

## **The complaint**

Mr T has complained that Tesco Personal Finance PLC trading as Tesco Bank ("Tesco") unfairly turned down his claim under Section 75 of the Consumer Credit Act 1974 ("CCA") in relation to the purchase of a holiday product in April 2014.

The contract for the purchase was signed by Mr T and Ms E, however as the purchase was partially funded with Mr T's credit card, he is the person able to make this complaint.

## **What happened**

In April 2014, whilst on holiday in Florida, Mr T and Ms E purchased a timeshare from a provider I'll call "Business O". The total paid was \$15,990, which was partly funded using Mr T's Tesco credit card. Under the timeshare, Mr T and Ms E were able to stay for one week every year in a two-bedroom villa. The agreement started in 2014 and the accommodation was available in "week 36".

In September 2017, using a professional representative ("PR"), Mr T made a claim to Tesco under s.75 CCA. PR said that Business O had breached its contract with Mr T, which Tesco was jointly liable to answer. PR said there was a term implied into the contract that Business O should have provided Mr T and Ms E with a "public offering statement" at the time of sale, but no such document was provided. Further, under the law in Florida, every contract had an obligation of good faith in its performance or enforcement. Here, PR said that Business O has asserted that the value of the property was \$15,990, when in fact the timeshare had no resale value. That meant Business O had acted in bad faith and, as such, was in breach of contract. PR said it meant Mr T was entitled to rescind the timeshare and sought a refund of the total contract price from Tesco. At that time, no other issues were raised in respect of the claim.

Tesco considered the claim, but said there was no evidence that the value of the property was misrepresented. Further, PR hadn't shown that the public offering document was required to be given to purchasers, nor was there anything to show it wasn't given to Mr T and Ms E. But Tesco also considered a complaint that the claim was unfairly turned down. It didn't think it had done so and said Mr T could bring his complaint to our service.

Unhappy with what Tesco said, PR referred a complaint to our service. In the complaint, PR said that Business O was in breach of contract, but it also alleged that the nature of the timeshare had been misrepresented to Mr T. PR also argued that Business O breached the EU Timeshare Directive.

One of our investigators considered the complaint and said that she didn't think that Tesco had acted unfairly in respect of the claim under s.75 CCA. She thought that there was nothing to suggest the value of the timeshare was misrepresented. And she didn't think there was enough to say there was a requirement for a "public offering" document to be provided. She further said that in respect of s140A, it was unlikely that a court would find there to have been an unfair debtor-creditor relationship.

In response to the investigator's view, Mr T put forward a different reason why the timeshare

was mis-sold. He said that the availability of the timeshare was misrepresented to him, in particular that the week at the timeshare could be exchanged for something in the UK or nearby. But in practice, he could only get one night at a hotel instead of a one week stay. It was explained that Mr T and Ms E first tried to use the timeshare in 2016, but couldn't get the exchange they wanted (the same happened again in 2017). It was also said that they found it difficult to get out of the timeshare.

PR further alleged that Mr T thought he was purchasing a share in the “*bricks and mortar*” of the property, citing a copy of the mortgage deed to show this. It was said that the timeshare was sold as an investment and Mr T never had any wish to purchase a timeshare, instead he wanted to be able to exchange his timeshare rights to use for different holidays and later sell the timeshare.

As the parties didn't agree with our investigator, the complaint was passed to me for a decision. But before that happened, PR raised further allegations. It said that the provision of the finance itself wasn't fair for a number of reasons. It said the credit was arranged on the same day the timeshare was taken out and no income or expenditure checks were done at the time. It also alleged that Business O's staff were self-employed and PR asked for information from Tesco about how it chose to lend to Mr T. Our investigator explained that she didn't think she needed any further information to resolve Mr T's complaint.

I considered the complaint and issued a provisional decision setting out my findings. I explained that I did so as I had come to the same overall outcome as our investigator, but for different reasons. So I set out my thoughts and asked for both sides to respond. Here is an extract of my provisional findings:

***“What I've provisionally 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.*

*When evidence is incomplete, inconclusive, incongruent or contradictory, I've made my decision on the balance of probabilities – which, in other words, means I've based it on what I think is most likely to have happened given the available evidence and the wider circumstances.*

*There is no evidence from Business O, and the only evidence there is from the time of sale is from Mr T and Ms E. They have provided all of the documentation they had from the time of sale, along with their memories. So, when considering this claim, that is the only evidence there is available. I'm mindful that their memories may not be an accurate representation of the precise sales process as memories are imperfect. So, I've had to weigh all of that up when deciding what I think most likely happened. I don't think it is unfair to Tesco for me to do this – ultimately I must decide the complaint in front of me based on the evidence available.*

**What claim was made?**

*At the outset, I think it's important to set out what claim was made to Tesco and then, in turn, what complaint was referred to our service.*

*The letter sent by PR to Tesco was headed “**Section 75 Claim**” and set out some alleged breaches of contract. Further, in the form used to refer a complaint to our service, PR explained it was referring a claim about a breach of contract and misrepresentation under s.75 CCA.*

*I think it's plain that the claim made was a s.75 CCA claim and I don't think any s.140A CCA claim was ever made. While Section 140A may be a relevant consideration, and I appreciate that our investigator went on to consider whether a court might conclude that the relationship between Mr T and Tesco was unfair, I can't see that Mr T (through PR) has ever asked Tesco to consider this point or provided evidence or arguments to support it, or that Tesco has had a chance to investigate it. So, in the circumstances, I think it would be better dealt with as a separate complaint, should Mr T wish to make one to Tesco.*

#### s.75 CCA

*Mr T's claim is brought under s.75 CCA. In summary, that provision means that, in certain circumstances, Tesco can be liable for a breach of contract or misrepresentation by Business O. I don't think it's in dispute that s.75 CCA applies in this instance.*

*Although PR framed Mr T's claim as a breach of contract claim, many of the things he said went wrong are more suited to a misrepresentation claim. So I've looked at both potential claims and considered the complaint that Tesco didn't properly consider those claims.*

#### *misrepresentation*

*In the original claim, PR argued that Mr T was told that the timeshare was worth \$15,990, and later found out that it had very little value. It was argued that this breached a term implied into the contract that Business O had to act in good faith. I think this allegation could amount to a misrepresentation in addition to the potential breach of contract alleged. With both claims, I need to consider whether I think any such representation was made and, for the reasons I'll explain, I don't think there is enough evidence to say it was.*

*Despite PR's allegation, I haven't seen any evidence that Mr T and Ms E thought "the property" was worth \$15,990. No detail was set out as to how they came to believe that the timeshare they were buying was worth that. In response to our investigator's view, Mr T and Ms E provided statements setting out their concerns and I think they were more focused on the holidays they could book, rather than on the value of what they had bought. For example, they said:*

*"As this product wasn't delivering on promises made and we were still paying annual maintenance fees I looked at handing it back and walking away, but after speaking to Business O and having the threat of legal action explained to me, I started to search the Internet and make calls to see if the product had any resale value."*

*So, when they were unhappy with the holidays, their first thought was to hand the timeshare back rather than try to realise any value in it. I don't think that fits with any representation being made that the timeshare had an inherent value that could be realised at a later date.*

*Further, Mr T and Ms E haven't set out in their own statements that they were ever told the timeshare had a value or that they were told it was worth \$15,990 (or any other amount), nor have they raised any concerns such an issue. I also note the Purchase agreement sets out the purchase "is being made for your personal use and enjoyment and not with the expectation of profit from the rental of your property or otherwise." So, although I understand that that is what was paid for it, I can't say they were ever told this was the 'value' of what they were buying. It follows, I don't think*

there was either a misrepresentation or a term of the contract that the timeshare was worth a given value.

*In response to the view, PR alleged that Mr T thought he was getting a share of the “bricks and mortar” of the property, that this could be rented out for income and this could be sold later at a profit. This wasn’t mentioned in the original claim, nor was it said by Mr T and Ms E in their responses. Mr T entered into a ‘mortgage deed’, but I think it’s clear that that is a loan arrangement to buy the timeshare, rather than a retail mortgage to purchase real property as one might find in the UK. So I think despite the document being set out as a mortgage deed, this isn’t proof that Ms E and Mr T thought they were being sold a share of the property rather than a timeshare entitling them to stay in a certain week each year. On balance, I don’t think the claim that Mr T and Ms E thought they were buying “bricks and mortar” or any interest in real property is credible.*

*Mr T and Ms E say that the availability of holidays they could get by exchanging their timeshare week was also misrepresented to them. Again this was not raised in the original claim made on their behalf by PR. It hasn’t been set out in any detail as to how the availability of exchange properties was misrepresented to them, so it’s not clear precisely what the alleged misrepresentation was. I understand that Mr T and Ms E were not able to find a suitable two bedroom property through the exchange scheme when they wanted it, but I can’t say that means the exchange programme didn’t work in the way intended. So although I understand the product might not have worked in the way they hoped, I don’t think there’s enough to say Business O misrepresented the product to them. Additionally, even if I did think certain statements were made on how the exchange programme worked, I haven’t seen evidence of any attempts to book holidays through it.*

*On balance, I’m not persuaded that there is enough to say Business O made any actionable misrepresentations to Mr T and Ms E.*

*breach of contract*

*In addition to the allegation about the value of the timeshare, PR said that the “public offering document” wasn’t supplied to Mr T and Ms E, in breach of state law. PR argue there was a term implied into the agreement requiring the document was supplied. I’m not satisfied PR has demonstrated the said document was required to be made available nor that any term requiring it was implied into the agreement. But even if I accept that such a document should have been supplied, and it wasn’t, and I accepted that there was a breach of contract because of it, I’d still need to consider what damage flowed from that. Mr T has asked Tesco to refund the full purchase price of the timeshare, but PR hasn’t explained why such a breach would lead to that level of damages. In fact, I can’t see any evidence Mr T suffered any loss as a result of not being supplied that specific document.*

*PR has said that this timeshare was sold in breach of an EU Directive and that was part of the claim for breach of contract. I’ve not seen any specific allegation about that set out in any detail, but as this timeshare was sold outside of the EU, I don’t think that Directive is relevant.*

*How the credit was arranged*

*PR has also made allegations that the credit wasn’t arranged in the right way and that Mr T’s ability to repay the amount borrowed wasn’t checked. The concerns raised appear to relate more to point of sale loans, where the credit is actually*

*arranged by the timeshare seller, rather than when a credit card is used, as was the case with Mr T. But as this allegation does not form part of a s.75 CCA claim and has never been made to Tesco directly, I won't consider it further."*

Neither party sent me anything further to consider following 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 I've not been provided with anything further to think about, I see no reason to depart from my provisional findings.

### **My final decision**

For the reasons set out above, I don't uphold Mr T's complaint against Tesco Personal Finance PLC trading as Tesco Bank.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 29 August 2023.

Mark Hutchings  
**Ombudsman**