

The complaint

Mr C has complained that Tesco Personal Finance PLC trading as Tesco Bank ("Tesco") has unfairly declined his claim under section 75 of the Consumer Credit Act 1974 ("CCA").

Although the things bought using credit were bought in the names of both Mr and Mrs C, the credit card used was in Mr C's name only. That means he is the only person able to bring this complaint.

What happened

Mr and Mrs C had a timeshare they had taken out with a timeshare provider. Mr C explained that he was contacted by a company he thought was his timeshare provider and offered a promotional holiday for a hotel in Tenerife at a cost of £100. But in fact the holiday was provided by a different business, that I'll call "Business M". Mr C says that Business M reassured him that it was linked to his timeshare provider.

When on this holiday in April 2017, Mr and Mrs C attended a meeting with someone from Business M. This turned out to be a sales meeting at which Mr and Mrs C say they explained that they liked their timeshare, but the maintenance fees were expensive. They were offered a new type of holiday product that provided 'credits' that could be used in exchange for discounted hotels and flights. As part of the deal, Mr and Mrs C understood that Business M would take over their timeshare, but they would still be able to use it as part of Business M's credits system. They would also have lower overall maintenance fees.

Mr and Mrs C agreed to take out the product offered and Mr C made payment to Business M using his Tesco credit card and then later paid another business (which I'll call "Business T") by cheque. Mr and Mrs C say both payments were part of the same deal.

Mr and Mrs C say that, after making the credit card payment, and before they paid the balance, they had second thoughts and went back to Business M to cancel. They say they were told that there was no cooling off period, but Business T would 'buy back' any points they bought at a rate of 50 pence per point. Relying on that, they agreed to pay the balance.

In October 2018, Mr and Mrs C found out that Business M had closed down. Further, when they tried to book a holiday using their travel credits, the cost of holidays was more than if they paid for the same holiday directly, so there was no discount. Finally, Mr and Mrs C said that Business M didn't take over their existing timeshare, so they felt the whole deal was a scam.

In June 2019, Mr C made a claim to Tesco under s.75 CCA, using the services of a professional representative ("PR"). The claim included a statement from Mr and Mrs C in the terms detailed above, plus documents from the time of sale. PR argued that Business M and Business T were linked as both contracts had the same contract number.

In January 2020, Tesco responded to Mr C's claim. Having looked at everything, Tesco agreed that something had gone wrong and it made an offer of compensation. It said the evidence suggested Business M hadn't taken over Mr and Mrs C's timeshare as promised,

so it agreed to return what had been paid to Business M based on its breach of contract. But Tesco thought the money paid to Business T was for the travel credits and, as that wasn't paid for using the credit card, it wasn't responsible for any of the losses. Tesco considered whether the two businesses were linked and accepted they may have been, but it said that as there were two different contracts for two different things, under the CCA, it wasn't liable.

Unhappy with the response, PR (on Mr C's behalf) referred a complaint to our service. On the form submitted alongside the complaint, it said that Business M said they would recoup monies spent on their existing timeshare and Business T would provide cheaper and better holidays, but neither of these things happened.

One of our investigators gave their view on Mr C's complaint. He said that Business M had sold a number of agreements to Mr C, in particular a timeshare relinquishment service and some travel credits that were provided by a separate company – these were all sold on the same day. He thought, as the amount paid to Business T was described as an 'outstanding balance', there was one overall price for the services offered. In effect the different things were sold as a package to Mr and Mrs C.

Our investigator thought there were the right arrangements in place to consider any misrepresentation or breach of contract by Business M. He thought there was a misrepresentation that Mr and Mrs C would be able to sell their credits after three years and made a return on what they had paid. He also thought that Business M misrepresented how the timeshare relinquishment would happen. So he recommended Tesco pay Mr C a sum equivalent to both amounts paid by credit card and by cheque.

Mr C accepted our investigator's view. Tesco disagreed. It reiterated that, as Business T were not paid using Mr C's credit card, it didn't think it needed to answer any claim in respect of that. Tesco pointed to some of the terms of the agreements that it suggested made clear the two businesses were separate and acting under two different agreements. As the parties didn't agree with our investigator, the complaint was passed to me for a decision.

Having considered everything, I reached a different outcome to our investigator. I agreed with Tesco that it wasn't responsible for the breaches of the agreement with Business T, as it hadn't been paid using Mr C's credit card. But I also considered whether Business M had misrepresented anything to Mr C and, based on the evidence I'd seen, I didn't think it had. So I issued a provisional decision and asked both parties to comment on it before I issued a final decision.

Tesco responded to my provisional decision and said it had nothing further to add.

PR responded on Mr C's behalf. It set out the things that were said to Mr C that could amount to misrepresentations. They included that the timeshare wasn't cancelled as promised, that Mr C couldn't get holidays through the product, that the business "*closed down so couldn't sell*" and that the credits were 'worthless'. PR also said that the business was "*set up by people in Tenerife to mislead people like they had done with other products they sold*". Finally, PR thought other cases, similar to Mr C's, had been upheld in similar circumstances, so I should have upheld Mr C's 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.

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 M or Business T, and the only evidence there is from the time of sale is from Mr C. He has provided all of the documentation from the time of sale, along with his memories. So, when considering this claim, that is the only evidence there is available. I'm mindful that his 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's unfair to Tesco for me to do this – ultimately I must decide the complaint in front of me based on the evidence available.

When considering this complaint, I think it's important to set out what I find Mr C agreed to and with which business. I'll then consider any legal claims that Tesco needed to consider, given the legal relationships between the parties. Finally, I'll consider whether Tesco's existing offer is a fair way to resolve this complaint.

The available documents

I've seen a one-page document titled "Contract Number: R4906" where Mr and Mrs C have signed to confirm details of their existing timeshare. In summary, this appears to set out the terms of their timeshare termination. It makes clear that the timeshare would be terminated using the services of a 'legal services partner' arranged by Business M. Instructions were given to Mr and Mrs C not to communicate in any way with their timeshare provider.

There is also a Business M document that sets out the details of purchase as:

*"Admin cost for the relinquishment of [Mr and Mrs C's timeshare]
Enroll in Dial & Exchange FOC"*

And a payment of £1,950 was made for this.

There is also a letter from Business M stating the Mr and Mrs C were entitled to a four-day break within the UK, but I can't see any price was given for this.

There is a letter on Business M headed paper that reads:

"Please accept this letter as confirmation that you have the option after 3 years, to market and resell your [Business T] credits.

You can do this directly yourselves or we will assist you through our resale network.

We will re-market them for 55% of the [Business T] listed price, however as you own the credits, the value you wish to re-market at, is entirely your choice."

I've seen a document on Business T headed paper dealing with 60,000 Business T credits that says the outstanding balance was for £11,000. It explained that payment needed to be made to a different, third business, "Business N", and gave the account details.

There were also some Business T 'Product Essentials' that explained how the credits worked – this was a one-page document. It makes it clear that the credits could only be used at the Business T travel agency and would give a "discount up to 70% on most [Business T] Holidays, Tours, Car hire and package holidays." It says that the credits are not a timeshare

or other holiday ownership product and can't be redeemed for cash. Mr and Mrs C signed to say they understood the product.

As well as the documents from the date of sale, there is a letter from Business M to Mr and Mrs C from May 2017 saying that the balance payment of £11,000 was received into the Business N account and that the Business T membership package would be sent out to them.

Finally, I've seen a letter from a claims management company ("CMC") from November 2017 stating that Business M had passed over Mr and Mrs C's details and that the CMC would take steps to terminate the existing timeshare. And in January 2018, the CMC wrote to Mr and Mrs C to say it had done everything it needed to do to terminate the timeshare agreement.

Payments made

Mr C's Tesco credit card statement shows that two payments totalling £1,912.18 were made to Business M on 25 April 2017, alongside non-sterling transaction fees of £52.57.

On 22 May 2017 a cheque was paid out of a bank account for £11,000.

I don't think this is in dispute, but I find it more likely than not that these payments related to the agreements detailed above.

What were the agreements?

I think Mr and Mrs C contracted with Business M to take steps to terminate their existing timeshare agreement. They were also enrolled into "*Dial & Exchange FOC*", although it's unclear what that was. It also looks like Mr and Mrs C got a four-day break in the UK as part of the deal, but it's not clear what that break was.

Mr and Mrs C also purchased travel credits from Business T. I find this was arranged by Business M, most likely acting as agents for Business T, as I can't see that Mr and Mrs C had any dealings directly with Business T. I also find this agreement was entered into on the same day and was sold alongside the things Business M offered.

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

Section 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'll have a like claim against the creditor. So here, Mr C (the debtor) was asking Tesco (the creditor) to answer his claims as set out above.

But this doesn't apply to every claim Mr C may have. Tesco 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 card. In Mr C's case, he paid Business M directly with his credit card and it's not in dispute that Tesco could be held jointly responsible for any claim of a breach of the contract with Business M that arose from that transaction or of a misrepresentation that led Mr C into entering into agreements with Business M.

However, I don't think Tesco had to answer any claim for breach of contract or misrepresentation by Business T. That was because anything supplied by Business T was outside of the arrangements between Mr C, Business M and Tesco. Under the CCA, it's

possible Tesco would have to answer a claim if it could be shown Businesses M and T were 'associates' (s.184 and s.187 CCA). But I've not seen any evidence to suggest that was the case. That means that complaints about breaches of the agreement with Business T can't be considered under a s.75 CCA claim. Those include PR's concerns that Mr and Mrs C couldn't get holidays using the Business T agreement, that Business T closed down so they couldn't sell their credits and that the credits were worthless.

Did Tesco properly consider the claims?

Tesco accepted that there had been a breach of contract by Business M and offered to pay back what Mr C had paid on his credit card – that was on the basis that his existing timeshare had not been terminated. But Tesco said that it would not pay anything in respect of the payment to Business T. For the reasons set out above, I agree that Tesco are not responsible for any breaches of Business T's agreement.

The damages normally paid for a breach of contract are to put the person claiming in the position they would be, had no such breach taken place. In this case, that would be to put Mr C in the position he would have been had Business M done what it needed to under the agreement. It's not entirely clear what it had agreed to do – for example, whether Business M had guaranteed the timeshare would be terminated or just that it would appoint a CMC to try to get termination. Also, I'm not sure what effect the non-termination had on Mr C as no further information has been given. But looking at things in the round, and as I can't see that Mr C got anything at all from the agreement, I can't see that Tesco's offer to refund what was paid is an unfair way to settle this part of the complaint. For the avoidance of doubt, I don't think any breach of contract by Business M (such as failing to cancel the timeshare) meant Tesco needed to refund what was paid to Business T.

However, it's possible that Tesco might need to do something further if there was a valid claim for misrepresentation. The normal way to remedy any such claim would be rescission of the contract entered into and damages to put Mr C in the position he would have been in had the misrepresentation not been made. So, it's possible that, if misrepresentations were made to Mr C by Business M, damages would need to cover the payments made to both Business M and Business T, if it could be shown he only entered the agreement with Business T due to those misrepresentations.

For there to be a misrepresentation there needed to be an untrue statement of fact or law made by one party to another, which induces the party receiving the statement to enter a contract, thereby causing them loss. A statement of opinion can be a misrepresentation if the opinion amounts to a statement of fact and it can be proved that the person who made it didn't hold that opinion or could not reasonably have held it.

The alleged misrepresentations have not been set out clearly, but I've looked at everything to see what I think they might have been. Having considered each one, I don't think there is sufficient evidence to conclude any misrepresentation was made.

Mr C said that Business M told him it was linked to his existing timeshare supplier. Not much detail about this is provided, but I'm not sure whether this is being alleged as a misrepresentation or a misunderstanding. But it appears that, by the time Mr C agreed to take out the services offered, he was aware that Business M wasn't linked to his timeshare provider. I say that because he was aware that Business M used a 'legal services partner' to cancel the timeshare and he was told not to speak to his timeshare provider – neither of those things fit with the two businesses being linked. So, I don't think any misrepresentation about the nature of the relationship between Business M and his timeshare provider was something that would have caused him to take out the agreements.

Mr C says he was told that the credits offered by Business T could be exchanged for holidays and at a discount, but when he came to use them he found that the cost was still more than buying holidays on the open market. I've not seen evidence comparing the actual holidays offered by Business T and what was available on the open market, so I'm not able to say the cost was different for two identical holidays. But I'm not able to say the product didn't work in the way expected – that discounts were offered on the cost Business T normally offered to its customers. The discounted price may still have been higher than what was available elsewhere, but I can't say no discount was offered.

Mr C says his timeshare would have been taken over and then been able to have been used through Business M's system and with lower annual maintenance fees. I've not seen anything to show that the holidays available through the timeshare provider were not also available through Business M (or Business T). I also note that one of the documents signed at the time of sale states "*I/We understand that the Disposal of our timeshare is a termination and is not resold in anyway.*" I can't see that Mr C was asked to assign his timeshare rights to Business M, so I don't think the documents fit with what Mr C says he was told that the timeshare would be taken over. Further, I can't see that there was any obligation to pay ongoing fees to Business M or Business T, so I don't think it was untrue to say that annual fees were lower.

I can't see that Mr C has alleged that he was told there would be a cooling off period that turned out to be untrue, rather after he had already agreed to purchase he was told there was no such a period. So, I don't think anything said about that could be a misrepresentation. Similarly, if Mr C was told Business T's credits would be bought back at a later date at a guaranteed price, his evidence is that such a comment was made after he had already agreed to purchase, so again I don't think it could amount to a misrepresentation.¹

When bringing the complaint to our service, PR said that Mr C was told Business M would recoup monies paid to his existing timeshare. But that wasn't something Mr C said at the time the original claim was made and none of the documents from the time of sale talk about Mr C making a claim against his timeshare provider. So, I can't say that such a representation was made.

I can't see that Mr C was given any assurance about how his timeshare relinquishment would take place that could amount to a misrepresentation. So, having considered everything, I don't think there is enough to suggest Business M made any misrepresentations that Tesco might be responsible for under s.75 CCA. It follows, I don't think Tesco needs to pay anything on top of what it has already offered to pay.

PR has said "*the company was set up by people in Tenerife to mislead people like they had done with other products they sold*" – it's not clear whether PR are referring to Business M, Business T or both. But even if I accept that was the case, Mr C still needs to provide evidence of an actionable misrepresentation by Business M for me to be say Tesco needs to pay the compensation he seeks under s.75 CCA. And for the reasons I've explained, I can't say that was the case.

Finally, I've thought about what PR has said that other, similar complaints have been upheld. But I must consider each complaint on its own facts and circumstances. Having done that, I don't think Tesco needs to do anything further to resolve Mr C's complaint.

¹ I also note that Mr C had a document from the time of sale saying that Business M would remarket credits after three years at 55% of the listed price. This doesn't fit with there being a guaranteed price or buyback scheme.

My final decision

I don't uphold Mr C'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 C to accept or reject my decision before 21 August 2023.

Mark Hutchings
Ombudsman