

complaint

Mr M complains that Tesco Personal finance PLC T/A Tesco Bank didn't refund a payment he made to a company on his credit card.

background

In August 2018, Mr M says he booked a photoshoot for his son with a company I'll refer to as "S". Mr M says he paid S a £50 deposit in advance to secure the booking.

Mr M says on the day of the photoshoot, he was told by S that he needed to purchase a high end portfolio for his son. Mr M says he felt pressured into buying the high end portfolio as it was sold with the promise of a forthcoming modelling job with a fashion company. Mr M says he was also told the portfolio would allow for his son to be registered with different agencies which would provide ongoing modelling opportunities. The package cost £7,500 in total and Mr M paid £2,500 of this total cost on his Tesco Bank credit card. Mr M says he paid the remaining amount across two other credit cards and that he had raised a claim for a refund with those banks.

The contract Mr M signed said he had purchased 100 photographs to be supplied on a CD-ROM, all of which would be digitally retouched. Also included was an online portfolio and a digital "Z Card" for his son. Mr M says his son was promised modelling work which would *"pay for the cost of the package in no time"* and that S had lined up a modelling job with a well-known fashion brand for his son which would pay him £2,000. Mr M also says his son was promised 12 months of aftercare service. The contract says that it was non-cancellable.

Mr M says whenever he's tried to contact S, he's not able to reach anyone. And when he requests a call back, he receives no response from them. Mr M reported the matter to Action Fraud as he feels he has been a victim of a scam. This was because Mr M says his son was promised modelling jobs which didn't materialise. Mr M says he returned the CD-ROM with his son's photos to S – as he says there were only 17 photographs on the CD-ROM and not the 100 which was promised under the contract. Mr M says as his son has not received the products and services he bought for him, he wants Tesco Bank to refund the £2,500 he paid on his credit card with them.

Mr M raised a complaint with Tesco Bank in October 2018. Tesco Bank considered Mr M's complaint in two ways:

Chargeback

Tesco Bank said they would attempt a chargeback in order to try and get Mr M's money back. They say S had challenged it and provided Tesco Bank with information which showed Mr M had signed a contract to confirm he had received the images and the disc was working correctly. S also said Mr M's son's online profile was still working at that time.

Tesco Bank say Mr M wasn't able to provide enough information to show his son hadn't received the services he agreed to. So, they let Mr M know that they wouldn't be proceeding with his chargeback in December 2018. And they re-debited £2,500 from his account in January 2019. Mr M says he has been treated unfairly.

Section 75

Tesco Bank then considered Mr M's complaint under section 75 of the Consumer Credit Act

1974. However, they said as there was a fourth party involved in the transaction, they didn't think there was a valid debtor-creditor-supplier (DCS) relationship. Tesco Bank say the fourth party involved are a business who offer a facility where a prepaid card can be loaded with funds to allow a customer to spend in certain places. In this case, Tesco Bank say Mr M used this method to pay S.

Mr M says he paid S directly using his Tesco Bank credit card and that he doesn't hold an account with the fourth party business. Therefore, he wouldn't have been able to make a payment via the fourth party.

Our investigator looked into Mr M's concerns. In summary, he said Tesco Bank should've offered more assistance to Mr M in progressing the chargeback. In particular, our investigator said Tesco Bank had enough information from Mr M when considering his complaint as a chargeback. He also said he thought there was a valid DCS relationship and that the fourth party, which Tesco Bank referred to, acted as a payment processor on behalf of S. Our investigator also said having considered everything, he thought it was most likely Mr M was given false statements about modelling opportunities for his son. And as a result, there had been a breach of contract. So, our investigator upheld Mr M's complaint and asked Tesco Bank to:

- refund the £2,500 and rework the credit card account as if the payment hadn't been made, including refunding the interest or charges accrued in relation to the payment;
- pay 8% simple yearly interest on any credit balance from the date that the credit balance arose to the date of settlement.

Mr M agreed with our investigators view, but Tesco Bank didn't. They remained of the opinion that there wasn't a valid DCS relationship. They also clarified that they did raise a chargeback claim for Mr M, but when S disagreed, they asked Mr M for more information. As they weren't able to obtain the necessary information from Mr M, they decided a chargeback wouldn't be successful. As Tesco Bank didn't agree with our investigator's findings, the complaint has been passed to me for a decision.

I issued my provisional decision setting out the below:

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. I note Tesco Bank attempted a chargeback claim and also considered Mr M's complaint under section 75. My provisional decision will be mainly focusing on the chargeback claim as I'm likely to uphold on this part of the complaint.

Chargeback

Mr M contacted Tesco Bank in October 2018 and explained to them that the goods and services to be supplied under the contracts with S, for his son, hadn't been provided. As Mr M paid for the goods and services using his credit card and wanted a refund, I've thought about whether Tesco Bank dealt with his request fairly.

The chargeback process is relevant in this case. This is a way in which payment settlement disputes are resolved between card issuers and merchants. They are dealt with under the

relevant card scheme rules. In certain circumstances, the process provides a way for Tesco Bank to ask for a payment Mr M made, to be refunded. One of those circumstances is where the goods or services aren't supplied or as described by the merchant Mr M paid.

A chargeback isn't guaranteed to result in a refund. First there needs to be a right to a chargeback under the card scheme rules. And any chargeback can be defended by the merchant if they don't agree. If a chargeback is defended, the card issuer (in this case Tesco Bank) can make a second presentment of the chargeback by providing further supporting evidence. If it is still defended by the merchant, it can ask the card scheme provider to decide whether a refund should be given. This final part of the chargeback process is called arbitration.

There is no strict obligation for a card issuer to raise a chargeback when a consumer asks for one. But I would consider it good practice for a chargeback to be attempted where the right exists and there is reasonable prospect of success.

Regarding second presentment and arbitration, there is also no obligation for a card issuer to take these further steps if the initial chargeback is defended. But if the defence from the merchant was particularly weak and/or the consumer's evidence was strong and there was a reasonable prospect of success, I would consider it good practice to pursue the chargeback further. So, I've kept this in mind when thinking about what's fair and reasonable in the circumstances of this case.

I can see Tesco Bank raised the chargeback initially under the reason code for goods and services not as described and I think it was fair for them to do this. The issue for me to decide is whether they acted fairly in choosing not to pursue the dispute any further after S defended the chargeback.

Once S were able to provide some information to Tesco Bank to defend the chargeback, Tesco Bank say they were under instruction from the card scheme to obtain further information from Mr M. Despite several attempts to contact Mr M to clarify some of the information he'd provided, they didn't receive a response from him. Ultimately, Tesco Bank said no matter how strong the chargeback was, that it wouldn't have been successful. So, Tesco Bank declined to pursue the chargeback further. But I don't think that was fair and I'll explain why.

From Tesco Bank's internal notes, I can see S challenged the chargeback on 9 November 2018. Tesco Bank then sent S' comments to Mr M via letter on the same day and asked for his response in relation to these.

Tesco Bank have been able to provide a copy of this letter and I can see it explains what they require further clarification on and how Mr M can respond to this request. It also asks for Mr M to reply by 23 November 2018 and that if he failed to do so, this could result in his account being re-debited on or after 7 December 2018. Mr M replied to Tesco Bank via email on 13 November 2018. I can see Mr M listed everything his son hadn't received under the contract – this included no modelling opportunities as promised, no agent assigned to his son and only 17 photos on the CD-ROM instead of 100 (none of which had been retouched). In the same email, Mr M explains he reported the matter to Action Fraud as he considered the actions of S to be fraudulent and offered to provide Tesco Bank with his crime reference number.

Tesco Bank say they then sent Mr M a further letter on 23 November 2018 – they haven't

been able to provide a copy of this letter, but they have provided a copy of their internal notes. Tesco Bank say the card scheme provider had asked Mr M to clarify what products his son was yet to receive. And I can see from the internal note Tesco Bank wanted to clarify if Mr M had received 100 photos on the CD-ROM, the digital "Z-card" and whether Mr M's son's online profile was in working order. The note also points out that the last day to challenge the dispute was on 12 December 2018.

Tesco Bank attempted to contact Mr M between 23 November 2018 and 10 December 2018 – when a further letter was sent to Mr M letting him know that as they were able to see Mr M's sons' online profile was working, they were unable to argue that this element of the contract wasn't provided. Also, upon reviewing the information provided by S when they defended the chargeback, they could see Mr M had signed a contract to confirm he had received all the images on the CD-ROM. And that he had checked that it was in working order. Therefore, it was for these reasons the chargeback wasn't pursued and Tesco Bank said Mr M's account was going to be re-debited.

I've thought about the information provided by S in defence of the chargeback and also the information Tesco Bank had from Mr M about the goods and services he hadn't received. I'm not persuaded S had shown Mr M's son received all of the goods and services as described under the contract. In effect, I can't see S addressed the contract that Mr M agreed to. I say this because they only made reference to two things – the online profile and the signed contract which confirmed the CD-ROM with the photos included was in working order.

The chargeback reason code was for goods or services not as described. And I think Mr M responded to Tesco Bank's letter of 9 November 2018 with enough detail about the goods and services which weren't as described in the contract. So, I think it was unnecessary for Tesco Bank to ask Mr M to clarify again what was still missing under the contract. I appreciate Tesco Bank said they checked Mr M's son's online profile and that it was still working. So, it may be the case that Mr M may have received some of the goods and services that was promised under the contract. But I think it's clear from the package cost that there were more goods and services to be provided – I find it unlikely Mr M would have paid £7,500 for an online profile for his son and a CD-ROM with photos.

Mr M has provided us with a copy of an email from his wife to S that was sent around two weeks after the contract was taken out. Mr M's wife asks about a modelling job her son was told about and asked for details of the job as he was told he'd receive the details 12-14 days before. Mr M's wife also refers to the lack of service provided by the aftercare team – Mr M's wife mentions contacting them twice about the need to change details on her son's online profile, but this hadn't been done. To me, this is further evidence, in addition to Mr M's testimony, which suggests Mr M was led to believe these were services which would be provided under the contract.

Mr M had also made it clear in his response to Tesco Bank on 13 November 2018 that he had reported this matter to Action Fraud and offered to provide Tesco Bank with a crime reference number. So, I think this is strong indication Mr M may have been a victim of a scam so I think this is another reason why it would have been equally important for Tesco Bank to pursue the chargeback. I think this, coupled with Mr M's testimony, was sufficient to cast significant doubt on the defence S had put forward which was simply information to show Mr M may have received two of the products agreed to under the contract.

Mr M's description of what happened has been detailed and consistent throughout his dealings with Tesco Bank and our service. And I think Mr M had already given strong testimony that he may have been a victim of a scam. In particular, Mr M told Tesco Bank he had reported the matter to Action Fraud and that he had returned the CD-ROM to S which was in line with the chargeback rules – he offered to provide Tesco Bank with proof of postage for this. In addition to this, Mr M also told Tesco Bank in one of his emails that the chargeback claims he made with his two other banks had been successful. Mr M says one of the chargeback claims wasn't defended at first presentment and the other was initially defended – like in this case with Tesco Bank. However, when it was re-presented the chargeback was successful. So, on balance, I think this shows it's more likely than not that had Tesco Bank made a second representment, it would have been likely to succeed.

I think based on the detailed account Mr M gave as well as the other supporting documentation which I believe strongly supported his version of events, I think Tesco Bank ought to have robustly pursued the chargeback. Particularly because S hadn't provided anything to demonstrate that they had provided all of the services as described under the contract. And I don't think Tesco Bank acted fairly in not pursuing the chargeback. It's no longer possible for Tesco Bank to submit the chargeback because of the time that's passed. While I can't be certain what would have happened had the chargeback been pursued, based on everything I've seen, I think it's more likely than not the chargeback would have succeeded and Mr M would have got his money back. Ultimately, I think Mr M has lost the opportunity of having his money refunded. And as I've said above, I think it's more likely than not the chargeback would have succeeded. So, I've thought about what a fair resolution should be.

As I think the chargeback would more likely than not have succeeded had Tesco Bank pursued it further based on the information Mr M had provided them with, I think Tesco Bank ought to now refund the £2,500 to Mr M. Tesco Bank should also pay 8% simple interest on that refund from the day it stopped pursuing the chargeback claim to the date of settlement. This is because Mr M has been deprived of the use of these monies.

Section 75

I note Tesco Bank have made several representations on the validity of the section 75 claim because they don't think there was a valid debtor-creditor-supplier (DCS) relationship. And although I'm intending to uphold on the chargeback aspect of this complaint, I thought it might be helpful to explain if I think Tesco Bank could have done more when considering Mr M's section 75 claim.

Section 75 of the Consumer Credit Act 1974 (CCA) says that in certain circumstances the credit card account holder has an equal right to claim against the credit card provider if there's either a breach of contract or misrepresentation by the supplier of goods or services. So, in Mr M's case, section 75 of the CCA makes Tesco Bank responsible for a breach of contract or misrepresentation by the supplier under certain conditions. One of those conditions is that there must be a direct relationship between the debtor (Mr M) the creditor (Tesco Bank) and the supplier (S).

I note Tesco Bank have said that there was a fourth party involved in the transaction – they say Mr M paid for the contract using a prepaid card or a mobile application as these are the services the fourth party offer. And that the payment was made to the fourth party and not directly to S. Tesco Bank say because the fourth party weren't a payment processor, there wasn't the necessary relationship here for a valid section 75 claim.

I can see from Mr M's bank statement that the payment was made to the fourth party Tesco Bank have referred to. So, I asked the fourth party for information about their involvement in this transaction. They explained that Mr M registered to set up an account with them on the same day the contract was taken out. The fourth party's system generated a customer registration which was sent to Mr M's email address. Next, a verification call was carried out with Mr M where his information was confirmed and the transaction then took place. Mr M has told us he wasn't introduced to fourth party and that he paid S directly using his Tesco Bank credit card.

The fourth party say it could be possible S initiated the registration for Mr M, which may explain why Mr M doesn't have any recollection of the fourth party's involvement. But the fourth party have provided evidence to show a receipt of the payment was sent to Mr M's email address. They also say their payments team is required to confirm who the customer is before processing any customer information or payments.

I appreciate everything Mr M has told us. But in the absence of any documentary evidence from Mr M, it's arguable that the fourth party's evidence should be preferred. If what they say is correct and the payment went through a payment account set up for Mr M, then I can see why Tesco Bank have said there wasn't the necessary relationship for a valid section 75 claim in this case.

Responses to my provisional decision

Mr M responded to my provisional decision and agreed with my findings. However, he said he still doesn't agree a fourth party was involved but that he was required to call head office to carry out the payment.

Tesco Bank responded and they asked if I agreed there wasn't the necessary debtor-creditor-supplier arrangement in place for a valid section 75 claim. Tesco also said they weren't aware at the time of this claim, that Mr M's chargeback claims with his other banks had been successful.

In addition to this, Tesco Bank referred to the chargeback rule which explains documentation from an expert or professional to support the cardholders dispute may be required. Tesco Bank said Mr M didn't provide them with further information following his email of 13 November 2018. And whilst Mr M may have told Tesco Bank he felt he'd been scammed, they said this alone didn't give them automatic chargeback rights. Lastly, Tesco Bank said they didn't think they had enough to pursue the chargeback further based on the information they had.

my findings

I've reconsidered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

As explained in my provisional decision, I can understand, based on the information available to me, why Tesco Bank said there wasn't the necessary relationship for a valid section 75 claim. I appreciate Mr M says he doesn't know who the fourth party was and it's possible he was misled in to who he was calling at the time. However, in the specific circumstances of this case, it doesn't look like the necessary arrangement was in place for a valid section 75 claim.

In relation to Mr M's chargeback claims with his other banks, I don't think it's relevant that Tesco were unaware these were successful. I say this because there were other compelling reasons why I think Tesco Bank should've pursued Mr M's chargeback as I set out in my provisional decision.

Tesco Bank have said the information Mr M provided didn't meet the criteria required for a chargeback claim as he signed a document to confirm he received the 100 photos on a CD-ROM and he confirmed he received the online portfolio for his son. However, I disagree with Tesco Bank's opinion that Mr M didn't meet the criteria. I say this because Mr M's email of 13 November 2018 provided clear detail of everything his son didn't receive under the contract – Mr M confirmed his son hadn't received the modelling jobs which were promised, no aftercare, no high-end portfolio, no agent assigned to his son and a CD-ROM with only 17 photos which hadn't been retouched, rather than the 100 that was promised. Mr M also mentions in this same email that he had reported matters to Action Fraud and refers Tesco Bank to information in the public domain about S to support his dispute.

I note the part of the chargeback rule Tesco Bank referred to in response to my provisional decision says documentation from an expert or professional may be required to support Mr M's claim. And the rule provides examples of the types of additional documentary evidence Mr M could provide. But it doesn't say Mr M is required to provide this documentation. In addition to everything Mr M told Tesco Bank he didn't receive under the contract, Mr M provided Tesco Bank with additional information to support his dispute - he'd told them he reported matters to Action Fraud and also that he felt he may have been a victim of a scam. So, with this in mind, I think Tesco Bank ought to have robustly pursued the chargeback process as far as they could. I say this because in addition to the required information Mr M had already provided Tesco Bank with to progress his claim further, Tesco Bank were also aware Mr M felt he had been scammed.

Having thought about everything again, I think Mr M already fulfilled the requirements under the chargeback rules. I don't think it was reasonable to continue pursuing Mr M for further information given he'd already provided a comprehensive response about everything he hadn't received.

my final decision

For the reasons given above, I uphold this complaint and I require Tesco Personal Finance PLC T/A Tesco Bank to:

- Refund Mr M the £2,500 he paid, adding 8% simple interest per year from the date the chargeback claim wasn't pursued further to the date of settlement*.
- Rework Mr M's account as if any charges hadn't been applied account for any interest and charges – including when Tesco Bank re-debited Mr M's account in January 2019.

*If Tesco Personal Finance PLC T/A Tesco Bank think they're required by HM Revenue & Customs to deduct income tax from that interest, they should tell Mr M how much they've taken off. They should also give Mr M a tax deduction certificate if he asks for one, so he can reclaim the tax if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 8 April 2021.

Leanne McEvoy
ombudsman