

Complaint

Mr F complains Tesco Personal Finance PLC (“Tesco Bank”) has failed to honour a claim he brought under section 75 of the Consumer Credit Act 1974 (“CCA”).

Background

I issued a provisional decision on Mr F’s complaint on 6 August 2021, a copy of which is attached to and forms a part of this final decision. In very brief summary, in my provisional decision I said I was not minded to uphold Mr F’s complaint because:

- It appeared possible that R, the company he had a dispute with, had in fact arranged for the disposal of his timeshare as agreed, or that alternatively he had made it impossible for R to fulfil its contract with him by disposing of the timeshare himself. So it was difficult for me to say there had been a breach of contract by R for which Tesco Bank would have been liable under section 75.
- I was unable to conclude R had misrepresented to him that it was an agent of another company, or that it had told him it would dispose of his timeshare when it had no intention of doing so. I thought there was a general lack of evidence to support these points.

I invited both parties to respond to my provisional decision and provide any more evidence they would like me to consider. Neither has done so, and so the case has been returned to me to decide.

My findings

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

Because neither party to the complaint has made any further submissions following my provisional decision, I see no reason to depart from the findings I made in that document. It follows that I don’t think Tesco Bank treated Mr F unfairly or unreasonably in declining the claim he brought under section 75 of the CCA.

My final decision

I do not uphold Mr F’s complaint.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr F to accept or reject my decision before 10 October 2021.

Will Culley
Ombudsman

COPY OF PROVISIONAL DECISION

Complaint

Mr F complains Tesco Personal Finance PLC ("Tesco Bank") has failed to honour a claim he brought under section 75 of the Consumer Credit Act 1974 ("CCA").

Background

Mr F and Mrs F had a timeshare-like arrangement with a company I will call "C". Some time in early 2016, another company I will call "R" rang Mr F, apparently with an offer to get him out of his timeshare with C, and to include him in a legal action against C with a view to obtaining a refund for the money he had paid for the timeshare.

In April 2016 Mr F met with representatives of R during which he says they told him they could claim back the money he had paid for his timeshare with C. He also says R put him under pressure to sign up for their services, which he ended up doing, paying £950 on his Tesco Bank credit card on 9 April 2016 as a deposit. He paid a further £5,605.78 by bank transfer on 16 April 2016.

Mr F says R never fulfilled its promises to him. It didn't reply to his later attempts at communication, and failed to get him out of his timeshare or claim his money back. He contacted a company R had said it was an authorised agent of, and says he was told by this company that they did not work with R.

Around October 2017, Mr F made a claim to Tesco Bank under section 75 of the CCA, including a copy of paperwork with R. The bank asked him to provide some evidence that he still owned his timeshare with C, and Mr F sent them some emails from C dated to August and November 2016 which appeared to confirm he no longer owned the timeshare because he had asked to cancel it.

Tesco Bank did not accept Mr F's section 75 claim. The bank felt there wasn't enough evidence R had breached its contract with Mr F, or had misrepresented something to him. It sent him a final response letter in April 2018, explaining he could refer his complaint to this service.

Dissatisfied with this response, Mr F brought his case to this service for an independent review. One of our investigators looked into the complaint. She thought it should be upheld. She analysed the contract with R and noted it had implied they would be arranging the disposal of the timeshare and preparation of legal action, and that there would be no refund if the disposal was unsuccessful. However, she felt there was no evidence R had done anything *at all*, and there *was* evidence online that companies like R had charged an advance fee and not delivered the service promised. She felt Mr F's account – that he had heard nothing from R since paying them – was plausible. She didn't think it was relevant that Mr F had cancelled his timeshare directly with C, because R wouldn't have done this anyway. She recommended the bank provide Mr F with a full refund of what he had paid.

Tesco Bank disagreed. It said there wasn't evidence to substantiate the conclusion that R wouldn't have provided the services had Mr F not cancelled the timeshare himself. It noted there had been only six months between Mr F signing the contract with R, and cancelling the timeshare himself. The contract had not contained any expected timescale, and it didn't feel enough of a chance had been given to R to do what it said it would do. It didn't think it was reasonable to base the conclusion on negative commentary online about other companies.

Ultimately, no agreement could be reached the case has now been passed to me to decide.

My provisional findings

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

Section 75 of the CCA allows consumers a degree of protection when they pay for goods or services on a credit card, so long as certain technical conditions are met. If these conditions are met then a consumer can hold their credit card company liable for any breach of contract or misrepresentation on the part of the supplier of those goods or services. A breach of contract occurs where the supplier fails to do something it was meant to have done under the contract. A misrepresentation occurs where a false statement of fact is made to someone, and this causes them to take an action which is to their disadvantage.

Whether or not Mr F's claim meets the technical conditions for section 75 to apply hasn't been disputed in this case. Nevertheless, I have considered this question myself.

One of the conditions is that the service Mr F purchased has to have been priced at more than £100 and no more than £30,000. He also needs to have used his Tesco Bank card to pay the company he entered a contract with. Mr F's claim clearly meets the first condition as the services he purchased were priced squarely within the correct range. I think there is more of a question over whether his claim meets the second condition, because although Mr F paid R, the wording of the contract in places suggests R was just an agent of another company (meaning he might have been entering a contract with that other company, and not R). However, my analysis is that the contract Mr F had was with R, so this second condition has been met as well.

The contract

In order to establish whether or not R breached its contract with Mr F, or made a misrepresentation to him, I've considered the contract itself carefully, alongside the other available evidence. The contract between Mr F and R essentially said that R would:

- Arrange for the disposal of Mr F's timeshare with C, paying any costs involved in transferring the timeshare out of his name.
- Defend any action brought by C against Mr F in respect of unpaid management fees arising after 9 April 2016, and paying any costs involved.
- Give "assistance and guidance" in respect of any other legal dispute Mr F had with C.
- Not refund any money paid towards the contract unless it had failed in its obligations above.

The contract didn't commit R to a particular timescale for making good on its promises above. In the absence of an agreed timescale the relevant legislation implies a term into a contract for services, that the services in question will be completed within a "reasonable time". So if R failed to do any of the above within a reasonable time, then this would have been a breach of contract.

The contract also committed Mr F to various obligations, including:

- Signing a power of attorney in favour of a legal representative, where necessary.
- Sending the title deeds and certificates relating to his timeshare to an address in Spain within 21 days.
- Notifying R of any legal action taken against him by C, by writing to the same Spanish address.

A separately signed page to the contract stated that if Mr F decided not to go ahead with the disposal of the timeshare then he would not receive a refund. It appears Mr F was also given a power of attorney document to complete, as a copy was included with the paperwork he sent the bank. However, this is not signed.

Mr F says R had promised to include him in a class action lawsuit against C in order to claim back the money he had paid for his timeshare. However, this doesn't appear in the contract or any of the other paperwork Mr F signed. It does say "assistance and guidance" would be given in respect of any legal dispute Mr F had with C, but this is vague and I don't think it really committed R to much. It would be difficult to interpret it as meaning R would include Mr F in a lawsuit against C.

Did R breach its contract with Mr F?

Having established what R was meant to do under its contract with Mr F, I've gone on to consider whether R failed to fulfil its obligations, therefore being in breach of contract and meaning Tesco Bank would have been liable to him under section 75.

Mr F says R did nothing at all, and also failed to respond to his attempts to communicate. He says the other company mentioned on the contract told him they had nothing to do with R. I agree there is no positive evidence from R of it having taken any action. If it failed to take positive action to dispose of Mr F's timeshare within a reasonable time, then this would be a breach of contract for which Tesco Bank would be liable.

A difficulty I have here is that it appears Mr F's timeshare was disposed of about 6 months after he entered his contract with R. It's not entirely clear what the background was to this, but the emails Mr F has provided from C suggest he simply contacted C himself and they were happy to cancel his timeshare. One email dated 17 August 2016 and sent to Mr and Mrs F said: "*We write to confirm that your application to cease membership...has now been processed.*" A later email dated 1 November 2016 and sent to Mrs F confirmed that this meant they would not receive any further invoices (for ongoing maintenance/membership fees).

At the bottom of the emails Mr F sent us, there is another email from Mrs F to a separate entity which appears to have been advising on how to dispose of the timeshare with C. Based on the email address, it seems these advisers may have been lawyers, or at least held themselves out to be. It's not clear what role they played, or whether they were linked with R in any way. If they were linked with R, then it's possible R had in fact "arranged for the disposal of" the timeshare and was not in breach of contract. If they were not linked with R then unfortunately I have to conclude that Mr F made it impossible for R to perform its contract with him, by cancelling the timeshare himself.

We've asked Mr F to comment on this aspect of the background to his complaint but he hasn't replied, so I don't know what links, if any, the advisers who helped him dispose of the timeshare had with R.

Based on the evidence I've seen, I don't think I am in a position to be able to say, on the balance of probabilities, that R breached its contract with Mr F.

Did R misrepresent something to Mr F?

As I mentioned earlier in this decision, a misrepresentation is a false statement of fact which causes someone to take an action which is to their disadvantage. In the present context, a misrepresentation could be a false statement made by R to Mr F, and which caused him to sign the contract and pay over the money when he wouldn't have done so otherwise.

Our investigator concluded, in effect, that R never had any intention of carrying out the services it said it was committing to in the contract. In other words, it misrepresented that it *intended* to hold up its side of the bargain. Our investigator based this conclusion on Mr F's recollection that R had failed to respond to his attempts to communicate, and on evidence that companies similar to R had failed to deliver on the services they'd agreed to provide.

I'm unable to reach the same conclusion as our investigator on this point. In order for me to be able to say that R had no intention of ever delivering the services it had promised, I would need more robust evidence than what is currently available. Firstly, I don't know if R failed to communicate with Mr F after he'd entered the contract; as I mentioned above it seems some unidentified "advisers" helped him exit his timeshare a few months later, and I don't know what relationship they had with R. I think there is too much uncertainty on this point.

But even if I was satisfied that R had become unresponsive immediately after Mr F signed the contract and transferred the money, it is difficult for me to say that this was more likely to have been because they had no *intention* of providing the agreed services. There are other possibilities – for example that they went out of business. I also cannot attach much weight to the evidence discovered by our investigator that other companies (not R) had failed to deliver services of a similar nature. I don't see how it follows that because some other companies unconnected with this complaint may not have done what they were supposed to do, that R had no intention of delivering the services it had contracted with Mr F for.

Finally, I note Mr F says that a company which R stated it was an agent of, later told him that R was not one of its authorised agents. Mr F hasn't said that R's status as an agent of this other company was one of the things which caused him to enter the contract, so I think it's possible he would have gone ahead anyway. But I'm not convinced in any event that R *wasn't* an agent of, or working with, this other company. Mr F has said the other company told him this, but I've not seen anything from the company in writing to confirm its position. I don't think there is strong enough evidence for me to be able to say R falsely represented its relationship with the other company.

Ultimately I'm unable to conclude R caused Mr F to enter into a contract with it by misrepresenting something to him about its intentions, or about its relationship with another company.

My provisional decision

As I have been unable to find that R breached its contract with Mr F or misrepresented something to him, it follows that I don't find Tesco Bank was liable to him under section 75 of the CCA, and I therefore don't think it was wrong of the bank to decline his claim.

This means I currently do not intend to uphold Mr F's complaint. I now invite both parties to the case to give me any further evidence or arguments they would like me to consider, by 27 August 2021. I will then review the case again before making a final decision.

Will Culley
Ombudsman