

## The complaint

Mr B complains that Tesco Personal Finance Limited trading as Tesco Bank ('Tesco') didn't fairly respond to his claim under Section 75 of the Consumer Credit Act 1974 - as amended (the 'CCA') relating to a payment he made when making a purchase using his credit card.

## What happened

In or around February 2016 (the 'Time of Sale'), while on a promotional holiday in Tenerife, Mr M attended a meeting with a business involved in the holiday sector (the 'Supplier'). During that meeting Mr B (together with his wife) agreed to purchase what he believed to be a 20% interest in a holiday property (the 'Purchase Agreement'). The purchase price agreed was €27,742. This was funded, in part, by using a credit card with Tesco (the 'Credit Agreement') in Mr B's sole name.

On 26 August 2021, Mr B – using a professional representative (the 'PR') – wrote to Tesco (the 'Letter of Complaint') to complain that the Purchase Agreement had been misrepresented to him by the Supplier. And further, that the Supplier had breached the Purchase Agreement. I don't propose to repeat all the various allegations included as the parties are familiar with them. However, Mr B thought Tesco was jointly responsible for the alleged misrepresentations and breach of contract under Section 75 of the CCA ('S75').

Having considered Mr B's complaint, Tesco rejected it on the basis it thought the Purchase Contract constituted an investment which was not covered under S75. The PR didn't agree with Tesco's findings and, despite further exchanges, could not reach a satisfactory outcome, so referred Mr B's complaint to the Financial Ombudsman Service.

One of this service's investigators considered all the evidence and arguments provided. Having done so, the investigator didn't think Mr B's complaint should be upheld. The PR didn't agree with the investigator's findings. In response, it made various arguments which included:

- This service should consider Mr B's testimony within the context of the circumstances and evidence available and the overall probabilities stemming from that;
- The contemporaneous documents are strong enough to support a breach of contract claim;
- The investigator's view fails to give sufficient consideration to what is widely known and accepted about the (holiday product) industry suggesting that *"...these types of scams were typical of the industry."*
- This service should be aware of, and therefore consider, previous complaints and decisions which involve this Supplier.
- This service should adopt a more inquisitorial approach and reiterated various details and allegations within the complaint in an attempt to provide greater clarity and understanding.
- Suggested the Purchase Agreement constituted an Unregulated Collective Investment Scheme ('UCIS') together with the associated regulatory inferences.
- Replacement of the Supplier following its insolvency in 2020 does not reasonably

negate the allegation that the Purchase Agreement was breached.

As an informal resolution could not be reached, Mr B's complaint was passed to me to consider.

### **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.

#### Relevant Considerations

When considering what's fair and reasonable, DISP<sup>1</sup> 3.6.4R of the FCA Handbook means I'm required to take into account; relevant law and regulations, relevant regulatory rules, guidance and standards and codes of practice; and, where appropriate, what I consider was good industry practice at the relevant time.

Whilst the Purchase Agreement was entered into by Mr B together with his wife, the payment was made using a Tesco credit card in Mr B's sole name. Because of that, only he is an eligible claimant and, as a consequence, the only eligible complainant. So, I will only refer to Mr B throughout my decision.

The CCA introduced certain protections that afforded consumers (like Mr B) a right of recourse against lenders that provide the finance for the acquisition of goods or services (like the purchase here) from suppliers.

The concerns Mr B has about the Purchase Agreement he entered into only constitute a complaint that the Financial Ombudsman Service has the authority to consider if those concerns are considered with at least one of those provisions of the CCA in mind.

S75 provides protection to consumers for goods or services bought using credit. Mr B paid an amount towards the Purchase Agreement under an existing credit card agreement with Tesco. So, it isn't in dispute that S75 applies here – subject to any restrictions and limitations. So, where the requirements of the CCA are met, it means Mr B is afforded the protection offered to borrowers like him under those provisions. As a result, I've taken this section into account - together with any related provisions within the CCA - when deciding what's fair in the circumstances of this case.

Where evidence is incomplete, inconclusive, incongruent or contradictory, my decision is made on the balance of probabilities – which in other words, means I've based it on what I think is more likely than not to have happened given the evidence that's available from the time and the wider circumstances. When doing that, my role isn't to address every single point that's been made. So, I'm only going to refer to what I believe are the most salient points having considered everything that's been said and provided by both sides.

*S75(1) says, "If the debtor under a debtor-creditor-supplier agreement falling within section 12(b) or (c) has, in relation to a transaction financed by the agreement, and claim against the supplier in respect of a misrepresentation or breach of contract, he shall have a like claim against the creditor, who, with the supplier, shall accordingly be jointly and severally liable to the debtor".*

For me to conclude there was misrepresentation by the Supplier in the ways alleged, generally speaking, I would need to be satisfied, based on the available evidence, that the Supplier made false statements of fact at the Time of Sale. In other words, that it told Mr B something that wasn't true in relation to one or more of the points raised. I would also need to be satisfied that any misrepresentations were material in inducing Mr B to enter the contract. This means I would need to be persuaded that Mr B reasonably relied on those false statements when deciding to complete the purchase.

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<sup>1</sup> Dispute Resolution: Complaints Sourcebook ("DISP")

### Mr B's recollections from the Time of Sale

I've carefully considered Mr B's witness statement which he has signed and is dated 31 May 2021 – a little over 5 years after the Time of Sale. In summary, Mr B describes being told about an investment opportunity – not a timeshare – whereupon, in exchange for purchasing a 'Participation' in a specified company, he would benefit from a guaranteed investment yield (from rental incomes) together with a share of property sale proceeds (and profits) at a point in the future.

In addition Mr B includes details of the expected dividends he would receive together with those actually received in 2017, 2018 and 2020, the amounts of which he was happy with. However, he explains that in the third year, the expected yields were not forthcoming, prompting him to seek an exit from the investment.

Mr B goes on to explain that his complaint is driven by concerns he has having become aware of financial problems associated with the Supplier. In particular, the suggestion that the Supplier entered into a liquidation process, and various parties were suggesting he might be entitled to a refund and compensation.

### The documentation from the Time of Sale

I've seen various documents from the Time of Sale which are summarised within the Letter of Complaint. They include:

- 'Purchase of Company Participations Agreement' dated 6 February 2016. This is a seven page document in both Spanish and English and has been signed by Mr B (and his wife) together with the Supplier.

In simple terms, it names the 'Parties' as the 'Seller' (the Supplier) and the 'Purchaser(s)' (Mr B and his wife). It explains that the Supplier owns all ten 'Participations' in a company registered in Spain (the 'Spanish Company'). And by entering into the Purchase Agreement, Mr B is acquiring two of the Participations from the Supplier for a cost of €27,742.

- 'Purchase of Company Participations Agreement' dated 14 November 2017. This appears to be almost identical to the previous agreement other than it confirms that the Supplier now owns seven Participations in the Spanish Company (rather than ten). And by entering into the Purchase Agreement, Mr B is acquiring two of those Participations from the Supplier for a cost of €27,742.

A separate document confirms cancellation of the original agreement above.

- 'Guide to your company [The Spanish Company] Paperwork and Q&A's'. The document lists the various associated documents and serves to explain in simple terms what each is. It goes on to include a number of 'Frequently asked questions' together with answers and explanations.

The 'other' documents include:

- 'Shareholders' Agreement' - for the Spanish Company
- Articles of Association - for the Spanish Company
- Services and Management Agreement - between the Supplier and the Spanish Company
- Rental Program Agreement - between the Supplier and the Spanish Company

Mr B does not appear to be party to any of these 'other' documents and/or agreements.

Having considered the documentation, it appears Mr B purchased Participations (equivalent to a 20% shareholding) in a Spanish Company established by the Supplier to hold a specified number of "*Holiday Certificate Licenses*" which are subject to the "*Rental*

*Agreement*". Those licenses appear to relate to a specified apartment, details of which are identified within the name of the Spanish Company. Mr B is not entitled to use that apartment, and the intention appears to be that the associated licenses will be rented out to derive an income for the Spanish Company.

The rental program is mandatory for the first three years or until *"title has been achieved"*. It states that there is a guaranteed dividend of 4.5% to the Spanish Company – not to Mr B or any of the Participation owners – although this is caveated based upon maintaining an *"obligatory legal reserve"*. That reserve *"must be held at 20% of Participation Capital"* from annual profits after tax. So, I can't see there was any guarantee that Mr B would personally receive any return during the first three years.

#### The claim under S75

From the information available, I can't be certain about what Mr B was specifically told (or not told) by the Supplier about the benefits of what he purchased here. Mr B has, however, indicated that he was told these things. So, I've thought about that alongside the other evidence available from the Time of Sale.

I've seen no evidence to suggest that the Supplier told Mr B he was guaranteed to personally receive dividends and/or investment returns in the first three years. And beyond that point, returns and/or strategy appears to be subject to decision by the shareholders at that time. The Letter of Complaint alleges Mr B was *"promised the benefit from a guaranteed yield of 4.5% of the capital investment and revenue generated from the rental income..."*. However, as I've already said, it appears any such dividend was payable to the Spanish Company – not directly to Mr B.

In the simplest terms, the documentation shows that Mr B bought a company shareholding, with the only contractual obligation being that Mr B receives his Participations. I've seen no evidence here to suggest he didn't. And because of that, I can't reasonably say that the Supplier breached the Purchase Agreement.

The remaining documents outline responsibilities between the Supplier and the Spanish Company. But as Mr B wasn't a party to those agreements, I can't see that they conferred any contractual obligations upon the Supplier to Mr B – only between the Supplier and the Spanish Company.

The PR suggest that the purpose of the agreements was to *"circumvent the laws relating to Timeshares..."*. But I've found nothing to suggest that what Mr B purchased constituted a Timeshare. And as I've already said, the agreement(s) certainly didn't convey any occupancy rights to Mr B as would ordinarily be associated with a timeshare contract.

So, having considered everything, I haven't found any evidence to support the suggestion that the Supplier misrepresented the purchase. And whilst I acknowledge that there is also a questions and answers document which refers to dividends to be paid, those were to be contractually paid to the Spanish Company – not to Mr B directly. And further, there are various provisos which restrict the release of payments to the shareholders (Participation owners).

### The PR's response to the investigator's findings

I've thought carefully about what the PR has said here. At the outset, I should be clear that in looking at Mr B's complaint I can only consider the individual and specific circumstances of what happened in Mr B's case when deciding what I believe to be fair and reasonable. So, looking at what happened in the cases of other consumers doesn't really help me to establish what actually happened here. In doing so, I have taken into consideration everything Mr B has said in his witness statement. But as the PR has gone to great lengths to point out, I must do so whilst also taking into account the specific documentary evidence from the Time of Sale, and how that evidence corroborates Mr B's own recollections.

The PR suggested that in the event that the Purchase Agreement was found to be a UCIS, it's likely there were regulatory breaches. But I haven't seen anything to suggest that was the case. As I've already said, this appears to be a simple purchase of a company shareholding.

The PR has subsequently pointed to an article suggesting that these types of Participation agreements were, in fact, timeshares. And further, that a Spanish court judgment was issued in relation to them. However, I've seen no further evidence to support this.

### Summary

I would like to reassure Mr B that I've carefully considered everything he and the PR have said and provided. In doing so, I've not found any evidence of the alleged misrepresentations or a breach of contract. Because of that, I can't say that Tesco's response to Mr B's complaint was unfair or unreasonable. Whilst I appreciate he will be extremely disappointed; I won't be asking Tesco to do anything more.

### **My final decision**

For the reasons set out above, I do not uphold Mr B's complaint about Tesco Personal Finance Limited trading as Tesco Bank.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 31 July 2025.

Dave Morgan  
**Ombudsman**