

complaint

Mr K is complaining that Tesco Personal Finance PLC ('Tesco') hasn't refunded a deposit he paid for a kitchen after he claimed a refund under S.75 of the Consumer Credit Act.

background

In December 2015 Mr K chose to buy a kitchen through a third party ('the seller') with a total cost of £24,500, paying a deposit of around £12,250. He paid around £250 of the deposit on his Tesco credit card with the remaining balance paid on his debit card.

Mr K later got into a dispute with his builders which meant that he wasn't able to move forward with the order until November 2016. But the seller told him that some of the units weren't available anymore. The seller said that another supplier could make the units needed, but the price of the kitchen would increase by around £2,400.

Mr K then told the seller that he wanted to cancel the order and asked it to refund the deposit. But the seller said he wasn't able to under the terms of his contract. Mr K then asked Tesco to refund the deposit under S.75 of the Consumer Credit Act because he thinks the seller has breached the terms of the contract. But Tesco rejected his claim. Mr K complained that it had done so, for the following reasons:

1. The seller is providing a different kitchen from the one originally agreed as it will be provided by a different, and less well known, supplier;
2. The seller says the terms of the contract don't allow Mr K to cancel it after the order's been placed with the seller. But he says the seller didn't place the order, so there's nothing in the contract that says he can't cancel the contract; and
3. The seller has increased the cost by 10%, so is a significant increase in price. He says that the Consumer Rights Act says that a term is unfair if the seller can increase the price to a too high price, but doesn't give him the right to cancel.

Our investigator didn't uphold the complaint because she didn't think the seller had breached the terms of Mr K's contract. Mr K didn't agree and asked for an ombudsman to review the complaint.

Since then I've written to Tesco and Mr K to say that I intend to uphold this complaint as I thought the seller should've allowed Mr K to cancel the contract. Tesco didn't respond and Mr K said he didn't have anything further to add.

my findings

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

I've decided to uphold this complaint and I'd like to explain why.

In Mr K is seeking to recover the deposit he paid for the kitchen he ordered through the seller. He says that he's entitled to a refund because he thinks the seller has breached the terms of his contract in not allowing him to cancel it. Tesco doesn't believe that the seller has breached the terms of the contract because it was still willing to supply the kitchen.

While I don't dispute that's the case, Mr K has asked to cancel the contract and he doesn't believe the terms of the contract allow the seller to decline his request. I don't think Tesco has taken this into account. I've looked at the terms of the contract and they say:

"14. Cancellation of Orders: We regret that we are unable in any circumstances to accept cancellation of orders for goods that have been ordered or manufactured to customer's special requirements unless agreed by the Seller in writing."

This is the only term in the contract in respect to cancellation of the order. So I think it's fair to infer from this that these are the only grounds that the seller can reject the request to cancel the order. And it would naturally follow that Mr K can cancel in all other situations. So I need to decide whether the seller's decision not to allow Mr K to cancel the contract is fair in line with this term.

It seems to me that this term is in place to protect the manufacturer in the situation that it's made a bespoke kitchen which can't be sold on to another consumer. If Mr K was allowed to cancel the contract at this point, the manufacturer and seller would be out of pocket as they would be stuck with a kitchen they can't sell on. So I think it's fair that there is a clause in the contract to protect them in this situation.

The term doesn't say with whom the goods have to be ordered - i.e. with the seller or the manufacturer. But I think it's reasonable to infer that it refers to when an order is specifically placed with the manufacturer to make them. Even if this wasn't what was intended, where a policy term is ambiguous it should be interpreted in Mr K's favour. So I think it only applies where the seller has specifically ordered the goods from the manufacturer. I haven't seen anything to say that it has done so and Tesco also hasn't provided any evidence of this.

It's clear that an enquiry had been made and the agreement had been made for the kitchen to be supplied. But, owing to the litigation with Mr K's builders, the contract was delayed. There can't be any dispute whether the manufacturer had started to make the goods or not, because it's told us it hasn't done so.

Irrespective of this, this service will always look to see whether a term is being used fairly. As I said, the purpose of this clause is to prevent the manufacturer being left with bespoke made goods if the consumer wants to cancel the agreement.

In this case, given the manufacturer hasn't made any part of the kitchen yet, I think the seller is applying the above term unfairly. So I think not allowing Mr K to cancel the kitchen is a breach of contract. And I think the seller acted unfairly in not refunding the deposit that he paid.

As Tesco is equally liable as the seller for the breach of contract, it should refund the deposit that Mr K paid. It should also pay 8% simple interest per year from the date that the seller first said it wouldn't refund the deposit until he gets it back. HM Revenue and Customs requires Tesco to deduct tax from the interest. Tesco should give Mr K a certificate showing how much tax it's taken off if he asks for one.

my final decision

For the reasons I've set out above, it's my final decision that I uphold this complaint. Tesco Personal Finance PLC should refund the deposit that Mr K paid. It should also pay 8% simple interest per year from the date that the seller first said it wouldn't refund the deposit until he gets it back.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 27 December 2017.

**Guy Mitchell
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