

The complaint

Mrs M has complained that Tesco Personal Finance PLC, trading as Tesco Bank, has unfairly dealt with a claim she made about something she bought with her Tesco credit card.

What happened

Mrs M bought a number of things from a holiday services supplier ("the Supplier") on 6 June 2016. She bought 522,311 'credits', which could be exchanged for holidays and other lifestyle products, and 532 'rewards vouchers', which offered discounts on a range of products and services. The vouchers had to be used within five years, but there was no time limit on when the credits could be used. The total cost of this was £10,080 and Mrs M paid £1,800 using her Tesco credit card and the balance was paid by bank transfer.

On 28 December 2022, Mrs M made a claim to Tesco under s.75 of the Consumer Credit Act 1974 ("CCA"). She said that Tesco was jointly liable for any misrepresentation or breach of contract that the Supplier was liable for, as she had paid using her credit card. Mrs M said there had been a misrepresentation as she was now aware that statements made at the time of sale were false as the Supplier didn't actually offer the rewards it said it would under the agreement. Mrs M argued that there was a breach of contract as the Supplier had ceased trading and its website was closed down, so it wasn't able to provide what it needed to under the agreement.

Tesco responded on 11 January 2023 to say that as Mrs M had claimed more than six years after she entered into her agreement with the Supplier, she had made her claim too late under the Limitation Act 1980 ("LA"). Mrs M responded the following day to raise a complaint about the way Tesco had dealt with her claim. She said she had six years from the date the Supplier went into liquidation to make her claim, which was in April/May 2019. Tesco said it stood by the earlier answer and so Mrs M referred her complaint to our service.

One of our investigators considered the complaint and thought Tesco didn't fairly deal with Mrs M's complaint. He agreed that it was likely Mrs M made her misrepresentation claim too late, but he thought the evidence suggested Tesco were jointly liable for a breach of contract claim. He concluded that it appeared the Supplier ceased trading in 2019 and Mrs M had claimed within six years of then, so Tesco should have considered it. Initially our investigator thought compensation should reflect the fact that the vouchers were only set up to run for five years so only a proportion of what was paid should be awarded, but then he changed his view to say everything needed to be refunded as the credits did not have an end date.

Tesco disagreed with our investigator. It said that Mrs M's own claim was that the breach of contract ran from the date of sale, so she had the opportunity to raise her claim at that stage or within the following six years. Further, it argued that Mrs M bought credits to redeem for discounts and, as her claim was that this was never going to be offered in practice, that meant the contract was breached at the date of sale. Tesco agreed that Mrs M was likely the victim of a breach of contract and misrepresentation, but it said it couldn't be liable due to the operation of the LA.

As Tesco didn't agree with our investigator, the complaint has been passed to me for a

decision.

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.

In this complaint, there appear to be a number of things not in dispute. So it is agreed that Mrs M is able to make a claim to Tesco under s.75 CCA and Tesco needs to fairly assess that claim to decide whether it has a joint liability with the Supplier and, if so, for how much. Further, I think it's agreed that the Supplier misrepresented matters to Mrs M and that it breached its contract with her. So the only issues that appear to be in dispute are when Mrs M could have made those claims and whether Tesco needed to answer them, given the operation of the LA.

The LA sets out periods of time within which claims need to be properly made and, if a claim isn't brought soon enough, that might mean a defence is available. Here Mrs M had six years from the date she could first make a claim for misrepresentation (s.2 LA) or six years from when she could first make a claim for a breach of contract (s.5 LA) to make those respective claims against the Supplier. And, as she had a like claim against Tesco, the limitation periods would be the same as the underlying ones against the Supplier.

For Mrs M's misrepresentation claim, she could have first made it at the time she entered into the agreement with the Supplier based on the alleged misrepresentations. That was because it was at that time she entered into an agreement, she says, based on the Supplier's misrepresentations and she suffered a loss by paying over money. So Mrs M had six years from 6 June 2016 to make a claim to Tesco, but she didn't do that until December 2022. As that was more than six years, I think Tesco acted fairly in turning down her misrepresentation claim.

For Mrs M's breach of contract claim, the time she could have first made a claim was when the Supplier failed to perform something it had to do under the agreement which caused Mrs M a loss. Tesco says that was on the date of the agreement, but Mrs M says it was later when the Supplier went out of business and closed its website.

The starting point is to think about what Mrs M said her claim was about. She said:

"Also, after November 2017 we became aware that [the Supplier] are under criminal investigation, it came to our attention that in November 2017 all the Monster Group offices here in the UK and in Spain had multiple arrests made of the directors and sales staff, we were advised that we had six (6) years to claim our money back due to the breach of contract and misrepresentations made at the point of sale in June 2016.

*...
[the Supplier] went into liquidation in 2019 I have 6 years from this date to put my dispute forward for Section 75 of the Consumer Credit Act 1974."*

Tesco state that Mrs M accepts that the breach of contract claim arises from the date of sale, but based on her own words I can't say that was the case. It appears to me that the words 'made at the point of sale' in the first paragraph just as likely relate to the misrepresentations, rather than the breach of contract. Further, the words in the second paragraph appear to show that Mrs M thinks she had six years from the date of liquidation to make a claim. But ultimately it's not a question of when Mrs M thinks she had a claim, rather Tesco needed to consider when the evidence objectively suggested she had everything she needed to make a claim.

Tesco has said that Mrs M's claim is that the breach of contract occurred at the date it was entered into, so Mrs M only had six years from then to bring a claim. That is on the basis that the Supplier would not have honoured the credits and vouchers from the outset. But saying that it was possible (or even probable) that the Supplier would not have offered anything in exchange for the credits and/or vouchers had Mrs M tried to use them, isn't the same as saying that in June 2016 the Supplier didn't provide her what she was entitled to and that she lost out as a result.

I think Mrs M's claim is different. She bought a number of credits and vouchers that she now says she is not able to use since the Supplier went into liquidation. The contract says that the credits and vouchers were to be redeemed through the Supplier's websites. So it seems to me that once those websites were no longer available the Supplier wasn't able to offer any services.

I'm not sure when the Supplier's website was taken down¹, but I've seen the Supplier's details held with the relevant Spanish authorities. It shows that the Supplier was set up in 2015 and the company placed in liquidation and dissolved in July 2019. So I think it is likely that after July 2019, Mrs M was no longer able to use any of the services the Supplier offered.

For Mrs M to have made her claim in time, the contract needed to have been breached no earlier than six years before she claimed, i.e. on 28 December 2016. But the evidence suggests that the Supplier was still operating between June 2016 and then, so I can't say Mrs M's agreement was breached in the sense that the Supplier withdrew its services in that period. It follows, I think Mrs M did raise her claim to Tesco within six years of when the Supplier stopped offering anything to its customers and when she was unable to use the credit and vouchers she had bought.

It follows, I think Tesco should have considered Mrs M's claim differently and, had it done so, would have accepted it was jointly liable for the breach of contract.

Putting things right

Under a claim for breach of contract, damages are normally meant to cover the losses that were caused by that breach. Here, Mrs M was not able to use the credits and vouchers she had paid for previously. I don't think it's possible to put a figure on the potential savings she could have made had the Supplier fulfilled its side of the agreement. But I do think she lost what she had paid for the vouchers and credits as, once the Supplier went into liquidation, they became effectively worthless and Mrs M has said that she didn't use any of the vouchers or credits before then. So I think the fair outcome to this complaint is for Tesco to pay Mrs M what she paid the Supplier for its services, plus interest.

I direct Tesco to pay Mrs M:

1. £1,899, being the payments made to the Supplier on 6 June 2016 using the Tesco credit card.
2. £8,280 paid to the Supplier by bank transfer on 30 June 2016.

Tesco also needs to add interest to these amounts. The rate of interest is 8% per year simple and it needs to run from the date of breach to the date of payment. Here I think it is fair for Tesco to take the date of breach as 1 July 2019 as it was around then that the Supplier was put into liquidation.

¹ The internet archive appears to show the website was available until January 2020.

My final decision

I uphold Mrs M's complaint against Tesco Personal Finance PLC and direct it pay compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 23 February 2024.

Mark Hutchings
Ombudsman