

The complaint

Mrs C has complained that Tesco Personal Finance PLC, trading as Tesco Bank ("Tesco"), unfairly turned down a claim she made under s.75 of the Consumer Credit Act 1974 ("CCA").

What happened

Mrs C and her husband were already members of a timeshare club and were using a holiday under that membership when they attended a meeting with their timeshare provider ("the Supplier") in May 2015. They say that they explained their annual maintenance fees were increasing unexpectedly and they were told to make a new purchase to overcome this problem.

Acting on what they say they were told, Mr and Mrs C took out a new membership from the Supplier. It cost £3,500 and was paid for by Mrs C paying £900 using her Tesco credit card and then paying a further £88.86 per month for the next four years, again using her Tesco credit card. Although the timeshare purchased was in the name of Mr and Mrs C, as the credit card was in her name, only she is able to bring this complaint against Tesco.

Whilst on holiday after this purchase, Mr and Mrs C says that they were told that they did need to keep paying their maintenance fees and they realised the timeshare did not work in the way they expected.

Using the help of a professional representative ("PR"), in April 2023, Mrs C made a claim to Tesco under s.75 CCA, alleging that the Supplier had misrepresented the nature of the timeshare to her.

In May 2023, Tesco responded to the claim. It said that under the provisions of the Limitation Act 1980 ("LA"), the claim had been made too late. So it said it had a defence to any claim made.

Unhappy with Tesco's response, PR referred a complaint to our service on Mrs C's behalf. It said that, as Mrs C continued to pay using her credit card to 2018, the limitation period did not apply in the way Tesco said it did.

One of our investigators considered the complaint and agreed with Tesco that it had a defence to any claim under the LA. But PR, on behalf of Mrs C, disagreed and asked for the complaint to be reconsidered by an ombudsman.

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 letter that PR sent to Tesco in April 2023 is somewhat hard to follow as it references timeshare purchases made both before and after 2015 and it isn't clear to me whether it is alleged that the Supplier were also involved in all of these other purchases. The only evidence I have seen of a purchase involving the Supplier is in respect of a purchase in May

2015 for £3,500 paid for in part by Mrs C using her Tesco credit card. So that is the purchase that I have considered in this decision.

The issues that PR listed in support of Mrs C's claim for misrepresentation were¹:

- Membership of the timeshare would guarantee them luxury holidays at affordable rates, at any resort of their choosing and at any time of their choosing, beyond that of the general public.
- The fact that the timeshare could be sold for a profit at the end of their term.
- That our clients would have unlimited access to all of The Company's holiday resorts as part of their membership.
- That a membership fee would be paid annually, though the sum would gradually increase, in line with inflation (if at all) and not at extortionate onerous unjustified rate.

These were different to the allegations PR referred to our service when bringing Mrs C's complaint. When doing so, the allegation was that Mr and Mrs C were told they wouldn't need to pay maintenance fees from 2020 onwards, but that turned out not to be the case and they were told that on a subsequent holiday. Further, it was alleged that the resorts available were not exclusive to members as promised. It was made clear however that the complaint was that Tesco turned down a claim for misrepresentation under s.75 CCA.

Under s.75 CCA, Tesco could be jointly liable for the alleged misrepresentations made by the Supplier. But Tesco argued that any claim brought by Mrs C for any alleged misrepresentations was made too late. Having considered that argument I agree. For the avoidance of doubt, I haven't decided whether the limitation period has expired as that would be a matter for the courts should a legal claim be litigated. Rather, I've considered whether Tesco acted fairly in turning down the claim.

Our service normally thinks it would be fair and reasonable for a creditor to rely on the LA as an answer to a claim under s.75 CCA. This is because it wouldn't normally be fair to expect lenders to look into a claim that has been made outside of the limitation periods, so long after the liability arose and after a limitation defence would have become available in court.

So I thought it was relevant to consider whether Tesco has a limitation defence under the LA when thinking about a fair answer to Mr W's complaint.

It was held in Green v. Eadie & Ors [2011] EWHC B24 (Ch) that a claim under s.2(1) of the Misrepresentation Act 1967 is an action founded on tort for the purposes of the LA; therefore, the limitation period expires six years from the date on which the cause of action accrued (s.2 LA).

Here Mrs C brought a like claim against Tesco under s.75 CCA. The limitation period for the corresponding like claim would be the same as the underlying misrepresentation claim. As noted at para. 5.145 of Goode: Consumer Credit Law and Practice (Issue 68 (April 2022)) the creditor may adopt any defence which would be open to the supplier, including that of limitation:

"There is no difficulty in treating the debtor's rights under sub-s (1) as a "like claim" against the creditor. Since the creditor's liability mirrors the supplier's it follows that, to the extent that the supplier has successfully excluded or limited his liability, the creditor may shelter behind that exclusion or limitation."

¹ There were some other allegations made, but these seem to be about a timeshare of a different type and of a different amount, so I have set out the points relevant to the 2015 purchase.

Therefore, the limitation period for the s.75 claim expires six years from the date on which the cause of action accrued.

The date on which a cause of action accrued is the point at which Mrs C entered into the agreement to buy the timeshare. It was at that time that she entered into an agreement based, she says, on the misrepresentations of the Supplier and suffered a loss. She says, had the misrepresentations not been made, she would not have bought the timeshare. And it was on that day that she suffered a loss, as she made a payment to the Supplier using her Tesco credit card, something she says she would not have done but for the misrepresentations. It follows, therefore, that the cause of action accrued in May 2015, so Mrs C had six years from then to bring a claim. But she didn't make a claim against Tesco until May 2023, which was outside of the time limits set out in the LA.

I also don't think the fact that Mrs C made further payments to the Supplier after May 2015 changes that. The limitation period runs from when the cause of action accrues, which is when Mrs C could have made her claim, not from when the last payment was made following on from the agreement. PR has pointed to a judgment that it says extends time (*Smith v. Royal Bank of Scotland* [2023] UKSC 34), however this judgment doesn't deal with either claims under s.75 CCA nor for misrepresentation, so I can't see it's of relevance to the issue in this complaint.

In response to our investigator, PR argued that Mrs C had a further complaint that her relationship with Tesco was unfair under s.140A CCA. Further, that facts relevant to her cause of action were concealed from her at the time of the sale and only revealed when she sought advice from PR. That gave her more time to make a claim under s.32 LA. I will deal with each point in turn.

Mrs C has never made a complaint to Tesco that it was a party to an unfair debtor-creditor relationship, so it has never had the opportunity to consider that. I find that is a separate complaint to the complaint made that Tesco unfairly turned down a s.75 CCA claim due to the operation of the LA. If Mrs C wishes to make such a complaint to Tesco, she needs to do so before our service is able to consider it.

PR has said that at the time of sale Mrs C was unaware that her purchase was based on a misrepresentation. But that isn't a relevant consideration when deciding when the limitation period began.

I have been asked to consider s.32 LA, which states that in cases where an action is based on the fraud of the defendant or a fact relevant to the right of action has been deliberately concealed from the claimant by the defendant, the limitation period only starts to run from when a claimant discovers the fraud or concealment (or could have discovered it using reasonable diligence). However, I can't see that anything about the specific claim being made was concealed from Mrs C or that the claim under s.75 CCA is based on Tesco or the Supplier's fraud.

It follows, I think Tesco acted fairly in turning down this misrepresentation claim as it was made too late.

My final decision

I don't uphold Mrs C's complaint against Tesco Personal Finance PLC, trading as Tesco Bank.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs C to accept or

reject my decision before 31 May 2024.

Mark Hutchings
Ombudsman