

The complaint

Mrs F has complained that TSB Bank plc ("TSB") has unfairly declined her claim under section 75 of the Consumer Credit Act 1974 ("CCA").

What happened

In October 2013, Mrs F paid £12,950 to a business I'll call "Business I", of which £2,000 was paid using her TSB credit card. This was to buy a computer software product that offered a way to get discounted holidays. Although the product was supplied by Business I, the actual software was developed by a different business I'll call "Business R", which also ran the scheme by which people could buy the holidays.

In March 2019, Mrs F made a claim to TBS under s.75 CCA. She said that Business I had breached its contract with her as she was never able to use the software to buy holidays and both Business I and Business R were no longer trading. She also thought the nature of the product was misrepresented to her at the time of sale.

TSB responded to Mrs F's claim and said there weren't the right arrangements in place to make a s.75 CCA claim as Mrs F hadn't paid Business R directly. TSB thought Business I had done what it needed to, by providing Mrs F with the software she bought. But it also thought that Mrs F had brought her claim too late and the Prescription and Limitation (Scotland) Act 1973 ("PLSA") gave a defence to any claims being made.

Unhappy with TSB's response, Mrs F brought a complaint to our service. One of our investigators considered everything, but didn't think TSB needed to do anything further to resolve the complaint. He thought the claim for misrepresentation was made too late and TSB had a defence to it under the PLSA. He thought the claim for breach of contract had been made in time, but because Business I was paid and not Business R, that meant TSB didn't need to answer that claim.

Mrs F disagreed and asked for an ombudsman to reconsider the complaint.

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.

The background facts

Mrs F has provided me with both her recollections of the sale as well as a number of documents from Business I and Business R. I've considered all of that to determine what I think happened.

Mrs F has explained that she was approached whilst on holiday and ended up attending a sales meeting with Business I. She says she was subjected to a high-pressure sales meeting where she was told that she could get a lifetime of discounted holidays by purchasing Business R's software. Mrs F remembers being told this was a "fool-proof"

investment that would save her considerable amounts of money. But, after returning home and trying to book something, it was clear that what she was told wasn't true. Mrs F provided articles and documents showing that other customers had found Business I and Business R not to have provided the discounts promised. Mrs F also explained that Business R closed down in 2018.

I have seen a one page agreement that contains the terms of the sale to Mrs F by Business I. It explains that Business I was an authorised distributor of Business R's browser application. The contract is said to be for the purchase of a boxed software product in the form of a CD. It also says that it is governed by Spanish law.

I've also seen a document called "*[Business R] Product and & Service Overview*" that sets out the services offered by Business R. In short, it offered a subscription based, online concierge service through its own browser application. Through this service, subscribers could book holiday accommodation, flights and associated holiday products. Nothing on this document mentions any services being offered by anyone but Business R.

Having considered everything, I have no reason to doubt anything Mrs F has said. But, for the reasons I'll explain, I don't think TSB needs to do anything further to answer these claims.

Was TSB jointly responsible for any breach of contract or misrepresentation?

S.75 CCA states that in certain circumstances, when a debtor has a claim against a supplier in respect of a misrepresentation or breach of contract, they will have a like claim against the creditor. So here, Mrs F (the debtor) was asking TSB (the creditor) to answer her claims for misrepresentation and breach of contract over the problems set out above.

But this doesn't apply to every claim Mrs F may have. TSB is only responsible for claims when there is a debtor-creditor-supplier ("DCS") agreement in place. This is set out more fully in s.11(b) and s.12(b) CCA, but in short, there have to be arrangements in place so that the supplier of goods or services is paid using the credit advanced. In Mrs F's case, she contracted with Business I directly and paid it using her TSB credit card.

I don't think it's in doubt that there was a DCS agreement in place concerning Mrs F, TSB and Business I. So TSB needed to consider any s.75 CCA claim made about Business I's misrepresentations or breach of contract. I'll consider each in turn.

Was there an actionable misrepresentation?

Mrs F set out a number of things she says she was told that turned out to be untrue. Mrs F said that Business I misrepresented the nature of the Business R product to her when she bought it and that she had a claim for misrepresentation.

Under s.75 CCA, TSB could be jointly liable for the alleged misrepresentations made by Business I. But TSB argued that any claim brought by Mrs F for any alleged misrepresentations was made too late.

Having considered everything, I agree. For the avoidance of doubt, it's not my role to decide whether the limitation period had expired, as that would be a matter for the courts should a legal claim be litigated. Instead, I've considered whether TSB acted fairly in turning down the claim.

Mrs F resided in Scotland, so the laws of Scotland applied to her credit agreement with TSB.

Under the PLSA, Mrs F had five years to bring a claim for misrepresentation.¹ Mrs F was able to make such a claim from the day she entered into the agreement to buy the timeshare. It was at that time that she entered into an agreement based, she said, on the misrepresentations of Business I and suffered a loss. She said, had the misrepresentations not been made, she would not have bought the software. And it was on that day that she suffered a loss, as she used her TSB credit card and was liable to repay that to TSB, which she says she would not have done but for the misrepresentations. It follows, therefore, that Mrs F had five years from then to bring a claim. But she didn't make a claim against TSB until March 2019, which was outside of the time limits.

In some circumstances, the period of time to bring a claim can be extended if someone isn't aware they can make a claim. But here, Mrs F said that she was aware the software didn't work in the way described when she returned home from holiday. I think that would have been very shortly after buying the software, so any extension of time would have been short too. I don't think any extension would have been so long as to extend the time to when Mrs F actually made her claim. So I think TSB acted fairly in turning down the misrepresentation claim.

Was there an actionable breach of contract?

Mrs F has explained that Business R closed in 2018, so she was unable to use the software at all from that day.² Mrs F raised a claim about this within a year of it happening, so I think this claim was made in time.

Mrs F had an agreement with Business R as detailed above, so I think it is answerable for a claim about a breach of that agreement. I can't see that Mrs F ever had any interaction with Business R directly, so I think Business I were acting as a representative or agent of Business R at the time of sale. That is how Mrs F ended up with an agreement with Business R.

But Mrs F entered into a separate agreement with Business I and that was for it to supply to her a physical disk containing Business R's software. Business I did supply that disk to her and, in exchange, Mrs F paid Business I. I don't think Business I's agreement with Mrs F was breached by Business R (or Business I) later going out of business. Once Business I had given Mrs F the software, it had fulfilled its side of the deal.

As Mrs F didn't pay Business R directly using her TBS credit card, I don't think there is the right sort of DCS agreement in place for TSB to be responsible for any breach of contract claim against Business R. There are circumstances where TSB could be responsible if Business I and Business R were closely connected or associated. But I've not seen any evidence of the sort of legal connection needed for TSB to be responsible. TSB would be responsible for any breach of contract claim arising out of the agreement between Mrs F and Business I, but I can't see that any such breach occurred. It follows, I don't think TSB acted unfairly in turning down the breach of contract claim.

My final decision

I don't uphold Mrs F's complaint against TSB Bank plc.

¹ The purchase agreement was governed by Spanish Law, which also had a five year limitation period. So I can't see this extended or changed the time Mrs F had to bring a claim.

² Mrs F also says she was unable to use it before too, but it's clear the allegation here that the contract was breached by Business R no longer offering its services to any customers.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs F to accept or reject my decision before 10 August 2023.

Mark Hutchings
Ombudsman