

## **The complaint**

Mr D complains that Tesco Personal Finance PLC, trading as Tesco Bank, has treated him unfairly in regard to a dispute about flight baggage.

## **What happened**

Mrs D is an additional cardholder on Mr D's Tesco credit card account. In January 2023 Mrs D used Mr D's Tesco credit card account to pay a website (the Website) who then booked her and her husband (Mr D) onto flights provided by an airline (the Airline). The Website told them that there was no baggage allowance on the flights and the booking confirmation shows this, as do emails from the Website on the subject. So Mrs D then made a separate transaction with the Website to purchase a baggage allowance in her name for an additional expenditure of £147.78, again using Mr D's credit card account. Mr D says it transpires through discussion with the Airline (and Mr and Mrs D's research) that the Airline does in fact provide a baggage allowance with such flights as they'd booked. So they asked the Website to refund the £147.78 for the luggage allowance they purchased on the basis that the Website had made a false statement of fact which had been relied upon and caused loss. The website refused. So they complained to Tesco.

Tesco didn't refund Mr D the £147.78 because it said it relied on the evidence of the Website which said the booking didn't get a baggage allowance. But Mr D felt this was unfair so he brought his complaint to this service.

Our investigator looked into the matter and concluded Tesco had treated Mr D unfairly and should pay Mr D the cost of the additional baggage purchase. Tesco didn't agree and argued that it wasn't wrong and that the conditions for a Section 75 claim to be successful hadn't been met. So the complaint was passed to me to decide.

Earlier this month I issued a provisional decision upholding the complaint. Both parties, Tesco and Mr D have responded. So I now issue this decision.

## **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.

Tesco hasn't contested anything with regard to my thinking in my decision. It has simply said it has nothing further to add. Mr D has accepted my decision. Accordingly I see no persuasive reason to deviate from my provisional rationale (which is summarised below) or the conclusions I reached. Accordingly I uphold this complaint and Tesco must pay £147.78 plus 8% simple from the date it declined his claim until it settles this matter with Mr D.

### *Summary of my rationale*

*Almost all facts here aren't in dispute. Mrs D made the booking for the flights and the separate booking for the baggage using Mr D's Tesco credit card account by using her additional cardholder status and made both transactions with the Website. The Website*

clearly told Mrs D in the booking confirmation and in emails that the flight booking didn't come with a baggage allowance. And the Website maintains that the flight bookings it made didn't come with any baggage allowance.

chargeback

The chargeback scheme is voluntary scheme, has limited and prescribed chargeback reason codes and doesn't take into consideration wider evidence. It seems likely the flight transaction would have been defended on the basis that the flights were provided and the baggage transaction defended on the basis that the baggage service was provided. And consequential losses (as claimed here) cannot be claimed under chargeback. So considering the straightforward process that chargebacks follow and only certain prescribed types of chargebacks can be raised, I'm not persuaded either chargeback would have been successful had they been pursued to the end of the process. So Mr D hasn't lost out because Tesco didn't pursue chargebacks further.

Section 75 of the Consumer Credit Act 1974 (shortened for ease to S75 and CCA respectively)

Mr D has provided Tesco with pictures from the Airline's webpage at the time of check in, which confirm that both Mr D and his wife were entitled to check in one piece of 30kg luggage and bring one piece of hand luggage on board, on each flight. It confirms that this was free.

I've also reviewed the Airlines terms and conditions and these state that the Airline's baggage allowance for this route and all such flights per passenger was "1 piece up to 30kg". The terms and conditions confirm they are applicable "If you have been issued with a ticket for carriage by air by (the Airline)" which is the case for Mr D and Mrs D, as the airline issued the tickets after check-in through its website. So I'm satisfied that the terms and conditions, which included the baggage allowance, applied to Mr D's booking, and that this baggage allowance was not added on in error by the airline.

I think had they been told the truth about the baggage they would not have purchased the extra baggage allowance that they did for £147.78. Based on the evidence available and bearing in mind that the Website stood to gain from this misrepresentation through the extra payment it received for the baggage transaction it offered, it is hard to conclude whether the misrepresentation is fraudulent, negligent, or innocent. I note Tesco's comments inferring its belief that it was made innocently. However it is of note that it did offer the baggage service to Mr D and Mrs D and would profit from that.

Tesco seem to be challenging whether Mrs D can make a like claim in relation to the booking for the baggage due to it being made by Mrs D in her role as an additional cardholder. However that isn't what Mr D and Mrs D are saying. They are saying they were misrepresented into making the baggage booking due to being misrepresented to during the flight booking. So although DCS is a consideration here (which I'll go on to address) Tesco's point here isn't persuasive as Mr D and Mrs D are saying that the baggage purchase was the loss suffered rather than the contract they are disputing on its own merits.

It isn't in dispute that the credit card agreement here falls within the CCA qualifying criteria as set out in s75 as described above. So the reality of the DCS situation here is I think best addressed by asking of two questions. Firstly can Mr D make a claim or be a claimant against the website, because if the answer to that question is yes he can make a 'like claim' against Tesco. Secondly, if he can make such a claim and the misrepresentation is made out, can he claim for a loss which he suffered (by paying that amount on his credit card) but

wasn't a contracting party to. If the answers to both questions are positive then Tesco should pay the £147.78.

can Mr D make a claim?

*In order to answer this I've considered the Website's terms and conditions. The opening paragraph defines the parties to the contract. "References in these terms of use to "you", "your" or "yours" are to be taken as references to the site user and the user's company, except where stated or where the context requires otherwise. References to "us" or "we" are to be taken as references to (the Website)." So it seems clear to me that anyone 'using' the Website is a contracting party with the Website and that would include both those making the bookings to travel for themselves but also those who are being provided with flight tickets through the website such as Mr D here. I also note that clause 7(e) says "If you are using this site as a consumer then nothing in these terms of use shall in any way limit your statutory rights." Clearly Mr D is a consumer here as he's acting outside of his business, trade, or profession. So I'm satisfied that Mr D can make a claim against the website both in his own regard but also alongside his wife due to the broad nature of the definition of the contracting parties here.*

can he claim for the loss which he suffered?

*The legal remedies available for misrepresentation depend on whether the misrepresentation was fraudulent, negligent, or innocent. If a misrepresentation is fraudulent or negligent, the claimant may claim both rescission (in essence unwinding the contract) and damages under s2(1) of the Misrepresentation Act 1967 (the Act). If a misrepresentation is negligent or innocent, the court has the discretion to award rescission or damages in lieu of rescission under s2(2) of the Act:*

*"Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded, the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party."*

*So clearly the Misrepresentation Act here gives the court significant room to manoeuvre in deciding remedies for misrepresentation including damages and or rescission. So although I note that Tesco would likely seek to differentiate between the contract where the misrepresentation occurred (the flight booking -covered under a 'like claim') and the contract which crystallised its loss to Mr D (not so covered) it cannot reasonably argue that Court's in this country, when considering misrepresentation generally (and indeed other areas) seek to do practical justice which is fair. And it is clear this is a unique set of circumstances. I also have a fair and reasonable remit here and am empowered to issue final decisions which do not follow the law if I consider it fair and reasonable to do so and give reasons for departing from the law in my decision.*

*It is possible here that Mr D has been innocently misrepresented to in the formation of the contract to purchase the flight tickets. Similarly it could easily be negligent misrepresentation also. Tesco (nor this service) is a court with powers to compel and test evidence to establish what sort of misrepresentation happened here. But Tesco is required to consider s75 claims fairly. I'm not persuaded the reasons it has given for declining Mr D's S75 claim are fair reasons for the reasons I've described.*

*It is clear that Mrs D has in essence been acting as Mr D's agent in purchasing the flight tickets for them both in order to for them both to travel abroad which necessitated the service of baggage transportation obviously. It is clear Mr D has suffered loss here as he funded the transaction to purchase the baggage transportation based on the misrepresentation made to him by the Website. It is obvious (and not remote) that if passengers are informed that there is no baggage allocation for a significant period away and that the option to purchase such baggage is offered to them by the party who made the misrepresentation (and profits from such an offer) then I think it likely a court would on balance consider that Mr D should be awarded damages in line with the loss suffered (the cost of the unnecessary baggage) in relation to the flight booking where he was misrepresented to on this matter. And thus I think it fair for Tesco to consider a like claim similarly.*

### **Putting things right**

So for the reasons in my provisional decision (summary of that is in italics above) and for the reasons I've given in response to the replies of Tesco and Mr D, I think it fair that Tesco remedies this loss by refunding him £147.78 plus 8% simple from the date it declined his claim until it settles this matter.

### **My final decision**

For the reasons set out above, it is my decision to uphold the complaint against that Tesco Personal Finance PLC, trading as Tesco Bank. It should remedy the matter as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr d to accept or reject my decision before 26 June 2024.

Rod Glyn-Thomas  
**Ombudsman**