DRN-4685278

The complaint

Mr B complains Tesco Personal Finance PLC ("Tesco Bank") did not treat him fairly when he approached it for assistance in connection with a disputed purchase on his credit card.

What happened

I issued a provisional decision on this case on 6 March 2024, which is appended to and forms a part of this final decision. In my provisional decision I set out the background to the complaint in detail along with my findings on it, so I will not repeat all that here. In brief summary however, Mr B used his Tesco Bank credit card to purchase a garage door from an online supplier for £241.64, which turned out to be defective – the wood warped.

In my provisional decision I found Mr B could make a claim against Tesco Bank under section 75 of the Consumer Credit Act 1974 ("CCA") in respect of the supplier's breach of contract in supplying him with a defective door. This was notwithstanding the fact that Mr B's credit card payment to the supplier had been processed via a digital wallet operator – PayPal.

I said I was minded to direct Tesco Bank to provide a refund of the price of the door (£241.64) plus compensatory interest, and that it should pay the reasonable costs of the door being removed and disposed of. I said I was willing to listen to alternative redress proposals.

Tesco Bank said that it would rather that Mr B kept the door in exchange for a reasonable price reduction. Mr B said that he had in fact had the warp in the door repaired between September and December 2022 at a cost of £120 plus £20 for repainting. He also said he'd originally paid £250 for the door to be installed and this didn't seem to have been accounted for in my provisional decision. He suggested that reasonable redress would involve him keeping the door for a full refund.

Having considered Mr B and the bank's further points, I arranged for a message to be passed to them with an update on my thinking in terms of how the complaint should be resolved. I said that I thought it would be consistent with the Consumer Rights Act 2015 ("CRA") for Mr B to keep the doors and be refunded the amounts he had needed to pay to repair and repaint them - £140.

Mr B made some additional comments following this. He said that a repaired door was not the same quality as the original, which needed to be taken into account. He hadn't wanted to buy repaired doors, and would have probably only agreed to pay about 50% for doors which had already been repaired. Tesco Bank said only that it didn't have any concerns about my updated proposals.

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.

The vast majority of the reasoning for my final decision is exactly as stated in the appended copy of my provisional decision. The only area where either party has disagreed is on the amount of redress Mr B should receive, and so this is what I will focus on below.

Under the CRA, a consumer who has purchased goods which are not satisfactory quality has certain rights which depend on the circumstances. Where a consumer reports defects more than 30 days after receiving the goods, the supplier of the goods is entitled to attempt a repair or replacement of the goods. If the repair or replacement fails to bring the goods up to a satisfactory standard, or cannot be accomplished within a reasonable time and without unreasonable inconvenience to the consumer, then the consumer can reject the goods for a refund (either partial or full, depending on the circumstances) or keep the goods and claim a price reduction.

The only evidence of Mr B reporting that the door had warped was from more than 30 days after receiving it. The supplier went out of business, so it would have been unable to repair or replace the door, leaving Mr B with the options, under the CRA, of rejecting the door or claiming a price reduction. The explanatory notes to the CRA explain that a price reduction is intended to reflect the difference in value between what the consumer paid for and the value of what they actually receive.

The CRA also makes it clear that a consumer's rights are not limited to what is set out in the CRA, and they may be able to make a common law claim for damages[1] for breach of contract (for example). Under the common law, where damages are awarded for a breach of contract, this is usually on a "cost of cure" or "diminution in value" basis. Putting that into the context of a person who has received faulty goods, it means they would be awarded *either* the cost of repairing the goods themselves, *or* of the difference in value between what was paid for the goods and their actual value when they were received. In some cases, these figures can be the same or similar, but it's important to mention that it is possible to claim one or the other, not both.

I do not think it is possible to determine, with any reasonable certainty, what the difference in value was between the door Mr B paid for, and the defective door he received. No evidence has been submitted relating to the market value of the door in either state. Mr B has told us what the door would have been worth to *him*, had it been put up for sale in a repaired state, but I don't think that gets us any closer to working out a market value.

Unable to determine the difference in value, I am left with the fact that Mr B has paid £140 for repairs and repainting, and has therefore already incurred the "cost of cure". He would not have had to have paid this money if the door had been satisfactory quality. I think it's likely a court would have awarded him damages on this basis, and I think it's fair and reasonable that this is what he receives from Tesco Bank in settlement of his complaint.

Mr B has referred to the amount he spent on having the door installed. I do not think he is trying to claim this cost[2], but for the sake of completeness, as this is a cost Mr B would have incurred regardless of whether the door was satisfactory quality, it is not something that I can reasonably require Tesco Bank to contribute towards.

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[1] Damages could best be described as compensation for a person's financial losses which have been caused by the breach of contract.

[2] I believe Mr B is making the point that in my provisional decision, I said I was minded that the door should be removed for a full refund, but that this didn't take into account the fact he had also spent money on installing the door. I was unaware at this point that Mr B had paid to have the door installed, which is why it was not considered in my provisional decision.

My final decision

For the reasons explained above, and in my appended provisional decision below, I uphold Mr B's complaint and direct Tesco Personal Finance PLC to take the following actions:

A) Pay Mr B £140, this being the cost of repairing and repainting the garage door.

B) Pay Mr B 8% simple interest per year* on the refund outlined in A), calculated from the approximate date Mr B paid for the repairs, to the date he receives the refund.

   Based on Mr B's recollection that he had the repairs carried out 15-18 months ago, I think it would be reasonable to use 1 November 2022 as the calculation date.

*If Tesco Personal Finance PLC considers it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr B how much it's taken off. It should also give Mr B a tax deduction certificate if he asks for one, so he can claim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 22 April 2024.

Will Culley
Ombudsman

COPY OF PROVISIONAL DECISION

I've considered the relevant information about this complaint.

Having done so, I've come to broadly the same conclusions as our investigator, but I've explained my reasoning in more detail, so I wanted to give all parties to the complaint an opportunity to comment further before I make my decision final.

I'll look at any more comments and evidence that I get by 20 March 2024. But unless the information changes my mind, my final decision is likely to be along the following lines.

The complaint

Mr B complains Tesco Personal Finance PLC ("Tesco Bank") did not treat him fairly when he approached it for assistance in connection with a disputed purchase on his credit card.

What happened

Mr B purchased a garage door from an online builder's merchants I'll call "BSOL", on 12 June 2021. The price of the door was £241.64, including taxes and shipping, and Mr B paid for this through his PayPal account. Mr B had some money in his PayPal account already, and the difference of £158.42 was made up by his Tesco Bank credit card.

At some point after receiving the door, Mr B raised concerns with BSOL about its quality. He filed a warranty claim via BSOL in May 2022, in which he explained the door had warped and answered various questions BSOL had put to him. It appears Mr B also sent photographs, though these have not been supplied to this service.

BSOL consulted the manufacturer of the door and wrote back to Mr B on 26 May 2022. They offered to replace the door or "credit the product in full and final settlement". Mr B understood the latter option to be a full refund and he replied to BSOL confirming this was the option he wanted to take up.

Mr B says he never received a refund from BSOL, and the company ceased trading and went into administration in June 2022. I understand he raised a "Significantly Not as Described" claim with PayPal on 20 July 2022, but this was declined because it had been made too long after purchase.

Before raising his unsuccessful claim however, Mr B had also raised a claim with Tesco Bank on 24 June 2022, via the bank's online portal. Tesco Bank considered the claim under two different potential redress mechanisms: "chargeback", and section 75 of the Consumer Credit Act 1974 ("CCA").

Tesco Bank considered it was unable to help Mr B get his money back via a chargeback, reasoning that they had only 120 days from the date Mr B received the door to pursue this avenue for a refund.

The bank also concluded that it had no liability to Mr B under section 75 of the CCA. It considered there was no debtor-creditor-supplier ("DCS") agreement in place, which was a requirement for a successful section 75 claim to be made. It said this was the case because Mr B had paid for the garage door via PayPal, instead of paying BSOL with his credit card directly. Mr B complained about this decision, and subsequently referred his complaint to the Financial Ombudsman Service for an independent assessment.

The complaint was looked into by one of our investigators. She issued an assessment in

May 2023 where she reached the following conclusions:

- Mr B had paid BSOL with his Tesco Bank credit card via PayPal, in what was known as a "back to back" or "live load" transaction.

- There had been arrangements of the kind required under the CCA, between Tesco Bank and BSOL for a DCS agreement to exist. This was because although the payment had gone via PayPal, this was a widespread and accepted commercial practice which was accommodated, or specifically permitted, by the major card schemes. The card schemes had developed in a way which brought payments such as Mr B's into their arrangements.

- Tesco Bank would have contemplated, when agreeing to give Mr B a credit card, that the way in which credit card payments were made would develop over time and would include any method accommodated by the relevant card scheme.

- There was evidence the garage door had been faulty and that a full refund had been agreed. There had been a breach of contract by BSOL for which Mr B could hold Tesco Bank jointly liable.

Our investigator recommended that Tesco Bank refund Mr B £241.64 and rework his account as though this amount had been refunded when Tesco Bank had initially declined Mr B's claim.

Mr B accepted our investigator's assessment but Tesco Bank did not. It noted that PayPal had not acted as a payment processor in Mr B's case. It said it had funded Mr B's PayPal account, and PayPal had then paid BSOL. In other words, two distinct transactions had taken place – and it had not been a party to the transaction with BSOL. For this reason, it disagreed that there was a DCS agreement in place and asked for a decision from an ombudsman.

The case has since been passed to me to decide. While considering the evidence I noted that Tesco Bank appeared to have missed that it may have had the ability to claim back the amount which had been charged to his card (£158.42), under a particular chargeback reason which had still been "in time" at the point Mr B contacted the bank. I pointed this out to the bank, which then offered to refund this amount to Mr B. This offer was rejected by Mr B because he considered he was still entitled to a full refund under section 75.

What I've provisionally 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 a consumer buys goods or services using a credit card, and something then goes wrong with the purchase, they may approach their credit card issuer for assistance. The card issuer may be able to help in obtaining a refund via the dispute resolution mechanism administered by the card scheme – often known as "chargeback" – or it may need to honour a claim under section 75 of the CCA.

Tesco Bank appears to accept now that it could have pursued a chargeback successfully for the amount which was charged to Mr B's credit card, so I will focus on the question of whether section 75 also applied to his purchase.

Section 75 of the Consumer Credit Act 1974

Section 75 of the CCA allows a consumer to claim against their credit card issuer, so long as certain conditions are met, in respect of any breach of contract or misrepresentation by a supplier of goods or services they have made a purchase from using the card.

Tesco Bank's position is that one of the key conditions for section 75 to apply has not been met, so I think it would be helpful to set out the relevant parts of section 75 of the CCA in full.

Section 75(1) of the CCA states the following:

"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, any 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."

Section 12(b) and 12(c), referred to above, are set out as follows:

"(b) a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier, or

(c) an unrestricted-use credit agreement which is made by the creditor under pre-existing arrangements between himself and a person (the "supplier") other than the debtor in the knowledge that the credit is to be used to finance a transaction between the debtor and the supplier."

A credit card agreement, when used to purchase goods or services using the card itself, operates as a restricted-use credit agreement. Section 11(1)(b) defines such an agreement as:

"A restricted-use credit agreement is a regulated consumer credit agreement— …

(b) to finance a transaction between the debtor and a person (the "supplier") other than the creditor…"

And section 11(4) says:

"*An agreement may fall within subsection (1)(b) although the identity of the supplier is unknown at the time the agreement is made."*

Section 12(b) of the CCA refers to the concept of "pre-existing arrangements". It makes it clear that for there to be a DCS agreement for a particular purchase, the payment needs to have been made under pre-existing arrangements or in contemplation of future arrangements with the supplier. I will refer to these simply as "arrangements" in this decision.

It is also relevant that "finance" is used within the CCA to mean "*to finance wholly or partly, and "financed" and "refinanced" shall be construed accordingly*". So, section 75 can apply where only part of the price of goods or services was funded by borrowing on a credit card.

Tesco Bank appears to be arguing that the way Mr B's payment via PayPal was structured, means that the purchase of the sofa was not a transaction financed by its credit agreement with him. I will return to the bank's argument later on in this provisional decision.

Firstly though, I think it is important to outline the relevant historical context relating to credit card purchases, along with more recent developments.

The historical context

The way in which the payments landscape has evolved over the years has significantly broadened the range of suppliers which accept payment by credit card, and the number of intermediaries involved in the processing and settlement of these payments.

Originally, however, credit cards operated according to a three-party structure. The card issuer (creditor) and the cardholder (debtor) entered an agreement whereby the card issuer would extend credit to the cardholder for purchases of goods or services made by the latter, from suppliers who had agreed to accept the card.

Under this structure, the card issuer would have an agreement with each individual supplier under which the supplier agreed to accept the card and the card issuer agreed to pay the supplier promptly. The cardholder would also have an agreement with the supplier – to purchase the goods or services which were the subject of the transaction.

This tripartite structure began to give way over time to a four-party structure involving a new type of entity known as a "merchant acquirer". In such a structure the merchant acquirer would have an agreement with the supplier under which the latter agreed to accept certain types of card, and the former agreed to pay the supplier. The merchant acquirer would also have an agreement with the card issuer, under which the acquirer agreed to pay the supplier and the issuer undertook to reimburse the acquirer. By the turn of this century, this four-party structure was widespread.

The Courts considered the appearance of this four-party structure, and its impact on claims brought under section 75 of the CCA, in the case of *Office of Fair Trading v Lloyds TSB Bank & others*[3] ("the OFT case"). This reached trial in 2004 before Mrs Justice Gloster, was appealed to the Court of Appeal in 2006, and went to the House of Lords in 2007.

At trial, two of the credit card issuers with four-party schemes argued that purchases were not "financed" by them because the issuer assumed no liability to the supplier, so it was the merchant acquirer that financed the purchase. Gloster J rejected that argument, saying:

"[Counsel for the OFT and one of the card issuers] argued, to the contrary, that the bank's … contentions on this issue were technical and that it was impossible to distinguish, in the real world, between a three-party transaction and a four-party transaction. The obvious and simple purpose of the regulated credit agreement is to provide the customer with credit (ie financial accommodation) so that he can purchase goods or services from the supplier. I accept these submissions. The phrase "to finance" is not defined in section 189(1). "Finance" has to be read in the context of its use in sections 11(1)(a) and 9(3), which do not involve the transfer of money by the creditor. Approaching the matter in a common sense way, the phrase must mean "provide financial accommodation in respect of" (see also the definition of credit in section 9(1)), rather than simply "pay money"). A credit card issuer clearly provides financial accommodation to its cardholder, in relation to his purchases from suppliers, because he is given time to pay for his purchases under the terms of the credit card agreement."

[3] Tesco Bank was itself a party to that case.

The Court of Appeal made a number of key findings. Firstly, it concluded that the introduction of a four-party structure had not meant the system had evolved significantly beyond the scenarios to which section 75 had been directed:

"From the customer's point of view…it is difficult to see any justification for drawing a distinction between the different [three-party and four-party] situations. Indeed, in the case of those card issuers such as Lloyds TSB, who operate under both three-party and four-party structures, the customer has no means of knowing whether any given transaction is conducted under one or the other arrangement. Similarly, from the point of view of the card issuer and the supplier the commercial nature of the relationship is essentially the same: each benefits from the involvement of the other in a way which makes it possible to regard them as involved in something akin to a joint venture, just as much as in the case of the three-party structure."

The Court of Appeal concluded that arrangements did not need to be direct between the creditor and the supplier, for them to be of the kind required to bring a section 75 claim against the creditor. The Court considered the word "arrangements" as used in section 12 of the CCA was to be construed loosely, observing that not to do so would result in some consumers being disadvantaged:

"…we find it difficult to accept that Parliament would have been willing to allow some consumers to be disadvantaged by the existence of indirect arrangements when other consumers were protected because the relevant arrangements were direct."

The Court of Appeal also considered the argument, originally advanced at trial, that the bank had not "financed" any purchase from the supplier. Waller LJ dealt with that argument as follows:

"In order to be a restricted-use credit agreement the agreement must be one to "finance" a transaction. Before the judge Mr Hapgood argued that a supply transaction entered into under a four-party structure was not "financed" by the credit agreement because the finance needed to pay the supplier was provided by the merchant acquirer, not by the card issuer. The judge rejected that argument, at paras 15–17, on the grounds that the purpose of the credit agreement in these cases is to provide the customer with credit to enable him to obtain goods or services from the supplier which amounts to financing the transaction. Before us Mr Hapgood abandoned that argument, recognising that from the customer's point of view, at any rate, there really could not be any argument but that the transaction is financed by the card issuer. In our view, however, the Act requires one to look at the position not simply from the point of view of the customer but by reference to the function of the credit agreement itself. It is clear that, whether the transaction is entered into under a three- or four-party structure, the purpose of the credit agreement is to provide the customer with the means to pay for goods or services. It follows that in both cases the card issuer finances the transaction between the customer and the supplier by making credit available at the point of purchase in accordance with the credit agreement. The fact that it does so through the medium of an agreement with the merchant acquirer does not detract from that because it is the card issuer's agreement to provide credit to the customer that provides the financial basis for the transaction with the supplier."

Therefore, the Court of Appeal's approach was to consider the objective purpose of the credit agreement, which was to provide the bank's customers with the means to pay for goods and services. If the bank, whether via an intermediary or not, makes credit available at the point of purchase in accordance with the credit agreement, it provides the financial basis for the transaction with the supplier, and so "finances" the purchase. This approach was similar to the that of the trial judge to the extent that the question it poses is

not who the bank agrees to pay money to, but what purchases the credit agreement is intended to enable the customer to enter into.

An appeal in the same case was later considered by the House of Lords. Lord Mance said the following in the course of commenting on the recruitment of overseas suppliers to the card scheme/network:

"That, in today's market, arrangements between card issuers and overseas suppliers under schemes such as Visa and Mastercard are indirect (rather than pursuant to a direct contract as is still the case with American Express and Diners Club) is a consequence of the way in which the Visa and Mastercard networks have developed and operate. Likewise, the fact that the rules of these networks give card issuers no direct choice as to the suppliers in relation to whom their cards will be issued. The choice of suppliers is, in effect, delegated to the merchant acquirers in each country in which these networks operate, and provision is made, as one would expect, to ensure and monitor the reliability of such suppliers in the interests of all network members. That network rules may not provide all the protections that they might, e.g. by way of indemnity and/or jurisdiction agreements, is neither here nor there. They could in theory do so, and it is apparent that there are some differences in this respect between different networks. The Crowther Report and 1974 Act proceed on the basis of a relatively simple model which contemplated that card issuers would have direct control of such matters. A more sophisticated worldwide network, like Visa or Mastercard, offers card issuers and card holders considerable countervailing benefits. Card issuers make a choice, commercially inevitable though it may have become, to join these networks, for better or worse."

While Lord Mance made these comments many years ago, they are still relevant today in the context of further developments which have been seen in how credit card payments are made to suppliers. It's clear that even by the early-2000s commercial practices were evolving and suppliers were beginning to be recruited to the card schemes by intermediaries. Card issuers were faced with a commercial decision of participating in the schemes and therefore accepting the benefits and drawbacks of having their cards accepted by suppliers who had been recruited to the schemes by others, or of not participating in the schemes. Since then, development has been accelerated by the introduction of new technologies and the growth of e-commerce. New ways of recruiting suppliers to the card schemes have appeared as a result. Payment facilitators, for example, are now an established part of the payments industry. The rules of the card schemes have changed to adapt to and accommodate new payment technologies and practices.

Recent legal developments

In late 2022, the High Court handed down judgment in the case of *Steiner v. National Westminster Bank [2022] EWHC 2519* ("The Steiner case"). This case has provided some further comment on the question of the debtor-creditor-supplier agreement and "arrangements" as they relate to claims brought under section 75 of the CCA.

The Steiner case involved the purchase of a type of timeshare product using a credit card. Instead of the payment being made to the timeshare provider, it was made to a trustee company.

The High Court dismissed the section 75 claim on the basis that the purchase was not made under a debtor-creditor-supplier agreement. The court cited the fact the credit card payment had been made to the trustee company and not the timeshare provider. The judge stated the central question was not whether arrangements existed between the creditor and the supplier at the time the purchase had been made and the credit card had been used to pay the trustee company. Instead, it was whether the debtor's credit card agreement with

the creditor was made by the creditor "under pre-existing arrangements, or in contemplation of future arrangements", between the creditor and timeshare provider.

The judge reasoned that when a creditor made an agreement with a customer in relation to a card issued by the creditor to that customer, then the agreement was made under the card scheme, and this constituted "arrangements" between the creditor and the other members of the scheme. Therefore, if a supplier was already a member of the card scheme, the agreement was made "under pre-existing arrangements…between the [creditor] and the supplier". The creditor was also aware that other suppliers were likely to join the card scheme in the future, so the agreement was also made "in contemplation of future arrangements", between the creditor and any supplier who subsequently joined the card scheme.

However, the judge also concluded that in the absence of specific factual evidence as to the state of mind of the creditor, it was difficult to envisage that a creditor which had issued a card to its customer and made a credit card agreement in relation to that card, had made any agreement under, or in contemplation of, any arrangements other than the card scheme. And, as the timeshare provider had been *outside* the card scheme in the Steiner case, it had meant the timeshare had not been supplied under a debtor-creditor-supplier agreement.

Characterisation of transactions and payments to BSOL

It's clear from the analysis above that the concept of "arrangements" between the creditor and the supplier, whether direct or mediated through third parties, is crucial to the question of whether a DCS agreement is in place. However, before going on to consider whether arrangements were in place between Tesco Bank and BSOL, it's necessary to consider an important question the bank has raised: did it fund the transaction with BSOL at all? It argues that it funded only the topping up of Mr B's PayPal account with electronic money, and that it was PayPal who funded the transaction with BSOL.

"Transaction" is not a defined term in the CCA, and I could not find in my review of the relevant case law that the courts have defined the term in the context of a claim made under section 75 of the CCA either. A dictionary definition of the term is:

"an occasion when someone buys or sells something, or when money is exchanged or the activity of buying or selling something"[4]

Mastercard – the card scheme to which Mr B's Tesco Bank credit card belongs – describes PayPal, when operating as it did for Mr B's purchase, as a "Staged Digital Wallet Operator", and describes the type of payment as follows:

"Functionality that can be used at more than one retailer, and by which the Staged Digital Wallet Operator effects a two-stage payment to a retailer to complete a purchase initiated by a Cardholder. The following may occur in either order:

- ***Payment stage*** *– In the payment stage, the Staged DWO pays the retailer by means of:*
    - *A proprietary non-Mastercard method (and not with a Mastercard Card); or*

[4] *Cambridge Advanced Learner's Dictionary & Thesaurus*, Cambridge University Press

- *A funds transfer to an account held by the Staged DWO for or on behalf of the retailer.*

- ***Funding stage*** *– In the funding stage, the Staged DWO uses a Mastercard or Maestro Account provided to the Staged DWO by the Cardholder (herein, the "funding account") to perform a transaction that funds or reimburses the Staged Digital Wallet.*

The retailer does not receive Mastercard or Maestro Account data or other information identifying the network brand and payment card issuer for the funding account."[5]

It's worth mentioning that the other of the two largest card schemes, Visa, treats such purchases in a similar way. It describes them as "back-to-back funding transactions", defining PayPal as a "staged digital wallet operator" and stating the following:

"Back-to-back funding", also known as a "purchase-driven load", "live-load", or "real-time load" – is a payment flow that automatically transfers value via a funding transaction that is directly connected to a specific purchase. It enables the customer to complete transactions on the digital wallet's platform when there are not sufficient (or zero) funds in the digital wallet-assigned account."[6]

To a consumer like Mr B, this way of paying a supplier would generally be presented in the following way: the checkout area of the supplier's website will contain a button featuring PayPal branding. Clicking or tapping on this button will prompt the consumer to enter their PayPal credentials and then allow them to select a "funding source" such as a credit card, and then to confirm their payment to the supplier. It is the selection and confirmation of payment via a credit or other plastic card which initiates a back-to-back transaction, and the whole process takes place at the point of sale, via the supplier's online checkout. Based on historic and current versions of BSOL's website[7], it appears its own e-commerce process worked in this way.

Not all charges to a credit card from PayPal will be so closely connected to a specific purchase. It is also possible for a consumer to "top up" their PayPal account with a credit card, in a way which is unconnected to any particular purchase. This can be done by logging on to the PayPal website or app and choosing to "Add Money" with a credit card. The credit card is charged and an equivalent amount of electronic money is added to the consumer's PayPal account. This electronic money can then be used as the consumer wishes, including to pay for goods or services at a supplier's online checkout, however I think it's important to note that if a person wished to structure a purchase from a supplier in this way, they would need to carry out the "top up" outside of the supplier's online checkout process.

Visa makes it clear in its documentation that it considers card payments associated with back-to-back transactions to be different to those which are associated with top ups. For example, Visa requires card payments which are associated with the former to be registered as purchases, while top ups must be registered as "account funding transactions". Visa also requires the Merchant Category Code (MCC) associated with a back-to-back transaction to reflect the line of business of the underlying supplier from which goods or services are purchased.[8] There appears to be a high degree of alignment across the major card schemes

[5] *Mastercard Rules*, Mastercard, 4 June 2023
[6] *Digital Wallets in Visa's Ecosystem: Policies & Requirements*, Visa Inc., March 2023
[7] Although BSOL itself became insolvent, some of its assets including its brand and website were purchased by another company during the administration.

in relation to this, and I note Mastercard's rules also require these transactions to be dealt with differently within its network. For example, both the Digital Wallet Operator and the retailer must be identified on the card statement, and the MCC must also reflect the retailer's line of business.[9]

The process of drawing down credit to pay the supplier via PayPal occurs in a way which is largely automatic, more or less instantaneous[10], and appears little different to a consumer than paying a supplier via an online checkout in which their card details have previously been saved, or using PayPal's "Guest Checkout" facility.[11] The process takes place at the supplier's point of sale. Looking at this in the round, my view is that where a payment of the type made by Mr B has occurred, there is a central transaction which the cardholder is making: the purchase of goods or services from a supplier. Serving that central transaction are the stages in which the payment is made. In a technical sense these may also be transactions, but their function is a subordinate one, facilitating the transaction between the cardholder and supplier, and doesn't amount to the purpose for which credit is provided.

I can see some logic to Tesco Bank's argument that it was simply funding the purchase of electronic money. But I think this argument is overly concerned with the technicalities of how the payment travelled from Mr B's card to BSOL. Taking a step back, I think it's clear that the key transaction Mr B was entering into was the purchase of a garage door from BSOL, and that he intended to draw on the credit advanced by Tesco Bank, under his credit agreement, in order to finance that purchase. He may have chosen PayPal as a convenient means through which to access the credit facility extended to him by his credit card and make a payment, but I don't think that changes the overall character of what happened – which was that Mr B purchased a garage door from BSOL using credit advanced by Tesco Bank.

I think this is consistent with the findings of the Court of Appeal in the OFT case. It was Tesco Bank's agreement to provide credit to Mr B that provided the financial basis for the transaction with BSOL, even if there were other parties (PayPal, and presumably a merchant acquirer) involved in getting the money from A to B. Specifically, Tesco Bank made credit available at the point of Mr B's purchase in accordance with the credit agreement. By providing the financial basis for the transaction with BSOL, it "financed" the purchase of the garage door. And the mechanism used to do so, a back-to-back type transaction using PayPal, was one that was widespread, long-established and specifically accommodated by the relevant card scheme rules.

I would have taken a different view had Mr B topped up his PayPal account using his credit card, outside of BSOL's online checkout process, and *then* chosen to pay BSOL via PayPal, using the money he had just added to his PayPal account. This is because I don't think there would have been arrangements of the required kind between Tesco Bank and BSOL.

Were there arrangements of the required kind between BSOL and Tesco Bank?

The CCA makes it clear that credit card financing needs to have been made under arrangements between the creditor and the supplier in order for there to be a DCS

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[8] *Digital Wallets in Visa's Ecosystem: Policies and Requirements*, Visa Inc., March 2023. See also table 7.4.7 of Visa's rules, which requires that purchases using back-to-back funding be given a code "that describes the primary business of the retailer".

[9] *Mastercard Rules*, Mastercard, 4 June 2023

[10] PayPal has supplied this service with evidence that the entire process took place within a single second for Mr B's purchase.

[11] Tesco Bank appears to accept that there would be a valid DCS agreement for such a transaction, in which it has described PayPal as acting as a "payment processor".

agreement and therefore for section 75 to apply to a particular purchase. I set out the relevant background to the question of "arrangements" earlier in this decision, but will now cover its application to Mr B's case.

PayPal is a very large and well-known company which provides a number of services to consumers and businesses, including staged digital wallets. Paying suppliers via staged digital wallets is a payment method which has evolved over time and become a widespread commercial practice. This practice is clearly accommodated by, and indeed is specifically permitted, under the rules of the card schemes. It is well known to all card issuers that where a payment is made via a back-to-back type transaction, the recipient of the payment will be a supplier which has been recruited to the digital wallet operator's platform in accordance with the card scheme rules.

I note that, as the Court of Appeal observed in the OFT case, card issuers such as Tesco Bank and suppliers accepting payment via staged digital wallets such as PayPal, each benefit from the involvement of the other in a transaction. The suppliers are able to benefit from credit extended by Tesco Bank in the form of payment for the goods or services they've agreed to sell, while Tesco Bank is able to benefit from any interest, fees or charges payable in connection with the payment.

The Steiner case has highlighted the importance of considering what was in the creditor's contemplation at the point it made a credit agreement with a given consumer. I think it is likely that Tesco Bank has always understood that the Mastercard card scheme would be operated in accordance with evolving rules and commercial practices, and that this constant evolution was likely to assimilate new groups of participants – either direct or indirect – to the scheme. I think Tesco Bank would also have appreciated that its credit card holders would, irrespective of when they entered their credit agreements, have the ability to use their credit cards to pay any suppliers to whom payment could be made in a way which was accommodated by the Mastercard card scheme. Ultimately, I think Tesco Bank would have contemplated, when agreeing to give Mr B his credit card, that the card would be used to finance purchases from whatever suppliers the scheme's rules and practices accommodated at the relevant time. I think this included BSOL, via PayPal, at the time Mr B made his purchase.

It follows that I consider the purchase of the garage door from BSOL was made under a DCS agreement involving Mr B, Tesco Bank and BSOL. This is one of the key conditions which must be in place for section 75 to apply to the purchase. Tesco Bank has not argued that any of the other conditions are not in place so I don't intend to comment on these in any detail. I will say only that, having considered the other conditions which exist under section 75 of the CCA, I'm satisfied that these have been met.

In order for Tesco Bank to have any obligation to provide redress to Mr B, there needs to have been a breach of contract or misrepresentation by BSOL for which it is jointly liable to him.

Does Mr B have a claim for breach of contract or misrepresentation against BSOL?

I've focused in this provisional decision on whether there has been a breach of contract by BSOL. This is because there has been no suggestion that BSOL made any kind of misrepresentation.

A breach of contract occurs when one party to a contract fails to discharge its obligations to the other. These obligations can either be written expressly into the contract or they may be

implied into the contract, for example because legislation treats certain terms as being included in specific types of contract.

In this case, Mr B bought a garage door from BSOL, which is a contract for the sale of goods. It's not been suggested that Mr B was acting other than a consumer when he made his purchase, so I've proceeded on the basis that he was so acting. This means the Consumer Rights Act 2015 ("CRA") applied to the contract. In contracts for the sale of goods, the CRA causes terms to be treated as included relating to the quality of the goods. Among other things, goods must be "satisfactory quality".

The CRA also prescribes certain remedies for consumers where goods do not conform to the contract. In general, consumers have a right to a repair or replacement for non-conforming goods. If those remedies cannot be achieved, or cannot be achieved in a reasonable time or without significant inconvenience to the consumer, they have the right to reject the goods and receive a refund, or to keep the goods at a reduced price. Any refund given on rejection of goods can be reduced to take into account the use the consumer has had of them, if the rejection takes place more than six months after delivery.

Not a great deal of evidence has been provided in relation to the problems Mr B experienced with his purchase. It's known that he purchased the garage door in June 2021 and that he was in contact with BSOL about the door having warped in May 2022. It's also known that, having reviewed the evidence Mr B sent it, BSOL agreed to either replace the door or to "credit the product", which Mr B understood to mean to provide a full refund.

Given it offered to replace the door or provide a credit, I think it's more likely than not that BSOL accepted there was a problem with the quality of the door. It did not describe its offer as a gesture of goodwill, for example, or suggest that Mr B's handling of the door had caused the problem. On the balance of probabilities, I think it's likely the door had indeed warped. I don't think this would be considered reasonable in a new garage door and I'm therefore minded to find that the door was not satisfactory quality as supplied to Mr B, and BSOL was therefore in breach of contract.

Because there is only evidence of Mr B reporting the problem eleven months later, ordinarily under the CRA he would need to give BSOL an opportunity to repair or replace the door before he could reject it and receive a refund. I note BSOL did in fact offer a replacement or to "credit the product", which I think Mr B reasonably assumed to mean a full refund. Given BSOL went into administration and no longer exists, it will not be able to provide either of these remedies and I think Mr B would be entitled to reject the door, or keep it and seek a price reduction. When Mr B contacted Tesco Bank, he was looking to receive a refund of the price paid for the door. I think that's something he was entitled to ask for due to the terms treated as included in his contract with BSOL by the CRA. Due to the effect of section 75 of the CCA, I think he was entitled to an equivalent remedy from Tesco Bank.

There is a slight difficulty here in that, as far as I am aware, the garage door remains installed and, in order for it to be fair and reasonable that Mr B receives a refund, the door will need to be removed and disposed of. As this wouldn't be necessary if the door had been satisfactory quality, I think any reasonable costs of removal and disposal are borne by Tesco Bank.

I appreciate BSOL made an offer which may have been to provide a full refund without returning the door, but this is not something I can require the bank to honour – its liability to Mr B is to remedy the breach of contract, not honour settlement offers made by BSOL.

Chargeback

I do not intend to cover the question of whether or not Tesco Bank should have attempted a chargeback to get back the amount charged to Mr B's credit card, in any detail. This is because the successful section 75 claim provides a better outcome for him. However, for the avoidance of doubt, I consider it was open to Tesco Bank to have attempted a chargeback on the grounds there was evidence BSOL was meant to have refunded Mr B and had failed to do so. I think there would have been a reasonable prospect of that chargeback succeeding and resulting in Mr B receiving a refund of the amount charged to his credit card.

Putting things right

To summarise, I'm currently minded that Tesco Personal Finance PLC treated Mr B unfairly and unreasonably by declining to honour the claim he brought under section 75 of the CCA. To put things right, I intend to direct the bank to take the following actions, depending on any further submissions or evidence I receive from either party:

A) Pay Mr B £241.64, this being a refund of the price of the garage door.

B) Pay Mr B 8% simple interest per year* on the refund outlined in A), calculated from the date the bank first wrote to him declining his section 75 claim, to the date the refund is paid to him.

C) Make arrangements with Mr B for the removal and disposal of the garage door, paying any reasonable costs involved in doing so.

I will say here that I'm happy to listen to any proposals for alternative redress from either party. For example, one possibility is that Mr B could keep the door at a reduced price.

*If Tesco Bank considers it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr B how much it's taken off. It should also give Mr B a tax deduction certificate if he asks for one, so he can claim the tax from HM Revenue & Customs if appropriate.

My provisional decision

For the reasons explained above, my provisional decision is that Mr B's complaint should be upheld and Tesco Personal Finance PLC should take the actions outlined in the lettered paragraphs in the "putting things right" section of this provisional decision.

I now invite both parties to let me have any further submissions they would like me to consider, by 20 March 2024. I will then review everything again before making a final decision.

Will Culley
Ombudsman