

complaint

Mrs S complained because Tesco Personal Finance PLC wouldn't agree to a claim under section 75 of the Consumer Credit Act 1974.

background

Mrs S had a credit card with Tesco, on which her husband Mr S was a joint cardholder.

In August 2015, Mr S used his card to buy a remote controlled toy car for their son's birthday. It broke within ten minutes of the boy using it. Mr S was a professional engineer and identified what he believed was a manufacturing fault. Mrs and Mr S returned it to the merchant, and after a number of difficulties getting a response, the merchant eventually said it wasn't faulty manufacture. The merchant offered a free repair, but Mr S disagreed with the merchant's opinion on what was wrong. He said the solution proposed couldn't possibly stop the same problem happening again. So he wanted a full refund for the toy car and for the postage costs, totalling £132.67.

The merchant wouldn't agree, so Mrs S wrote to Tesco, asking to be reimbursed under section 75 of the Consumer Credit Act 1974. This sets out the circumstances when consumers can claim against the credit provider if there's either a breach of contract, or misrepresentation on the supplier's part.

Tesco replied that the merchant was offering a reasonable resolution by arranging a free repair, though Tesco offered to re-open the claim if the car was still faulty after that. Mrs and Mr S complained to this service.

The adjudicator didn't uphold Mrs and Mr S's complaint. She explained that for a section 75 claim, there must be evidence of a breach of contract or misrepresentation, plus an unbroken link between debtor, creditor and supplier. These three parties are:

- a debtor, who has an obligation to make finance repayments to the creditor. In this case the debtor is Mrs S who's the Tesco cardholder;
- a creditor, who has the obligation to send the finance direct to the supplier. In this case, the creditor is Tesco;
- a supplier, who has the obligation to supply the goods to the debtor.

The adjudicator said that the link was broken, because the card is in Mrs S's name, but the toy car was bought by Mr S. So, even though Mr S was an additional card holder, the chain was broken and there wasn't a section 75 claim. The adjudicator thought the offer of the free repair was fair.

Mrs and Mr S didn't agree with this. They looked up various websites about section 75, and said purchases made by additional cardholders are valid if it can be shown that the primary cardholder benefited from the purchase in some way. In this case, Mr and Mrs S had jointly chosen the toy car which they bought together for their son's birthday. They gave it to him together with both their names on the wrapping. So Mrs S did have a benefit from the purchase.

Mrs and Mr S also responded about whether the free repair was a fair solution. They said there was what was fair legally, and what was fair in the eyes of their young son. Legally, they said that under the Consumer Rights Act, goods had to be of acceptable quality, and

breaking after ten minutes didn't meet that. They said they had a right to short-term reject the item, with a refund, and said they'd met the necessary 30 day timescales for that. They received the toy car on 24 August, it was used on Saturday 29 August, and they requested a refund on 31 August.

Mrs and Mr S also referred us to their technical explanation, and photos, of what was wrong with the toy car, and why Mr S, a professional engineer, was convinced the proposed fix wouldn't work. They didn't want their son disappointed a second time.

my provisional findings

I issued a provisional decision on this complaint. I concluded:

- Section 75 of the Consumer Credit Act 1974 states that consumers can claim against the provider of credit, if there's either a breach of contract or misrepresentation by the supplier. This means that if a consumer would normally return something to a shop to ask for a replacement or refund of a faulty item, they can ask the finance provider for that instead.
- There are conditions for this, and for a claim to be successful, I must be satisfied that section 75 applies, and that there has been a breach of contract or misrepresentation by the supplier.
- Looking first at whether section 75 applies, it's correct that the link between debtor, creditor and supplier mustn't be broken. The problem here is whether this is broken because the toy car was paid for on Mr S's card rather than on Mrs S's card, as she was the main cardholder. I accepted that the link is satisfied if the purchase made on Mr S's card also benefited Mrs S. I find that it did, because it was a present for their son, which they told us they sat together on the sofa and chose on the laptop, and wrapped up with a label from them both. So I found it was a combined purchase and a joint decision, chosen together and given to him together. So I found that the debtor, creditor and supplier requirement of section 75 was satisfied.
- I also checked the other requirements for a section 75 claim. This transaction was made on a credit card, and fell within the financial limits for a claim.
- I looked at whether there had been a breach of contract or misrepresentation by the supplier. Mrs and Mr S provided detailed emails about the problems with the car, and it was clear that Mr S has specialist technical knowledge. So I found that, on the balance of probabilities, the toy car was faulty and there was therefore a breach of contract.
- So I was satisfied that all the requirements of section 75 were met. This meant that Tesco does have a responsibility for the problem.
- Turning to solutions, I noted that the merchant did eventually offer to repair the toy car free, and that Tesco considered this was a suitable solution. I read the emails and technical explanations between Mr S and the merchant. The merchant wasn't responsive and helpful and Mr S had to chase, losing more confidence in a solution.
- It was also very clear that Mr S had considerable technical engineering knowledge. Although in many circumstances it might be understandable to seek a repair, in this

case Mr S had professional expertise which, from the evidence, appeared to me to have been at a much higher level than that of the merchant. I accepted Mr S's professional opinion that the solution proposed by the merchant would not fully remedy the problem, and that the error would recur after another ten minutes of use. So I considered that a refund is the appropriate solution, and that it should include the postage cost which Mrs and Mr S incurred sending back the toy car to the merchant.

- I also considered whether Mrs S should be compensated for the inconvenience, distress and upset they have suffered. Clearly the main cause of that nuisance was the merchant of the faulty toy car, not Tesco, and I don't have jurisdiction to award compensation against the merchant.
- I noted that Tesco did reply reasonably quickly to Mrs and Mr S, and that it did offer to reconsider if they agreed to the toy car being repaired and it failed again. But I considered it would have been fair and reasonable for Tesco to recognise that this was a valid section 75 claim, and that Mr S's specialist professional expertise meant he knew what he was talking about. So I provisionally intended to award Mrs S £100 compensation for inconvenience and upset.
- My provisional decision was that I intended to uphold this complaint, and to order Tesco Personal Finance PLC to pay Mrs S:
 - £119.99 refund for the car plus £12.68 postage, totalling £132.67
 - £100 compensation for inconvenience and upset.

Responses to my provisional decision

Mrs S had nothing further to add.

Tesco responded by saying this would be unfair. It said:

- The evidence available to Tesco at the time made it impossible to identify it as a valid claim under Section 75 of the Consumer Credit Act 1974. Tesco said the contract was in Mr S's name, and Mr S's claim letter didn't say it was a joint purchase. It didn't think its disputes team should have asked whether it was a joint purchase.
- Tesco was unhappy that the actual validity of the claim had been upheld mainly on Mr S's professional expertise. Tesco said that neither Mr S nor the merchant was impartial, so it quoted internet references about the car. Tesco said the item was mass produced, so it was likely that other people would have had the same problem if it had been a manufacturing fault. Tesco provided a link to internet reviews of the particular model, which were positive. It pointed out that the reviews did say the car could easily be crashed at high speed. So Tesco suggested it was more likely the car had been crashed at high speed, in which case the merchant's offer of repair was reasonable.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. This includes the two particular issues identified by Tesco in its response to my provisional decision:

Tesco said it couldn't have identified this as a valid claim under Section 75

I note Tesco's point that the consumers' original claim hadn't said it was a joint purchase. But we'd expect a bank to conduct a reasonable investigation into the issue, which may involve further enquiries or questions if necessary. I wouldn't expect consumers initially to have realised that for a section 75 claim they needed to point out to Tesco that it was a joint purchase. It was after all on an account where they were both cardholders, and I don't think it's reasonable to expect consumers to realise the difference between a joint account, and an account in Mrs S's name with Mr S as additional cardholder. I've borne in mind that it was a toy bought by a couple who were both cardholders, which makes it more likely it was a joint purchase for their child. So I think Tesco should have asked more questions.

I also note that Tesco's final response letter didn't say it was rejecting the claim because it wasn't valid under Section 75 – it said it was rejecting it because it considered repair was a reasonable resolution.

Tesco said the internet shows the real problem was likely to be the child crashing the car

I've read the 32 reviews on the link which Tesco sent. Most are, as Tesco says, positive. And it's true that about five of these reviews talk about crashing the car at high speeds such as 40 mph or more. These say they've then had to buy upgrade parts.

So I accept that it is possible that Mr and Mrs S's son got his new fast car out of the box and excitedly drove it full speed into the wall. That's not what Mr and Mrs S say, and of course I have no way of knowing for sure. In these circumstances I make my decision on the balance of probabilities.

I've read the technical explanations put forward by Mr S, and his careful points methodically and consistently put to the merchant. I also note that he offered to discuss the condition of the car further with the merchant, and if necessary talk to a third party arbitrator about them. I don't think Mr S's emails and actions bear the mark of someone who's dishonestly inventing, in order to disguise what really happened. I also consider that if some of the reviewers just bought relatively low-price upgrade parts and sorted it themselves, the technically-competent Mr S was much more likely to have done this when the car first went wrong on the child's birthday.

I also consider that the fact that other reviewers didn't identify a technical cause doesn't guarantee there wasn't one. So, on the balance of probabilities, I think Mr and Mrs S were telling us the truth and that they found technical problems with the car, for which a repair was likely to be an unsuitable solution.

I also note that right from the start Tesco offered to review the situation if the car was still faulty or had new faults after the repair. I consider that insisting on repair attempts – especially when the merchant had already been less than responsive and helpful – would only be delaying the inevitable.

So I see no reason to change my original decision.

my final decision

My final decision is that I uphold this complaint. I order Tesco Personal Finance PLC to pay Mrs S:

- £119.99 refund for the car plus £12.68 postage, totalling £132.67
- £100 compensation for inconvenience and upset.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S to accept or reject my decision before 16 June 2016.

Belinda Knight
ombudsman