

## **The complaint**

Mr P complains about the way Tesco Personal Finance PLC trading as Tesco Bank responded to his claim.

## **What happened**

The background details of this complaint are familiar to the parties so I will only cover these briefly here.

In summary, Mr P paid for a two night hotel stay with food and entertainment and is primarily not happy with the entertainment, in particular he says he did not get a good view of the evening show despite being moved at his request and got '*a good view of people's heads*'. He says it is the third time this has happened attending this hotel chain. He believes the supplier wilfully and knowingly put him and his wife on a table where they would not be able to see the show.

Mr P has also said in his submissions that:

- he was dissatisfied with the quality of the entertainment and overall says it was '*below par*'. For example the singer was '*dreary*' and '*depressing*', the comedian was not funny and the cinema was showing a superhero film that was better suited to kids than an adult audience; and
- he was unhappy certain food and drinks options were not available, in particular a certain brand of beer and diabetic ice cream.

Mr P says the supplier has breached its contract with him and he wants a full refund for the stay of £304.20. He made a claim to Tesco Bank for this refund.

Tesco Bank considered the claim but did not pay Mr P the refund. In summary, it decided not to proceed with a chargeback, and concluded there wasn't evidence of a breach of contract or misrepresentation under Section 75 of the Consumer Credit Act 1974 ('Section 75').

Mr P raised a complaint with Tesco Bank which was referred to this service. Our investigator did not uphold it.

The matter was referred to me for a final decision. I emailed Mr P to clarify some matters, set out my initial thoughts and invite Mr P to comment further. I am now in a position to make a final decision on the matter.

## **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.

Mr P has made several lengthy submissions on this case as to why he considers Tesco Bank has not acted fairly. I have considered these alongside the submissions of Tesco

Bank. However, I won't be commenting on everything said – only what I consider key. This reflects my role resolving disputes informally.

I'm sorry to hear Mr P is unhappy with aspects of his stay at the hotel. However, in deciding what is fair and reasonable I am looking at the actions of Tesco Bank in its response to his claim. In doing so I consider the card protections of chargeback and Section 75 to be relevant here, so it is those I will focus on in deciding if Tesco Bank has acted fairly.

## Section 75

Section 75 in certain circumstances makes Tesco Bank responsible for a '*like claim*' for breach of contract or misrepresentation in respect of goods or services Mr P has paid for using his credit card.

There are certain criteria that need satisfying before Section 75 applies to a transaction, relating to matters like the cash price of the goods/services and the parties to the contractual agreement. I am satisfied these criteria are met, so in order to decide what is fair I have moved on to consider whether there was persuasive evidence of a breach of contract or misrepresentation available to Tesco Bank at the time it considered the claim.

I have taken into account relevant law in my findings. In considering breach of contract I have noted the specific terms and conditions of the contract Mr P made with the supplier but also any terms implied by relevant law. For example, the Consumer Rights Act 2015 ('CRA') implies a term into consumer contracts for services that they will be performed with reasonable '*care and skill*'. I also think there is an argument that the Package Travel Regulations 2018 ('PTRs') are likely to apply to the contract here due to the combination of travel services supplied. So I have considered if these make a difference too.

It is worth noting that Mr P has raised some case law and legislation which I don't consider directly applicable to his claim against Tesco Bank. For example he has mentioned certain legislation in respect of fraud which creates criminal offences under statute that are not directly relevant to the claim for breach of contract or misrepresentation via Section 75 (or a chargeback claim). Furthermore, he has mentioned certain case law regarding a supplier relying on an exclusion clause in a contract to avoid liability. However, after consideration I don't think this case law is directly analogous to the situation here.

In considering whether there has been a breach of contract I have looked to see if there are any specific terms in the agreement Mr P made with the supplier which would be relevant here. However, I note:

- there are no terms stating exactly where Mr P and his wife would be sitting for the entertainment – or details in the contract of special requests that had been agreed in advance in respect of seating arrangements;
- there are no terms stating particular brands of beer would be available or that diabetic ice cream would be available or any details of specifically agreed special requests to accommodate this;
- there is nothing in the contract stating a refund will be available if the customer is unhappy with the quality of the entertainment or view.

Therefore, based on the lack of contractual promises in respect of Mr P's claim I do not think there is evidence of a breach of an express term of the contract here.

I have moved on to consider whether there is persuasive evidence of a breach of an implied

term of the contract such as a failure of the supplier to act with reasonable care and skill (as implied by the CRA).

I know the focus of Mr P's claim against Tesco Bank is not about the food options or quality of the acts. But for completeness, I don't think that Mr P's dissatisfaction with these would constitute a breach of the requirement to exercise reasonable care and skill. The considerations around entertainment are largely subjective (including whether a superhero film appeals to adults) and there is no persuasive evidence the standard of entertainment here was of such a level as to constitute a breach of contract. Furthermore, the food and drink choices in question were not pre-agreed. And Mr P appears not to have presented persuasive evidence to Tesco Bank that the food and drink on offer overall was not sufficient in the circumstances.

Therefore, I have moved on to the central issue regarding the view of the evening entertainment. In doing so I note Mr P says at one point he asked to move seats and this request was granted – so on the face of it the supplier did appear to try to make an effort to accommodate him. I don't have any compelling evidence to support Mr P's allegation that the supplier wilfully placed him somewhere he wouldn't be able to see either. However, I note Mr P wasn't happy with the view in the position he was moved to – in particular he has focused on the need to move his head due to other guests heads being in the way. He has also sent some photos to support his case.

I have carefully considered the evidence Mr P has provided but it does not persuade me there has been a breach of the requirement to act with reasonable care and skill by the venue. While the photos show heads in the crowd, this would be reasonably expected in this situation. I don't conclude the view in the photos can reasonably be described as restricted as Mr P has claimed. A view is normally considered restricted at a concert or sporting event where a significant part of the stage is blocked by a structural element of the venue. There appears to be a reasonable view of the performers from what I can see. And while Mr P has explained he had much better views in other venues and that you had to pay an extra fee for better 'VIP' seating this does not mean the view he received would constitute a breach of contract. I think it is reasonably expected that some seats will differ to others at any venue, while the existence of 'VIP' seats is common and does not automatically mean that other seats are not fit for purpose.

I note Mr P has mentioned his enjoyment of the show was impacted as people in front of him moved around – and that he had to move his head to see. He also says some performances were carried out during dinner and that he doesn't think you can eat and look at the stage. However, I am not persuaded these comments reasonably show the supplier likely acted without reasonable care and skill in presenting the evening entertainment here.

For completeness, I have considered (if this purchase were considered a 'package') if any implied terms via the PTRs have likely been breached. However, because of the lack of persuasive evidence to show the booking was not performed in conformity with the contract I do not think Tesco Bank acted unfairly in not concluding that a term implied by the PTRs had been breached here.

In summary, based on the information reasonably available to it at the time I am not persuaded that Tesco Bank should have fairly concluded there was a breach of contract by the supplier. Either via an express term of the contract or an implied term via relevant law.

I have considered what Mr P has said in respect of allegations of misrepresentation – in that he wasn't told in advance by the supplier that the seating for the evening show would be cabaret style (rather than theatre style) and that more generally it falsely represented that he would see a show when in fact he didn't.

In considering this I have already explained how I don't think the view Mr P got can be reasonably described as restricted. So I am not persuaded there has been a misrepresentation in this regard. Furthermore, because of my earlier conclusions in respect of the view I am not persuaded Mr P didn't see the show. It follows that I don't accept the supplier has falsely represented to Mr P that he would see a show that he ended up not seeing.

I note the contract does not say the evening entertainment is presented in cabaret style or theatre style. And accept this might not have been specifically pointed out before the booking. However, I have noted the venue's website does clearly indicate that the entertainment is presented in the dining area rather than a theatre. And while Mr P has said he didn't book via the website I think this serves as a reasonable indicator that this information would have been freely available to Mr P during pre-booking enquires over the phone or in writing. I believe Mr P could have reasonably found out the style of seating via such enquires if as he has indicated it was something important to him (I note he has described having problems with the view at previous stays with the chain too which would underline the reasonableness of checking the arrangements in advance). I am also not persuaded a cabaret setting would be so onerous or unexpected in these circumstances as to have expected the supplier to specifically draw attention to it before the booking either.

In conclusion I don't think there is persuasive evidence there has been a misrepresentation (by omission or otherwise) in respect of the view/seating arrangements.

Based on what I have seen I am not persuaded Tesco Bank should have reasonably concluded the supplier had committed a breach of contract or misrepresentation here. Therefore, I don't consider it has made a mistake in not upholding the Section 75 claim.

### Chargeback

Raising a chargeback dispute is another way Tesco Bank could have assisted Mr P. The chargeback scheme is not guaranteed to recover a refund and is based on the specific rules as laid down by the card scheme (which appears to be Mastercard here).

I note Tesco Bank says it considered but decided not to pursue a chargeback. I don't think this was unfair in the circumstances. The evidence indicates the supplier is likely to have defended the chargeback. In addition, due to the nature of the dispute about the view I think it is difficult to say there was a chargeback reason that would have had a reasonable prospect of success. The most relevant might be 'service not as described' however, as I have already touched on in my findings on Section 75 there is no persuasive evidence showing the service was not as described.

I know Mr P feels very strongly about the dispute and has recently raised new arguments and evidence including content from a discontinued court case he had against the supplier. I don't think this makes a difference to my findings in any event, however, I have to consider the information reasonably available to Tesco Bank at the time the claim was made to it. With this in mind I don't think Tesco Bank acted unfairly in the way it handled the claim.

I know Mr P is likely to be disappointed, however, he does not have to accept my decision, and is free to explore whether he is able to pursue his claim against the supplier by other means.

### My final decision

I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 20 February 2024.

Mark Lancod  
**Ombudsman**