

## The complaint

Mrs W complains that a holiday package was misrepresented to her and that the seller is in breach of contract. Because she paid for the package using her credit card, issued by Tesco Personal Finance PLC (which I'll refer to as Tesco Bank), she says that she has a claim against it in the same way as against the seller.

## What happened

In October 2021 Mr and Mrs W bought a holiday package from Atlantic Travel Service SLU ("ATS"), a Spanish company. The contract entitled Mr and Mrs W to three weeks accommodation at resorts and hotels with which ATS had arrangements. The contract terms included:

*The holiday package chosen by the purchaser consists of 3 weeks of accommodation in a one bedroom apartment with an occupancy for a maximum of four people. Each of these weeks as agreed includes 7-day accommodation only, but flight costs, meals, visitor's tax, etc. are not included.*

*The first one-week booking is agreed for the hotel Flamingo Beach Resort on Tenerife, from 09.10.22 to 16.10.22, with a maximum occupancy of four people.*

...

*The remaining 2 weeks can be selected from the accommodations offered by the provider.*

There followed a list of resorts and hotels in the Canary Islands, mainland Spain, Portugal and Thailand.

Mr and Mrs W have explained that, when they tried to book their stay at the Flamingo Beach Resort, they were told that there was no availability. They booked instead at Los Olivos – a resort on the provider's list. They say they did so because they had already booked flights, but that the accommodation was of a lower standard than at the Flamingo Beach resort.

They have explained too that it was a condition of booking that they attend a holiday club or similar presentation during their stay. If they didn't do so, they would have to pay for their accommodation. That requirement was not mentioned in the original contract.

Mrs W says that these matters mean that she and Mr W have claims for breach of contract and misrepresentation against ATS and that, because payment was made with her credit card, she has a similar claim against Tesco Bank.

Tesco Bank did not accept the claim. It said that the contract was clear that bookings were subject to availability. Accommodation at the Flamingo Beach Resort was not guaranteed.

Mrs W referred the matter to this service. Our investigator did not recommend that the complaint be upheld – for broadly the same reasons as Tesco Bank. Mrs W asked that an ombudsman review the case.

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

*One effect of section 75(1) of the Consumer Credit Act 1974 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.*

*The supplier in this case was ATS. Mrs W's credit card statement shows a payment on 11 October 2021 to "Travel Service", which I take to be the same company. I am satisfied therefore that there was a debtor-creditor-supplier arrangement in this case and that section 75 of the Consumer Credit Act could apply.*

*I have therefore considered what Ms S has said about the sale contract and the statements which led her to enter into it.*

*As a matter of English law, a misrepresentation is, broadly speaking, a statement of fact or law made by one party to a contract, which (i) is untrue and (ii) induces the other into the contract.*

*The contract here was expressly governed by Spanish law, but I have approached this provisional decision on the assumption that Spanish law is not materially different from English law, at least insofar as it relates to Mrs W's complaint. The parties can tell me in their response if they believe there are material differences. Section 75(1) of the Consumer Credit Act applies to overseas contracts.*

*I accept that the sales contract did not refer to the requirement that Mr and Mrs W attend a presentation when using the accommodation weeks. I think it unlikely that it was mentioned to them at the time. But it was clearly a requirement of booking accommodation; it was set out in the booking request.*

*I must therefore consider whether a failure to mention that requirement amounted to a misrepresentation.*

*Generally, a failure to mention something relevant to a contract will not amount to a misrepresentation. It is not treated in the same way as a positive statement of fact or law. There are exceptions, however. They include, for example, where one party to a contract knows that the other is proceeding under a misapprehension about the facts or where there is active concealment.*

*I very much doubt however that Mr and Mrs W were proceeding here on the (mistaken) assumption that they would not have to attend a presentation, still less that ATS knew that. Rather, I think it likely that they simply had not addressed the issue. And it may well be that ATS chose not to mention sales presentations when selling the holiday package. I do not believe however that it was under any legal duty to do so. I do not believe therefore that this is a case where a case in misrepresentation can be based on silence.*

*I take a different view on the issue of breach of contract, however. The contract clearly said that Mr and Mrs W could stay at the Flamingo Beach Resort, and gave the dates on which they could do so. I note of course that the contract also said that bookings were subject to availability. Given that dates had been included, however, I think that provision referred to the accommodation for the remaining two weeks of the package. At best it was ambiguous.*

*In English law, any ambiguity in the wording of a consumer contract is to be construed in favour of the consumer – in this case, Mr and Mrs W. That is now set out at section 69 of the Consumer Rights Act 2015. I believe that similar provisions apply in Spanish law, since the relevant part of the Consumer Rights Act derives from a European directive – Directive 93/13/EEC. I think it likely therefore that a court would find that it was a term of the contract that Mr and Mrs W could stay at the Flamingo Beach Resort on the dates included in the contract and that there was a breach of contract when they couldn't.*

*That, however, is not the end of the matter. In order to bring a successful claim for breach of contract, a party must also show that they have suffered some loss. Mr and Mrs W say that the alternative hotel they booked was of a lower standard. That is, to some extent, a subjective assessment. Los Olivos – where Mr and Mrs W did stay – was included on the list of hotels where Mr and Mrs W could stay, so it was within the broad category and standard of accommodation included in the contract. I note that online reviews overall give it a lower rating than the Flamingo Beach Resort, but I don't believe I can fairly rely on that to conclude that Mr and Mrs W got less than what they paid for – that is, I don't believe they have shown that they suffered any financial loss as a result of any breach of contract.*

*It is not for me to decide whether ATS was in fact in breach of contract or whether Mrs W has a valid claim for breach of contract and/or misrepresentation. I must however take relevant law into account in deciding what's fair and reasonable in all the circumstances. Having done so here, I think that Tesco Bank's response to Mrs W's claim was reasonable.*

Neither Tesco Bank nor Mrs W responded 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 I have received no further evidence or arguments, I see no reason to change my conclusions from those set out in my provisional decision. I stress however that I have considered the case afresh before reaching this decision.

### **My final decision**

For these reasons, my final decision is that I do not uphold Mrs W's complaint and I do not require Tesco Personal Finance PLC to do anything more to resolve it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs W to accept or reject my decision before 1 November 2023.

Mike Ingram

**Ombudsman**