA. So, while I note the

comments made, as these do not change my position in regard to the claim under Section 75 of the CCA I have not considered these points further.

As I set out in my provisional decision, as issues relating to an unfair relationship giving rise to claims under Section 140A hadn't been raised with Tesco Bank I haven't considered these further. If Mr and Mrs B wish to complain that there was an unfair relationship under Section 140A, they will need to contact Tesco Bank separately.

In conclusion, while I note the points raised in response to my provisional decision, these do not change my conclusion and my decision remains that I do not find Tesco Bank was wrong not to uphold this claim.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 23 May 2023.

Jane Archer
Ombudsman