

The complaint

Mr M complains that he was mis-sold a timeshare product when he was on holiday in Mexico. Because he used his credit card, issued by Tesco Personal Finance PLC, to pay part of the purchase price, he says that he has a claim against it in the same way as he has a claim against the seller.

Mr M is represented by a claims management business, which I'll refer to as "S". Where I refer to Mr M's submissions, I include those made on his behalf.

What happened

In April 2019 Mr M was on holiday with his wife in Cancun, Mexico. He says that they were required to attend a presentation, at the end of which they agreed to buy a timeshare product for US\$17,000 from a Mexican company which I'll refer to as "DSO". Most of the purchase price was funded with a loan arranged by DSO, but Mr M paid US\$2,975 using his Tesco Bank credit card.

In December 2019 S contacted Tesco Bank on behalf of Mr M. It said he had a number of concerns about the timeshare and the sale of it. In summary, S said:

- Mr M had not realised that the timeshare was for a floating week, rather than a fixed week. Such contracts were null and void as a matter of EU law – as confirmed by a judgment of the Spanish Supreme Court.
- Mr and Mrs M had not been able to book holidays.
- The situation was similar to that where a lender had had to seek Validation Order from the Financial Conduct Authority.
- Some clauses of the sale contract were "unfair" within the meaning of the Unfair Terms in Consumer Contracts Regulations 1999.
- Mr and Mrs M had been coerced into buying the timeshare.
- Insufficient credit checks had been carried out.

Subsequently, Mr M said that he had asked about cancelling the timeshare a few days after he and Mrs M had taken it out. However, they only had five days in which to do so and would have needed to give notice at an address in Florida. Since they were in Mexico, they were unable to give notice in time. They tried to do so on their return to the UK, but emails simply bounced back.

Tesco Bank did not accept that it was liable to Mr M, who then referred the matter to this service, where one of our investigators considered what had happened. The investigator did not recommend that the complaint be upheld, and Mr M asked that an ombudsman review the case.

I did that and issued a provisional decision in which I said:

As a general observation, I should mention that the complaint submitted on behalf of Mr M in many respects bears little relation even to facts which are not in dispute. So, for example:

- There are numerous references to a loan agreement. But Mr M's claim against Tesco Bank arises from a credit card account, not a loan taken out specifically in connection with the timeshare.*
- They include references to "... false representations ... made by the broker relating to the financial impact of the regulated credit agreements..." But the relevant regulated agreement here was the credit card agreement, a credit agreement which was already in place and the existence of which had nothing to do with DSO.*
- There are also references to a different timeshare company and to its general practices.*

In my view, these are not minor or administrative issues. They go to the heart of the complaint and indicate that at least some issues have been raised without proper regard to the facts.

Sections 56 and 75 of the Consumer Credit Act 1974

Under section 56 of the Consumer Credit Act statements made by a supplier in relation to a transaction financed by a debtor-credit-supplier agreement within section 12(b) or (c) are to be taken as made as agent for the creditor.

In addition, one effect of section 75(1) of the Act is that a customer who has a claim for breach of contract or misrepresentation against a supplier can, subject to certain conditions, bring that claim against a creditor. Those conditions include:

- that the credit financed the contract giving rise to the claim; and*
- that the credit was provided under pre-existing arrangements or in contemplation of future arrangements between the lender and the supplier.*

In this case, the credit card payment financed (albeit only in part) the purchase of the timeshare. A credit card payment can fall within section 12(b) of the Consumer Credit Act and will generally do so if payment is taken by the supplier (rather than, say, by a trustee or agent).

Tesco Bank said that the payee named on Mr M's credit card was not DSO and that section 75 of the Consumer Credit Act did not therefore apply. It did however consider Mr M's claims.

In my view, it is not clear whether the payee was the same company as DSO, or a closely related company, or some other entity. The credit card statement includes the abbreviation "DSO". If Tesco Bank wishes to argue that the transaction fell outside section 12(b) of the Consumer Credit Act, I would need to see more evidence of the identity of the payee – which it may be able to obtain through the card scheme, Mastercard. I have therefore considered what Mr M has said about the sale and subsequent events.

Misrepresentation

As a matter of English law, a misrepresentation is, in very broad terms, a statement of law or of fact, made by one party to a contract to the other, which is untrue and which induces the other party into the contract.

The sale contract included, at clause 18, provisions about applicable law and jurisdiction.

Clause 18 said that the parties would accept the jurisdiction of the courts and tribunals of Cancun, Quintana Roo for the enforcement and interpretation of the contract. In other words, it was subject to local law, not English law.

I have seen no evidence to show whether local law recognises claims in misrepresentation in the same way that English law does, but I have considered this part of the complaint on the assumption that there are no material differences. It is of course open to both parties to provide evidence to the contrary, should they wish to do so.

Mr M says that he was led to believe that he was buying a fixed week timeshare. I take that to mean that he would have an identified week in an identified property. But the contract he signed refers to a "studio (flex) unit ... in gold season". It does not identify a specific property or a numbered week. Mr M has not said which week he thought he bought, nor has he referred to any property in which he says he thought he bought an interest. I do not believe he was told he was buying a fixed week timeshare.

Mr M says too that he was told it would be easy to book holidays, but he was not able to do so – because of lack of availability. I would say first of all that this is not entirely consistent with his case that he thought he had bought a fixed week. If that had been the case, availability would not have been an issue, since his accommodation and the week in which he could use it would have been fixed (unless he wanted to use an exchange scheme).

Be that as it may, Mr M has provided no evidence at all of any attempts he may have made to make use of the timeshare – either at the Cancun resort or any of its partner resorts. I note as well that he brought his complaint within a matter of months of buying the timeshare. He was not however eligible to use it until 2020.

Mr M says as well that he has been unable to book accommodation through RCI, a well-known timeshare exchange business, contrary to what he was told. Again, there is no evidence of any attempts to do so. In addition, however, there is no evidence that the timeshare contract included RCI membership. It included reference to resorts with which DSO had reciprocal arrangements, but not to RCI.

For these reasons, I am not persuaded that Mr M could demonstrate to a court that he has a claim for misrepresentation against DSO. It follows that it would not be reasonable of me to uphold this part of his complaint.

Section 140A claims

Under section 140A and section 140B of the Consumer Credit Act a court has the power to consider whether a credit agreement creates an unfair relationship and, if it does, to make appropriate orders in respect of it. Those orders can include imposing different terms on the parties and refunding payments.

In considering with a credit agreement creates an unfair relationship, a court can consider any connected agreement. In this case, that could include the agreement for the sale and purchase of the timeshare.

I note of course that this is not a case where Mr M took out a loan with Tesco Bank as a result of buying the timeshare, or in order to do so. He already had the credit card account. That is a matter I must take into account in considering what is fair and reasonable.

In support of his claim that there was an unfair relationship here, Mr M relies on what he says are breaches of timeshare legislation – specifically EU Directive 2008/122/EC and The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 which

enacts it. He has referred as well to Spanish legislation.

As I have indicated, however, the timeshare contract was governed by local laws in Mexico. Neither the Directive nor the 2010 Timeshare Regulations applied. The seller was a company registered in Mexico, the agreement did not concern any property in the UK or the EEA, and the seller did not do business in the UK.

S referred me as well to a case in which a lender had to seek a Validation Order from the FCA under section 26A of the Financial Services and Markets Act 2000. That case concerned loans brokered by a business that was not authorised to carry out consumer credit activity. S has not suggested however that Tesco Bank was carrying on any business which it was not authorised to carry out. In any event, the Order was granted.

S says too that some parts of the agreement were “unfair” within the meaning of UTCCR. By the time of the sale in this case, the relevant statute was the Consumer Rights Act 2015, although the provisions relating to unfair terms are broadly similar. But neither piece of legislation has any application to contracts governed by Mexican law.

Mr M say he was coerced into signing the contract. He has not however provided any detail.

He says too that he tried to cancel the contract. That did not form part of his initial complaint, even though he suggests that it was this which triggered his dissatisfaction with DSO. In any event, there is no evidence to support what he says – for example, by way of returned emails or other correspondence.

Affordability

Finally, S says that the lending was not affordable for Mr M. But any complaint of this type here would be a complaint that Tesco Bank did not properly assess affordability when setting or changing Mr M's credit limit. S has provided no information about that. I am not persuaded that the credit limit was not properly assessed or that Mr M suffered any loss if it wasn't.

I invited further submissions, but neither party had anything to add in response to my provisional 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.

As neither Tesco Bank nor Mr M has anything to add following my provisional decision, I do not believe there is any reason to change my conclusions. I stress however that I have nevertheless reviewed the case in full.

My final decision

For these reasons my final decision is that I do not uphold Mr M's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 2 October 2023.

Mike Ingram

Ombudsman