DRN-5643247

The complaint

Mr M complained about how Tesco Personal Finance Limited trading as Tesco Bank responded to a claim to refund a payment made for goods he said were faulty.

What happened

The parties are familiar with the background details of this complaint – so I will briefly summarise them here.

In August 2022 Mr M visited a well-known online marketplace I'll call AM. He paid around £690 to a supplier I'll call B for a printer. He said the printer developed a fault and stopped working in less than two years.

In June 2024 Mr M contacted B who referred him to the manufacturer for support.

He contacted Tesco to dispute the transaction in June 2024. He said that the printer was high-end, expensive and hadn't been abused or maltreated in any way. He said he wouldn't have expected it to fail within two years. He said he tried to get support, and then a refund, from B but found he would have to find an authorised repairer at his own risk and expense. Tesco said that Mr M had contacted it too late for a refund under the chargeback scheme. It said that the technical criteria, in particular the debtor-creditor-supplier (DCS) agreement wasn't in place to consider a section 75 claim, because there was an additional party involved in the transaction.

Mr M complained about the outcome of the claim but ultimately Tesco didn't uphold his complaint and said it stood by its original response as it wasn't aware of any precedent set by the court.

Mr M referred his complaint to our service. An investigator here reviewed the evidence and agreed that Tesco Bank's answer to the chargeback was fair. But he thought the technical criteria for a section 75 claim was in place. He upheld Mr M's complaint and recommended that Tesco Bank pay the costs of repair plus simple interest. Mr M broadly agreed.

Tesco Bank disagreed. It said that it still didn't agree the DCS agreement was in place as the payment had been made to AM acting as an intermediary, rather than B who was the supplier.

The complaint was passed to me to make a decision. I issued a provisional decision which said:
I've read and considered the evidence submitted by both parties, but I'll focus my comments on what I think is relevant. If I don't comment on a specific point, it isn't because I haven't considered it, but because I don't think I need to comment in order to reach what I think is the right outcome. This is not intended as a discourtesy but reflects the informal nature of this service in resolving disputes.

I need to consider whether Tesco Bank – a financial services provider – has acted fairly and reasonably in handling Mr M's request for a refund. I have to make the distinction between

the financial services provider (Tesco Bank) and the supplier (B) here as we can't look directly at what happened with B. I've gone on to think about what statutory protections and other methods are available in situations like this.

When something goes wrong with goods or services that were paid for, at least in part, by credit card, the card provider can offer to assist in some way. It might have a legal obligation to the account holder under section 75 of the Consumer Credit Act 1974 (CCA) or it might be able to help through other dispute methods such as "chargeback".

Chargeback allows for a refund of the money paid with a credit or debit card in certain situations, such as when goods or services have been paid for and not received. But there isn't an automatic right to get a refund from the card provider. I would expect a card provider to attempt a chargeback if there was a reasonable prospect of success. This is determined by the claim being in line with the rules of the card scheme to which the card belongs.

While it's good practice for a card issuer to attempt to chargeback where certain conditions are met and there's some prospect of success, there are grounds or dispute conditions set by the relevant card scheme that need to be considered. If these are not met, a chargeback is unlikely to succeed. And something going wrong with a merchant won't always lead to a successful claim. Tesco Bank said it was unable to submit the chargeback because it was out of time.

I've looked at the relevant rules from the card scheme. In order for Tesco to raise a chargeback for defective goods it would have had to do so within the strict timescales laid down by the card scheme. This is within 120 days from the day Mr M received the goods. It's not in dispute Mr M raised his claim out of time taking these rules into account, so I don't think Tesco Bank acted unfairly by not pursuing the chargeback. It didn't have a reasonable prospect of success as it wouldn't have been able to comply with the card scheme's rules.

Section 75

Section 75 is a statutory protection that enables Mr M to make a 'like claim' against Tesco Bank for breach of contract or misrepresentation by a supplier paid using a credit card in respect of an agreement it had with him for the provision of goods or services. But there are certain conditions that need to be met for section 75 to apply.

Tesco Bank has focused on whether all of the technical criteria have been met for a section 75 claim to be valid, and in particular whether there is a valid DCS agreement, so I will address this point in detail, starting with the relevant sections of the CCA.

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."

Sections 12(b) and (c), referred to above, read 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.[1]

Section 11(1)(b) of the CCA 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…"

Section 12(b) of the CCA refers to the important 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.

In Mr M's case, his purchase was financed by his credit card with Tesco Bank. The supplier of the printer was B. So long as there were pre-existing arrangements between Tesco Bank and B then there will have been a valid DCS agreement for the purchase and Tesco Bank could be found liable for the supplier's breach of contract or misrepresentation.

Tesco said that the payment for the goods was processed by AM "acting as a platform provider which helps facilitate transactions. AM provides a venue for sellers and buyers to negotiate and complete transactions. Accordingly the contract formed at the completion of a sale for these third-party products is solely between buyer and seller. This means the 'debtor-creditor-supplier' link has been broken and therefore Section 75 does not apply to this purchase".

In response to our investigator's opinion, it went on to say "we are satisfied that the contract to buy the goods was made between Mr M and B and AM acted as an intermediary facilitating the transaction between them. This included taking the relevant payment from Mr M on his Tesco Bank credit card. I appreciate AM then passed that payment on to B, but I'm satisfied the relevant payment was made to AM and this means the DCS link, that section 75 requires, is broken. Mr M paid AM but AM wasn't the party supplying the printer - the Supplier was due to supply the printer".

I think Tesco Bank is saying that AM collected the payment as an agent for the supplier B, and its role was to pass on the payment. My understanding is that it accepts there is a DCS agreement between Tesco, Mr M and AM. But there's no DCS agreement between it, Mr M and B because the payment wasn't made directly. I think this also means Tesco is saying that the payment wasn't made under pre-existing arrangements it had with B. So it thinks there isn't a valid DCS agreement for Mr M to be able to make a Section 75 claim against it for breach of contract by B.

The payments landscape has evolved over the years, significantly broadening the range of suppliers which accept payment by credit card and the number of intermediaries involved in the processing and settlement of these payments, and this is not incompatible with there being arrangements between a creditor and supplier. I'll explain why in more detail with some background.

<u>The historical context</u>

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[1] *Confirmed in Example 16 of Schedule 2, Part II of the Consumer Credit Act 1974*

Credit cards traditionally 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 that 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.

The Court of Appeal 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 & others [2006] ("the OFT case"). The court 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." And: "It is clear that, whether the transaction is entered into under a three-party 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."

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."
An appeal in the same case was later considered by the House of Lords. Lord Mance said the following when 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 used. 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 both 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."

Lord Mance made these comments many years ago, but I think they are still relevant today in the context of further developments in how credit card payments are made to suppliers.

It's clear that even by the mid-2000s commercial practices were evolving and supplier 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 scheme by others, or of not participating in the schemes. Since the mid-2000s there has been further development catalysed by the growth of new technologies and the increasing popularity of e-commerce, and new ways of recruiting suppliers to the card schemes have appeared. 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 these developments.

<u>Recent developments</u>

The recent High Court case of Steiner v National Westminster Bank [2022] EWHC 2519 ("the Steiner case") has provided further comment on the issue of "arrangements" and the DCS agreement in the context of a section 75 claim. The case involved the purchase of a kind of timeshare product using a credit card. The credit card payment was not made to the timeshare provider, it was made instead to a trustee company.

The High Court decided to dismiss the section 75 claim on the basis that the purchase was not made under a DCS agreement, citing 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. Rather, it was whether the debtor's credit card agreement with the creditor was made by the creditor "under pre-existing arrangements, on in contemplation of future arrangements", between the creditor and the 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 creditor's state of mind, 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, on 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 DCS agreement.

<u>How is this relevant to Mr M's case</u>

I think it is possible to draw some general facts and principles from this information which can be applied to Mr M's case:

- *While Mr M's transaction with B was financed by his Tesco Bank credit card, for section 75 to apply, there also needs to have been a DCS agreement in place.*
- *This means there need to have been "pre-existing arrangements" between Tesco Bank and B.*
- *The pre-existing arrangements do not need to have been direct between Tesco Bank and B as the courts have decided that such arrangements can be indirect, and that the way in which suppliers are paid will evolve over time as a consequence of how the card schemes have developed and operate. The card schemes mediate and make possible the arrangements between the various participants within the schemes through their technologies and their setting of comprehensive rules which all scheme participants must follow.*

<u>How did Mr M's payments to AM work?</u>

In order to buy or sell items on AM's marketplace, it's necessary to set up an account with it and agree to terms and conditions relating to various matters including how business is to be transacted between buyers and sellers, the limits of AM's liability if things go wrong, payment arrangements, and so on.

AM's rules regarding payments are governed by a "User Agreement". These outline how AM, or an associated company or "affiliate", acts as a payment intermediary for transactions between buyers and "merchants" or sellers. Payment is received by the intermediary and then passed on to the seller. So when Mr M used his Tesco Bank credit card to pay for the printer, his payment went to AM (or an associate/affiliate service provider) and those funds were then transferred to B.

<u>Were there pre-existing arrangements of the required kind between Tesco Bank and B?</u>

AM is a large, well-known online marketplace on which buyers are able to pay for goods or services using various payment methods, from suppliers AM has recruited to its platform. Paying suppliers via online marketplaces is a method of payment which has evolved over the years and become a widespread commercial practice which is clearly accommodated by the card schemes. It is known to all participants within the schemes that, when a card payment is made via an online marketplace, the ultimate recipient will be a supplier which has been recruited to that marketplace and, indirectly, to the card scheme

itself.

Online marketplaces are a specifically recognised type of participant under the rules of the Mastercard card scheme. Mr M's credit card belonged to the Mastercard scheme, and Mastercard doesn't appear to recognise online marketplaces as a unique, named type of participant in its scheme. However, I think their participation is accommodated and encouraged by Mastercard based on the promotional material it has directed at them.[2]

Given the size of AM, the amount of Mastercard transactions it generates must be very large and so I also think the scheme must have decided that paying suppliers in this way is acceptable. This is supported by the fact it allows AM to bear the Mastercard logo/mark to advertise the acceptance of its cards on the platform. I would also note that, as the Court of Appeal found in the OFT v Lloyds case, card issuers such as Tesco Bank and suppliers on platforms such as AM, each benefit from the involvement of the other in a transaction. The suppliers are able to benefit from the credit extended by Tesco Bank in the form of payment for the goods or services they have agreed to sell, while the card issuers are able to benefit from any interest, fees or charges payable on the transaction.

I think it is likely that Tesco Bank has always understood that the Mastercard scheme would be operated in accordance with evolving rules and commercial practices, and that this evolution was likely to bring in new groups of scheme participants. 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 the same suppliers – suppliers who were accommodated under the Mastercard scheme. So I think Tesco Bank would have contemplated, when agreeing to give Mr M his credit card, that those cards would be used to finance purchases from whatever suppliers the scheme's changing rules and practices accommodated at the time of any given purchase. I think that included B at the time Mr M made his purchase from them.

In light of what I've said above, I think there were the necessary pre-existing arrangements in place between Tesco Bank and B for there to be a DCS agreement between Mr M, Tesco Bank and B for the relevant purchase. This means Tesco Bank would need to consider a section 75 claim brought by Mr M in respect of those purchases, so long as he meets the other conditions for making a valid claim. The price of the goods Mr M purchased falls within the range allowed under section 75 of the CCA, so the purchase meets those criteria too.

Having concluded that the technical criteria for a s75 claim is in place I've gone on to consider if there was a breach of contract.

Implied terms

The Consumer Rights Act 2015 (CRA) is of particular relevance to this complaint. It says that under a contract to supply goods, there is an implied term that "the quality of the goods is satisfactory".

The CRA says the quality of goods are satisfactory if they meet the standard that a reasonable person would consider satisfactory taking into account any description of the goods, the price and all the other relevant circumstances. The CRA says the quality of the goods includes their general state and condition and other things like their fitness for purpose, appearance and finish, freedom from minor defects, and safety.

Satisfactory quality also covers durability which means that the components within the

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[2] *https://developer.mastercard.com/solutions/online-marketplaces/*

printer must be durable and last a reasonable amount of time – but exactly how long will also depend on a number of factors.

Mr M bought a brand-new professional standard printer at a cost of around £690. I think a reasonable person would expect it to be free from fault for a considerable amount of time. Information available online suggests the lifespan of such a printer might be between 5-7 years depending on use.

Mr M has explained that the printer didn't get daily use, he said that he used it around 100 times over the course of less than two years to print photos.
Tesco Bank looked into the claim promptly and it had already asked Mr M to supply any evidence which supported his claim. Had it agreed that it might have some liability I think it might have asked Mr M to supply evidence of the fault which made it not of satisfactory quality at the time it was supplied, which he has now been able to do.

Mr M took the printer to a local repairer for diagnostic and repair, in order to mitigate the situation. He's supplied the diagnostic and invoice for repair. It said that it replaced a Wi-Fi card at a cost of £40 plus a £30 fee for the diagnostic. He paid £70 in total and has told us that the printer is now back to working as expected. A copy of the invoice will be provided with this decision.

I've not seen anything which indicates the fault could be influenced by how Mr M has used or maintained the printer. It seems more likely due to an inherent fault.

A repair is a suitable remedy under the CRA. But I don't think it is fair that Mr M should pay for it.

I think the technical criteria for a Section 75 claim is in place, and there is evidence to support a breach of contract, because the goods were not of satisfactory quality when they were supplied because they weren't sufficiently durable. It follows that a fair way to resolve this complaint would be for Tesco Bank to pay for the cost of the repair.

Like our investigator, I don't intend to award compensation for how Tesco Bank dealt with the claim. I think it kept Mr M informed about what was happening and dealt with the matter promptly.

Mr M responded to the provisional decision and agreed. Tesco Bank didn't respond to the provisional decision. I'll now go on to make my final 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.

On the basis I don't consider I've been provided with any further information to change my decision I still consider my findings to be fair and reasonable in the circumstances.

Therefore, my final decision is the same for the reasons set out in my provisional decision.

My final decision

My final decision is that I uphold this complaint and direct Tesco Personal Finance Limited trading as Tesco Bank to pay Mr M £70 plus 8% simple annual interest from the date the claim was declined to the date of settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 22 July 2025.

Caroline Kirby
Ombudsman