

The complaint

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

What happened

In or around June 2017, Mrs H says she received an unsolicited cold call from a company (who I'll refer to as "PST") offering a free consultation with a professional representative at their offices in Tenerife. Mrs H was told the representative would advise on her options for claiming compensation for a previously owned timeshare product supplied by another business.

Having accepted the invitation, Mrs H travelled to Tenerife with her husband to attend a meeting with a representative of PST in November 2017. She says PST promised to take her previous timeshare supplier to court seeking compensation for her, as they said the timeshare product had been mis sold. To do so, Mrs H says she was told she'd have to pay an upfront fee of £12,058.62 to cover legal costs.

During the meeting, Mrs H agreed to enter into two contracts which provided various holiday services. The first of these was with PST for an agreed price of £3,000 (€3,360.86). Mrs H funded this using her Tesco credit card. The second contract was with another company (who I'll refer to as "SIE") with a price agreed of £9,000 (€10,080). Mrs H funded this by making a bank transfer from her account with another financial business.

In February 2022, Mrs H submitted a claim to Tesco under section 75 of the CCA ("S75"). She said that PST/SIE had breached the contracts as she hadn't received any of the promises made to her. She said the facts had been misrepresented at the time of the sale. Further, that PST and SIE have *"all now disappeared and gone without a trace [due to] negative exposure on mainstream media"*.

Mrs H alleges the various companies were linked and provided information she thought supported that. She also pointed out that the contracts and documentation quoted the same reference number and a clause within the contract with SIE showed a link with the contract provided by PST. Mrs H's claim was based upon breach of contract by PST and SIE and misrepresentation of the facts relating to her purchase(s).

Having investigated the circumstances of Mrs H's claim, Tesco said they hadn't been provided with documentary evidence to support any alleged breach of contract under the agreement with PST. And as the contract with SIE wasn't paid for, in any part, using a Tesco credit card, they wouldn't consider a claim for that element. They also didn't think they could consider any claim in relation to any agreement to secure compensation as there was no evidence any fee or charge had been paid for that using a Tesco credit card.

Unhappy with Tesco's response, Mrs H and Tesco exchanged further emails and correspondence. But Mrs H wasn't able to achieve the outcome she wanted, and Tesco didn't think they'd done anything wrong in the way they'd handled her claim. So, Mrs H referred her complaint to this service.

One of this service's investigators considered all the information and evidence provided. Having done so, our investigator didn't think Tesco had acted fairly and reasonably. They

thought the contracts had been sold as a package by connected businesses. And Tesco should reimburse all payments for the contracts to Mrs H together with statutory interest.

Having considered our investigator's findings, Tesco didn't think their initial decision was correct and provided a settlement offer for Mrs H to consider. Specifically, they now thought the contract with PST had been breached. And they agreed that breach does fall within the scope of S75. So, Tesco offered to refund the £2,994.28 Mrs H paid to PST using her credit cards. But they didn't agree they should be held liable for the separate contract with SIE as it wasn't financed by them. Further, they didn't agree there was any liability under S75 in relation to the compensation claim as there was nothing to show that any upfront payment had been made for that.

Our investigator forwarded Tesco's offer to Mrs H to consider. But she didn't agree it represented a fair outcome. So, as an informal resolution couldn't be reached, Mrs H's complaint was passed to me to consider 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 25 March 2024 giving both sides the chance to respond before I reached 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. Mrs H 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 Mrs H is afforded the protection offered to borrowers like her 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 Mrs H'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.

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.

¹ Dispute Resolution: The Complaints sourcebook (DISP)

² Financial Conduct Authority

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 Mrs H along with her 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 Mrs H's complaint, I think it's important to set out what I've found Mrs H 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 Mrs H's complaint.

Mrs H's memories of the sale

Mrs H has explained what she recalls happening leading up to and including the point of the sale. She explained that she was cold called in or around June 2017 by someone representing a marketing company (who I'll refer to as "IB"). Mrs H said they offered her a free consultation at their offices in Tenerife with a professional representative who would advise her on options to secure compensation relating to a timeshare product she'd bought previously from another business – albeit that product had already been relinquished. Mrs H said IB told her a claim for compensation could be made for that purchase by taking the company to court under the provisions of the European Timeshare Directive.

Mrs H went on to say that when she attended the appointment in Tenerife, PST promised to take her holiday product supplier to court under new laws and legislation. But the compensation would only be obtainable if she paid an upfront fee of £12,058.62 to cover legal costs. Mrs H further said she was told the service purchased from SIE would provide an unlimited choice of flights and holiday accommodation at substantially discounted prices and provided various additional 'free' benefits. Mrs H said she was told there was no cancellation clause, and the membership was a "*today only*" offer

Despite all of this, Mrs H says she's been unsuccessful in securing any of her 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 Mrs H has had no further communication in relation to any compensation claim for the timeshare holiday product she'd previously owned.

The available documents

Much of the documentation comes from the sales that took place on 23 November 2017 ("the time of the sales"). I've seen various documents, each signed by Mrs H (and her husband). 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 accommodation voucher from another business (who I'll refer to as "ADS"). It confirms a booking for five nights' accommodation from 22 November 2017 to 27 November 2017. The voucher makes no reference to either PST or SIE and doesn't detail any costs, charges or payments. It also doesn't provide any details of who booked or arranged the booking, and I haven't seen any other emails or correspondence referencing this booking or its purpose. However, I am persuaded it was during this visit that the sales meeting took place. And I'm also persuaded that visit was conducted as a consequence of the call Mrs H had previously received.

I've seen a document on PST headed paper with the heading 'Accommodation Contract' which is dated 23 November 2017. 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 23rd November 2017 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 is stated as £3,000 (€3,360.86) and it said payment was received on 23 November 2017.

I've seen another document on SIE headed paper which is headed 'Subscription for the Exclusive Service'. This set out that Mrs H was to pay £9,000 (€10,080) by bank transfer on 23 December 2017. On a further page to that document, it includes the following:

1. *"[...] the person/s will be entitled to full usage of [SIE] 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 SIE headed paper provides bank transfer details to enable a payment of £8,960 to be made by 23 December 2017.

Mrs H was also given a letter addressed to her and her husband on PST headed paper from the date of the sale. It confirms that PST "will instigate a claim on your behalf for the estimated amount of £49,000 [...]". The letter also says:

"All claims will be settled in full directly to yourselves, at which point you will be expected to pay back 20% of the total claim. Therefore the estimated net figure would equate to £39,200."

Please note, from registering the claim, to having the monies paid into our client account, will take a maximum of 60 days."

[PST] is not a finance company, and is currently working with a third party firm of Solicitors, and various advisory companies, who specialise in reclaims, to enable us to offer our customers this intermediate service”.

Mrs H has also provided copies of correspondence between her and Tesco.

What payments were made?

I've seen a copy of a 'Foreign payment confirmation' dated 30 December 2017 for £8,960 to SIE from another financial business, albeit it doesn't show the name of the account holder and I haven't seen a bank statement showing completion of that payment.

Mrs H's Tesco credit card statement shows that she made a credit card payments to PST on 23 November 2017 for €3,360.86 (£2,994.28) with a related transaction fee charged of £82.34.

What were the agreements?

It appears Mrs H 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 Mrs H paid for this using her Tesco credit card as the amount in Euro's is the same as detailed on the accommodation contract with PST.

Furthermore, in signing the contract, Mrs H (and her husband) confirmed they'd used the first week and had reserved and paid for the other three weeks.

Mrs H says she also purchased something from SIE as detailed in the document 'Subscription for the Exclusive Service' I've referred to above. It's unclear to me what the contract was for, but I think it was for some form of travel or holiday service. The contract price was shown as £9,000 (€10,080), although the foreign payment confirmation is for a slightly lower amount and doesn't show who the account holder was that made the payment. So, based upon this evidence, whilst I'm persuaded the payment did, on balance, relate to that purchase, I can't say for certain the payment was made from an account in Mrs H's name.

I also think PST agreed to make a claim on Mrs H's behalf in relation to the rescinded timeshare membership that was previously held. It isn't clear what that claim was actually for, but PST said Mrs H would receive a pay out within 60 days from registering the claim, which would be £49,000. However, I've not seen any evidence to show that a claim was registered. In exchange for this service, it appears Mrs H agreed to pay 20% of what was recovered to PST.

I think it's likely the agreements were entered into at the same time and at the same meeting. So, to some extent, I think they were linked in that there's nothing to suggest Mrs H was offered these parts of the deal individually. But I can't see that the various businesses, I've referred to, were all part of the same company.

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

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

Ultimately, even if I was to find that the SIE contract was sold by PST (acting as SIE's agent) it remains that it is SIE 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, Mrs H 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 Debtor-Creditor-Supplier³ ("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 Mrs H. So, I think this established the necessary DCS link for the contract that was to be fulfilled by PST. Tesco have now 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 SIE) 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 SIE 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 SIE. Tesco weren't involved in any payment to SIE. So, I agree with Tesco here. I don't think they can be held responsible for any breach of that contract by SIE.

Did Tesco properly consider the claim?

Tesco have said there was no evidence that there was a misrepresentation made about the accommodation contracts. Mrs H claims they didn't get any of the accommodation they were entitled to under that agreement. But I can't say, based on the available evidence, that was down to SIE's actions. So, I can't reasonably say that there was a breach of that agreement by SIE that Tesco needed to answer under S75.

However, I do think Tesco needed to properly assess any claim for misrepresentation – here that the misrepresentation was fraudulent or negligent. The normal way to remedy such a claim would be rescission of the contract entered into and damages to put Mrs H in the position she would've been had the misrepresentation not been made. So, I first needed to consider whether PST, and thereafter SIE, could be liable for a misrepresentation.

I can't see that Mrs H has made an allegation that SIE misrepresented the specific nature of their contract with her, other than her suggestion the businesses were one and the same. Rather she suggests she 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 PST told Mrs H she would benefit from a claims service in respect of her rescinded timeshare product. So, I think a misrepresentation about the service offered by PST was something that could have induced Mrs H to enter into the agreements with PST and SIE.

From Mrs H's recollections, supported by the letter she received from PST at the time of the sale together with the booking confirmation received in June 2017, I think it's more likely than not that Mrs H travelled to and attended the appointment with PST in Tenerife because of the representations 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 Mrs H was told something that wasn't true in relation to the allegations

³ Under section 75(1) of the CCA and defined under section 12 of the CCA

raised. I would also need to be satisfied that the misrepresentations were material in inducing Mrs H to enter into the contracts. This means I would need to be persuaded that she reasonably relied upon false statements when deciding to buy those products.

Mrs H has set out what she believes amounts to misrepresentation. In particular, that a claim would be initiated, on her behalf, which would result in her recovering any outlay for her rescinded timeshare product within 60 days. The specific things included within PST's letter to Mrs H were clearly representations of things that PST would cause to happen. But I think those statements of fact weren't true. And I thought PST 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 against Mrs H'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 PST could have any reasonable grounds to believe they could procure the outcome they said they would. It follows that I think this amounted to a misrepresentation.

And given what I've said above, I don't think Mrs H would've agreed to enter into the contracts with PST and SIE but for that misrepresentation. I think the central reason she entered into the contracts was that PST would initiate a claim that would lead to her receiving compensation for her previous timeshare purchase.

Given my findings above, and as I believe there was a DCS link in place between Mrs H, PST and Tesco, I think Tesco would need to pay a sum equivalent to what Mrs H paid to PST to enter into the contract with them. In reality, they've offered that but for different reasons. From Mrs H's recollections, it's unclear whether the misrepresentations were made by PST or SIE albeit the letter referring to the claims service was from PST. However, I can't see that SIE were at any time paid using Mrs H's Tesco credit card, so I don't think Tesco can be held legally responsible for any misrepresentations made by SIE anyway. And because of that, I can't reasonably say that Tesco's liability extends to cover amounts paid to SIE.

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

Having considered everything here, I think it's highly likely that PST and SIE are 'linked'. Particularly given that the products were sold together by the same people from the same office. So, 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 Mrs H for what she paid to SIE.

Here Mrs H entered into a contract with PST and paid for it directly to them using her 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 Mrs H 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 Mrs H used her Tesco credit card to pay PST for something SIE 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 Mrs H and SIE at all. And the bank transfer was made direct to SIE, rather than through PST. So, whether or not PST and SIE were associated doesn't make a difference in this complaint.

But, as I've already said, I do agree that Tesco have a liability under S75 in respect of the credit card payment made to PST. During the course of this service's investigations, Tesco revised their findings to include their offer to settle that amount.

And in order to make the settlement binding, I intend to include that within my provisional decision.

Summary

I do appreciate that Mrs H will be very disappointed as this isn't the outcome she's expecting or wants. But I'd like to reassure her that I've considered everything very carefully; including how the provisions of the CCA apply here.

I intend to ask Tesco Personal Finance PLC trading as Tesco Bank to pay to Mrs H a sum equivalent to what she paid to PST using her credit card. That being £2,994.28 plus 8% per annum simple interest* from the date of payment to the date of settlement.

*If Tesco considers they should deduct income tax from any 8% interest element of my proposed award, they may do so. But they should give Mrs H the necessary certificate to show that, should she request one.

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, Mrs H confirms she doesn't agree with or accept my provisional findings and has provided a detailed response through a representative.

In responding, Mrs H's representative repeated various aspects of Mrs H'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 the following was included:

- IB, who originally contacted Mrs H, were a marketing company procured by PST;
- available articles show connections between IB, PST and SIE and their alleged operations and tactics;
- correspondence shows links between IB's original cold call, the claim appointment and Mrs H's resultant stay in Tenerife;
- correspondence demonstrates that PST would facilitate a claim on Mrs H's behalf;
- the initial contact with IB 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 Mrs H;
- PST organised a loan for Mrs H's husband through another financial business to fund the payments;
- Mrs H's husband only took up the loan as they'd been guaranteed compensation in 60 days under their claim;
- failure to secure the promised compensation is a breach of contract by PST;
- had Mrs H and her husband not paid for the contract with SIE, their claim wouldn't have been initiated;
- a letter from PST confirms that PST would initiate the claim for the estimated amount of £49,000; and

- whilst PST and SIE had different company tax numbers, evidence suggests that the companies are the same business.

In my provisional findings, I thought it was reasonable to conclude that Mrs H's trip to Tenerife was initially driven by IB's offer of a free consultation with a representative who could advise on options to initiate a claim for a timeshare product she and her husband previously owned. The additional comments and evidence provided support that view. I also said, "*I think it's highly likely that PST and SIE 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.

It's alleged that Mrs H had to make the payments she 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 Mrs H making the purchases (and payments) she did. But as I said in my provisional decision, a misrepresentation about something outside of the contract can still be actionable if it induced Mrs H to enter into the agreement.

Mrs H entered into a purchase agreement with PST as a result of the representations made. So, it could be argued that she wouldn't have made that purchases but for PST's representation that they would initiate a claim on her and her husband's 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 Mrs H for the purchase they financed. They've already offered to refund the amount paid using Mrs H's credit card but for different reasons. And I included that requirement in my provisional decision.

However, there's no evidence Mrs H used her Tesco credit card to purchase the product from SIE. And the bank transfer was made direct to SIE, rather than through PST. So, as I explained in my provisional decision, whether or not PST and SIE were associated doesn't make a difference in this complaint.

Mrs H's representative has provided a copy of a bank statement showing an international payment out of that account of £8,982 on 2 January 2018 – after the payment due date detailed in the agreement with SIE. The bank statement also shows a payment into that account of £12,0000 suggesting a personal loan received from another financial business. Mrs H says the loan was arranged by PST to fund the payments made to them (and SIE).

The bank statement doesn't appear to include the account holder's name. I therefore can't say, with any certainty, that the payment of £8,982 was made from an account in Mrs H's name. Although, on balance, I am persuaded it's likely the payment related to the SIE contract purchased.

I've also seen a loan statement from the personal loan provider together with a letter from that business. Firstly, neither of these documents provide any details of the purpose of the loan. And as a personal loan, it's likely that there was no restriction upon what those funds could be used for. In other words, they weren't contractually tied to the purchases in question. Secondly, it appears the loan was actually in the name of Mrs H's husband rather than her. So, even if I found that the payment transactions were connected, it appears the second payment (to SIE) was funded by Mrs H's husband, not Mrs H.

Ultimately, I've not been provided with any new evidence that demonstrates that a valid DSC exists involving Tesco, SIE and Mrs H in relation to the associated payment of £8,962. And because of that, I can't reasonably hold Tesco liable for that payment.

Putting things right

I would like to reassure Mrs H that I've carefully considered everything she and her representative have said, including their response and the additional evidence provided following my provisional decision. I'm persuaded that PST breached (and misrepresented) the contract they provided. And because of that, Tesco should reimburse Mrs H for the payment she made to PST using her credit card.

Whilst I acknowledge Mrs H disagrees with my provisional findings, for the reasons above, I won't be asking Tesco to make further reimbursement for any amount paid to SIE.

I require Tesco Personal Finance PLC trading as Tesco Bank to pay to Mrs H a sum equivalent to what she paid to PST using her credit card. That being £2,994.28 plus 8% per annum simple interest* from the date of payment to the date of settlement.

If Tesco considers they should deduct income tax from any 8% interest element of my proposed award, they may do so. But they should give Mrs H the necessary certificate to show that, should she request one.

My final decision

For the reasons set out above, I uphold Mrs H's complaint and requires Tesco Personal Finance PLC trading as Tesco Bank to put things right as described above under "Putting things right".

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs H to accept or reject my decision before 23 May 2024.

Dave Morgan
Ombudsman