

The complaint

Mr D complains that Tesco Personal Finance PLC trading as Tesco Bank ("Tesco") has not honoured a liability he says arises out of his claim made under section 75 of the Consumer Credit Act 1974 ("CCA").

What happened

In or around March 2018, Mr D says he received an unsolicited cold call from a company (who I'll refer to as "SM") offering a free consultation with a professional representative at their offices in Tenerife. SM said the representative would advise him on his options for relinquishing an existing holiday product he'd previously purchased from another supplier.

Having accepted SM's invitation, Mr D travelled to Tenerife to attend a meeting and met with a representative of another company. He says that company promised to take his holiday product provider to court seeking compensation from them, as that product had been mis sold to him. To do so, Mr D was told he'd have to pay an upfront fee of £11,968.65 to cover legal costs.

During the meeting, Mr D agreed to enter into two contracts which provided various holiday services. The first of these was with a company (who I'll refer to as "PST") for an agreed price of £3,500. Mr D funded this using his Tesco credit card. The second contract was with another company (who I'll refer to as "GLS") with a price agreed of £8,468.65. Mr D funded this by making a bank transfer from his account with another financial business.

In October 2021, Mr D submitted a claim to Tesco under section 75 of the CCA ("S75"). He said that PST/GLS had breached the contract as he hadn't received any of the promises made to him. He said the facts had been misrepresented at the time of the sale. Further, that GLS had *"since closed it's doors following the on site investigation [...]"* (sic), and had *"disappeared and gone without a trace"*.

Mr D alleges the various companies were linked and provided information he thought supported that. He also pointed out that the two contracts quoted the same reference number and a clause within the contract with GLS showed a link with the contract provided by PST. Mr D's claim was based upon breach of contract by PST and GLS and misrepresentation of the facts relating to his purchase(s).

Having complete their investigation, Tesco offered a partial refund of £3,500 + 8% interest for the contract with PST. But as the GLS contract was not paid for using his Tesco credit card, they said they couldn't consider that part of the claim.

Mr D disagreed with Tesco's findings and insisted that the contracts were interlinked, having been sold at the same time and provided by related companies. He also referred back to information he'd provided to support the existence of a debtor-creditor-supplier ("DCS") link, as required under S75, and reiterated many of the points he'd raised in his original claim.

Tesco considered Mr D's response as a complaint about the outcome of their investigation. Having done so, they confirmed their view that the separate contract with GLS hadn't been funded using a Tesco credit card. And because of that, they weren't able to consider that part of his claim under S75.

Mr D still didn't agree with what Tesco had said. So, he referred his complaint to this service. Having considered all the evidence and information available, one of this service's

investigators didn't think Tesco response was fair and reasonable. They thought the evidence pointed to the contracts having both been sold by PST.

The investigator agreed that Tesco should honour Mr D's claim for the PST contract, but also thought they should reimburse him for the GLS contract too. They agreed that Tesco couldn't be held liable for any breach of contract by GLS as the necessary DCS link didn't appear to exist. But thought Tesco could be held responsible for any misrepresentation of that contract by PST at the time of the sale.

The investigator thought it was likely that misrepresentations were made about PST making a compensation claim on Mr D's behalf. They thought this was Mr D's key driver for his decision to enter into the contracts. But it appears no compensation claim was made, or that there was any intention to do so. Our investigator thought PST had sold the contracts as a package resulting in a DCS Link covering any misrepresentation of that contract by PST. The investigator thought Tesco were liable for that under S75 and should reimburse Mr D accordingly.

Tesco didn't agree with our investigator's findings. They thought our investigator's suggestion that a DCS link didn't exist for breach of contract but did for misrepresentation was contradictory. And because there was no financial link between Tesco and the GLS contract, they didn't agree they should be held liable for it under S75.

As an informal resolution couldn't be reached, Mr D's complaint was passed to me to consider further and reach a decision. Having done that, I was inclined to reach a different outcome to that of our investigator. So, I issued a provisional decision on 21 March 2024 giving both sides the chance to respond before I reach my final decision.

In my provisional decision I said:

Relevant considerations

When considering what's fair and reasonable, DISP¹ 3.6.4R of the FCA² 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.

S75 provides protection for consumers for goods or services bought using credit. Mr D paid for one of the contracts purchased under a pre-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 D 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.

It's important to distinguish between the complaint being considered here and any legal claim. The complaint referred to this service specifically relates to whether I believe Tesco's treatment of Mr D's claim was fair and reasonable given all the evidence and information available to me. This service isn't afforded powers to determine any legal claim itself. That is the role of the courts.

It's also relevant to stress that this service's role as an Alternative Dispute Resolution Service ("ADR") is to provide mediation in the event of a dispute. While the decision of an ombudsman can be legally binding - if accepted by the consumer - we do not provide a legal service. And as I've said above, this service isn't able to make legal findings. Where a consumer doesn't accept the findings of an ombudsman, it doesn't prejudice their right to pursue their claim in other ways.

¹ Dispute Resolution: The Complaints sourcebook (DISP)

² Financial Conduct Authority

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. In doing so, my role isn't necessarily to address, in my decision, every single point that's been made. And for that reason, I'm only going to refer to what I believe are the most salient points having considered everything that's been said and provided.

No evidence has been provided by any of the supplier companies referred to above. The only evidence relating to what was purchased, and the circumstances surrounding that, was provided by Mr D along with his recollections. I'm mindful that recollections may not always be an accurate representation of the precise sales process as memories can be imperfect. So, I've had to weigh up all of that when deciding what I thought most likely happened. I don't think it was unfair on Tesco for me to do that – ultimately I must decide the complaint based upon the evidence available.

In considering Mr D's complaint, I think it's important to set out what I've found Mr D agreed to and with which business. I've then considered any legal claims that Tesco need to consider, given the relationships between the various parties. Finally, I've considered whether Tesco need to do anything more to resolve Mr D's complaint.

Mr D's memories of the sale

Mr D has explained what he recalls happening leading up to and including the point of the sale. He explained that he was cold called around March 2018 by someone representing SM. He said they offered him a free consultation at their offices in Tenerife with a professional representative who would advise him on options to relinquish an existing long term holiday product sold to him previously by another holiday product supplier. Mr D said they would claim compensation for that purchase by taking the company to court under the provisions of the European Timeshare Directive.

Mr D went on to say that when he attended the appointment in Tenerife, PST/GLS promised to take his holiday product supplier to court under new laws and legislation. But the compensation would only be obtainable if he paid an upfront fee of £11,968.75 to cover legal costs. Mr D further said he was told his membership (with PST and GLS) would provide an unlimited choice of flights and holiday accommodation at substantially discounted prices. He said they also gave him various additional 'free' benefits. Mr D said he was told there was no cancellation clause, and the membership was a "*today only*" offer

Despite all of this, Mr D has been unsuccessful in securing any of his preferred holiday choices or a competitive price. And the prices could always be matched or bettered using other conventional holiday booking services. Further, it appears Mr D has had no further communication in relation to any compensation claim for his existing holiday product.

The available documents

Much of the documentation comes from the sales that took place on 21 June 2018 ("the time of the sales"). I've seen various documents, each signed by Mr D. It's not entirely clear what each related to, so I will set them out below and then explain what I thought happened.

I've seen an email from a company (who I'll refer to as "CYC") dated 20 March 2018. It confirms Mr D was offered one week's accommodation in Tenerife free of charge and included:

“An appointment will be arranged with your Claim Consultant in Tenerife and the process will be as follows;

- 1. You would expect to receive back no less than the original purchase price as discussed, on a strictly No win No Fee basis.*
- 2. The procedure will take a maximum of 60 days and only on receipt of refunded monies into your bank will you be asked to pay the companies percentage of 20%*
- 3. The relinquishment of any timeshare or points would then follow to eliminate any further maintenance bills.”*

I've seen no other information relating to the accommodation booking referred to in this email and I've seen no other documents evidencing the involvement of SM – the original cold caller.

I've seen a document on PST headed paper with the heading 'Accommodation Contract' which is dated 21 June 2018. An extract reads:

“Included in the initial subscription fee is 1 week of accommodation in the Canary Islands, provided and used, a second week reserved and paid for today 21 June 2018 and the choice of 2 additional weeks of accommodation in any of the Canary Islands of your choice, reserved and paid for today, which can be modified if required.”

The reservation details showed that the 'Tourist Agent' was PST, and the price and other offers were agreed by PST. The total price as £2,500 (€3,990.03) and it said payment was received on 21 June 2018.

I've seen another document on GLS headed paper which was headed 'Subscription for the Exclusive Service'. This set out that Mr D was to pay £8,500 (€9,690) by bank transfer on 21 July 2018. On a further page to that document, it includes the following:

- 1. “[...] the person/s will be entitled to full usage of [GLS] facilities.*
- 2. “The duration of this application is for a period of 364 days from the date of completion [...] the person/s can renew for no additional cost and this facility is repeated at the end of each 364 day period.”*
- 6. “All accommodation and flight benefits are subject to availability.”*
- 7. “The week of accommodation in the Canary Islands is to be used before the Exclusive use of the Travel Agency.”*
- 10. “[...] the Product is not a long term holiday product (LTHP) or Timeshare, and as such does NOT fall under any part of the 2011 EU Timeshare Directive, with regards to a statutory legal requirement offer of a “COOLING OFF PERIOD””*

A further document on GLS headed paper provides bank transfer details to enable a payment of £8,460 to be made by 21 July 2018.

Mr D has also provided copies of correspondence between him and Tesco.

What payments were made?

I've seen a copy of an 'International payment request' dated 5 July 2018 for €9,256 (£8,468.65) from his account with another financial business albeit I haven't seen a bank statement showing completion of the payment..

Mr D's Tesco credit card statement shows that he made two credit card payments to PST on 21 June 2018. The first for €2,850.01 (£2,507.21) with a related transaction

fee charged of £68.94. The second was for €1,140.02 (1,002.90) with a related transaction fee of £27.57.

What were the agreements?

It appears Mr D purchased accommodation from PST for one week in Tenerife, a further week in Tenerife and two further weeks anywhere in the Canaries – a total of four weeks. From the evidence available, I think Mr D paid for this using his Tesco credit card. Although the Sterling amounts don't exactly correspond for the payments and the contract, the combined credit card payments were for the same amount in Euros.

Mr D also purchased something from GLS as detailed in the document 'Subscription for the Exclusive Service' I've referred to above. It's unclear to me what this was for, but I think it was for some form of travel or holiday service. The contract price was £8,500 (€9,690), and although the international payment request provided differs slightly from those amounts, I'm persuaded that's how Mr D paid for that service.

Other than the initial email received in March 2018 from CYC, I've seen no other reference to the provision of a claim service, as referred to by Mr D. And it isn't clear to me whether the person Mr D spoke to (at CYC) was acting as an agent for or representing PST or GLS. It also isn't clear whether the person Mr D spoke to, at the time of the sale, was from PST, GLS or any other business. That said, what does seem clear is that Mr D entered into a contractual relationship with both PST and GLS as a result of the various discussions. And although I've not seen any evidence to link the email in March 2018 from CYC to the sales meeting in June 2018, on balance, I think it more likely than not that the two are related.

It seems both of the contracts were entered into at the same time as part of the same sales meeting. So, to some extent they were linked in that there's nothing to suggest Mr D was offered these parts individually. Or that they could've been purchased individually. Particularly as note 7 of the GLS contract specifically references that the Canary Island accommodation must be used before that product can be used. Further, as observed by our investigator, both contracts appear to include the same reference number. So, I think it more likely than not they were sold together as a 'bundle'. That said, I haven't seen any evidence that the two businesses were part of the same company, even if they were based at the same address.

Is Tesco jointly responsible for any breach of contract or misrepresentation?

Tesco have accepted that there has been a breach of contract in relation to the products Mr D purchased. So, I don't think I need to make a finding on this aspect of Mr C's claim. But Tesco didn't agree they should be held liable for any breach under the contract with GLS as this was distinct and separate and wasn't paid for using Mr D's Tesco credit card.

Ultimately, even if I was to find that the GLS contract was sold by PST (acting as GLS's agent) it remains that it is GLS that were responsible for fulfilling that contract – not PST. And whether or not those companies may have been connected, it appears they were still registered as separate companies in their own right.

S75 provides that where there's a claim for breach of contract, Mr D can make a 'like claim' for that breach against Tesco, so long as all the requirements of that provision are met. That includes the existence of the necessary DCS relationship between Tesco and the company responsible for fulfilling the contract.

Here, the Tesco credit card payment was made to PST, and they undertook to provide a contractual service to Mr D. So, I think this established the necessary DCS link for the contract that was to be fulfilled by PST. Tesco have agreed that's the case and their settlement offer reflects that.

However, even if I was to find that the two contracts (with PST and GLS) were sold as one 'package', whilst that 'package' was paid for – in part – using the Tesco credit card, I can't see that PST were responsible for fulfilling any obligations under the GLS contract. Because of that, I don't believe there's the necessary DCS link to render Tesco liable for a breach of contract claim against GLS. Tesco weren't involved in any payment to GLS. So, I agree with Tesco here. I don't think they can be held responsible for any breach of that contract by GLS.

Did Tesco properly consider the claim?

Whilst it appears Tesco have considered the breach of contract allegations; I haven't seen any suggestion that they've considered Mr D's allegations of misrepresentation.

Tesco need to properly assess any such claims, here that the misrepresentation was fraudulent and/or negligent. The normal way to remedy such a claim would be rescission of the contract entered into and damages to put Mr D in the position he would've been had the misrepresentation not been made. So, I first needed to consider whether PST, and thereafter, GLS, could be liable for a misrepresentation.

I can't see that Mr D has made an allegation that GLS misrepresented the specific nature of their contract with him. Rather that he suggests he didn't gain any benefit from it. However, I thought focusing solely on that was too narrow a way to look at the issue of misrepresentation. A misrepresentation about something outside of the contract can still be actionable if it induced someone to enter into the agreement. Here, it appears CYC told Mr D he would benefit from a claims service in respect of his existing holiday product. So, I think a misrepresentation about the service offered by CYC was something that could have induced Mr D to enter into the agreements with PST and GLS.

From Mr D's recollections, supported by the email he received from CYC in March 2018, I'm persuaded that Mr D travelled to and attended the appointment with PST in Tenerife because of the representation CYC made about the claims service that would be provided. In Particular, that a legal claim would be made, and the procedure would take a maximum of 60 days.

For me to conclude there was misrepresentation in the way that has been alleged, generally speaking, I would need to be satisfied, based on the available evidence, that false statements of fact or law were made when the products were sold. In other words, that Mr D was told something that wasn't true in relation to the allegations raised. I would also need to be satisfied that the misrepresentations were material in inducing Mr D to enter into the contracts. This means I would need to be persuaded that he reasonably relied upon false statements when deciding to buy the products sold.

Mr D has set out what he believes amounts to misrepresentation. In particular, that a claim would be initiated, on his behalf, which would result in him recovering any outlay for his existing holiday product within 60 days. The specific things included within CYC's email to Mr D were clearly representations of things that the "*Claim Consultant in Tenerife*" would cause to happen. But I think those statements of fact weren't true. And I thought CYC must have known they couldn't guarantee any payment of compensation within a specific timeframe or at all. Or that they had reasonable grounds for believing they could do so. Any claim made to Mr D's previous holiday product provider was simply that – a claim – with no guarantee it would be paid or how much. Further, claims like that take time. So, I thought it was fanciful to say that anything would be paid within 60 days. And I couldn't see how CYC could have any reasonable grounds to believe they could procure the outcome it said it would. It follows that I think this amounted to a misrepresentation.

And given what I've said above, I don't think Mr D would've agreed to enter into the contracts with PST and GLS but for that misrepresentation. I think the central reason he entered into the contracts was that the claim would lead to him receiving compensation for his previous purchase.

Given my findings above, and as I believe there was a DCS link in place between Mr D, PST and Tesco, I think Tesco would need to pay a sum equivalent to what Mr D paid to PST to enter into the contract with them. In reality, they've done that but for different reasons. However, from the evidence available, it isn't clear whether the person who sold the agreements to Mr D was from PST, GLS, CYC or another third party. And as neither GLS nor CYC were paid using Mr D's Tesco card, I don't think Tesco can be held legally responsible for the misrepresentations of those companies. And as I can't say for certain in what capacity the salesperson was acting, I can't reasonably say that Tesco's liability extends to cover amounts paid to GLS.

The Debtor-Creditor-Supplier ("DCS") Links

Having considered everything here, I think it's highly likely that PST, GLS and CYC are 'linked'. Particularly given that the products were sold together by the same people from the same office. I've also considered what the position would be if the various businesses were associated (as set out in sections 184 and 187 of the CCA) where there's proven common directorship. Having done that, I still don't think Tesco needs to compensate Mr D for what he paid to GLS.

Here Mr D entered into a contract with PST and paid it directly using his credit card. That meant there was a DCS link in place in respect of that purchase. And as the creditor, Tesco could be held liable for any claim Mr D has against the supplier of that contract (PST) under S75. So, the key issue here is which agreement was financed using the Tesco card?

If the companies were associated, and Mr D used his Tesco credit card to pay PST for something GLS were providing, there may well have been a DCS link in place to cover that specific transaction. However, the Tesco credit card wasn't used to finance the other contract between Mr D and GLS. So, whether or not PST and GLS were associated doesn't make a difference in this complaint.

Here the issue is that when Mr D was told by CYC that a successful claim would be made on his behalf, I don't think it was clear who would be making that claim – whether PST, GLS or CYC. And unfortunately, there's no other supporting documentation from any of the companies that says that. So, the only misrepresentation supported by the evidence appears to have been made by CYC. And although I acknowledge Mr D's own recollections, it isn't possible for me to establish who the salesperson in Tenerife was representing. It follows, I can't say that Tesco can be held responsible for the losses that flow from that.

Summary

Tesco have made an offer to compensate Mr D for his losses under the breach of contract claim relating to the agreement with PST. And as I haven't made a finding on that as part of my decision, I'm not able to comment further. The question here is whether Tesco should further compensate Mr D for the payment he made to GLS. For the reasons explained above, I don't think they should.

I do appreciate that Mr D will be very disappointed, but I don't intend to ask Tesco to pay any more to him.

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.

I can't see that Tesco have acknowledged my provisional findings. However, Mr D confirms he doesn't agree with or accept my provisional findings and has provided a detailed response through a representative.

In responding, Mr D's representative repeated various aspects of Mr D's original claim and recollections together with providing various comments, observations and additional evidence. I don't propose to repeat everything that's been said but would summarise as follows:

- CYC, who originally contacted Mr D, were a marketing company procured by PST;
- available articles show connections between CYC, PST and GLS and their alleged operations and tactics;
- correspondence shows links between CYC's original cold call, the claim appointment and Mr D's resultant stay in Tenerife;
- correspondence demonstrates that PST would facilitate a claim on Mr D's behalf;
- the initial contact with CYC makes no mention about the sale of holiday packages;
- the two contracts purchased were linked, having been sold together during the meeting in Tenerife;
- the promises of a compensation claim, and discounted holidays were misrepresented to Mr D;
- PST organised a loan for Mr D through another financial business to fund his payments;
- Mr D only took up the loan as he'd been guaranteed compensation in 60 days under his claim;
- failure to secure the promised compensation is a breach of contract by PST;
- had Mr D not paid for the contract with GLS, his claim wouldn't have been initiated;
- a letter from PST confirms that PST would initiate Mr D's claim for the estimated amount of £33,000; and
- whilst PST and GLS had different company numbers, a publicly available article concludes that the companies are the same business.

In my provisional findings, I thought it was reasonable to conclude that Mr D's trip to Tenerife was driven by CYC's offer of a free consultation with a representative who could advise on options to initiate a claim for a timeshare product he owned. The additional comments and evidence provided support that view. I also said, *"I think it's highly likely that PST, GLS and CYC are 'linked'"*. So again, I reached that conclusion within my provisional findings.

The key issue here is establishing what, if any, liability Tesco might have under S75 for the transactions that were involved. And where a potential liability is likely to exist, to what extent that links to the alleged misrepresentations and contract breaches.

In my provisional decision, I summarised the various purchase documents and how the payments made appear to relate to them. I also included my interpretation of what those documents suggest was actually purchased together with who was responsible for providing those products and/or services and consequently, what potential liability could exist under S75.

I've now seen a letter from PST confirming they would initiate a claim on Mr D's behalf. And it's alleged that Mr D had to make the payments he did before any claim would be initiated.

However, I've not seen anything to support that. There's no evidence to suggest the claims service PST were offering was contingent upon Mr D making the purchases (and payments) he did. But as I said in my provisional decision, a misrepresentation about something outside of the contract can still be actionable if it induced Mr D to enter into the agreement.

Mr D entered into a purchase agreement with PST as a result of the representations made. So, it could be argued that he wouldn't have made that purchase but for PST's representation that they would initiate a claim on his behalf. But I can't see they've done that here. So, Tesco could be held liable under S75 for that misrepresentation. And as I've said in my provisional decision, I think that means Tesco would need to refund Mr D for that purchase. That's what they've offered here, but for different reasons.

However, Mr D didn't use his Tesco credit card to purchase the product from GLS. And the bank transfer was made direct to GLS, rather than through PST. So, as I explained in my provisional decision, whether or not PST and GLS were associated doesn't make a difference in this complaint. So, I can't reasonably hold Tesco liable for that payment.

Summary

I would like to reassure Mr D that I've carefully considered everything he and his representative have said, including their response and evidence provided following my provisional decision.

Whilst I do acknowledge Mr D disagrees with my findings, for the reasons above, I won't be asking Tesco to do anything more here.

My final decision

For the reasons set out above, I don't uphold Mr D's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 21 May 2024.

Dave Morgan
Ombudsman