

## The complaint

Mr Z's complaint is, in essence, that Tesco Personal Finance PLC ("Tesco") acted unfairly and unreasonably by deciding against paying a claim under Section 75 of the Consumer Credit Act 1974 (the "CCA").

## What happened

Around late 2016 / early 2017, Mr Z was contacted by a company (who I'll refer to as "A") to discuss a problem he was having with a holiday product ("*timeshare*") he owned. Mr Z says that A offered to assist him with cancelling any liability he had under the existing holiday product.

Mr Z subsequently met with A in January 2017 (the "Time of Sale") whereupon, he was persuaded to purchase a lodge under a Limited Partnership Agreement (the "LPA") for an agreed price of £26,183. Mr Z made an initial payment of £2,000 to another company (who I'll refer to as "SL") using his Tesco credit card. He says the balance of the lodge payment was later paid from a current account with another bank to which Mr Z was a party. Mr Z says he also made a further payment of £1.00 enabling A to arrange cancellation of his existing holiday product agreement.

In April 2023, Mr Z submitted a claim to Tesco which included:

- misrepresentations by A at the Time of Sale giving him a claim against Tesco under Section 75 of the CCA ("S75"), which Tesco failed to accept and pay.
- breach of contract under the agreement giving him a claim against Tesco under S75, which Tesco failed to accept and pay.

### (1) S75: the supplier's misrepresentations at the Time of Sale

Mr Z says that A told him that the cost of the lodge was £40,000. But they could discount the future value of credits against the lodge purchase. He says the purpose of the meeting was originally to discuss the problems associated with his existing timeshare product and receive compensation for mis selling. However, he now believes A were guilty of a "*Bait and Switch*" in order to convince him to buy a lodge.

### (2) S75: the breach of contract claim

Mr Z says that A (as the seller) has ceased trading, so they're unable to fulfil the full performance of the contract he entered into. He says he's unable to use the products and services purchased.

In response, Tesco rejected Mr Z's claim on every ground. In particular, Tesco were unable to establish any breach of contract or misrepresentation. And in any event, as the evidence suggested to them that the total cost of the contract was £669,855, the transaction amount was outside the limits set within S75. Despite Mr Z complaining about the outcome of his claim and providing Tesco with additional evidence and information, Tesco didn't think they'd done anything wrong.

Unhappy with Tesco's response, Mr Z referred his complaint to this service. Having considered all the evidence and information available, one of our investigators didn't think Mr Z's complaint should be upheld. Our investigator thought any claim for misrepresentation had been submitted too late under the provisions of the Limitation Act 1980 (the "LA").

Furthermore, our investigator was unable to find any evidence of a breach of contract such that Tesco could be held liable and/or pay compensation.

Mr Z didn't agree with our investigator's findings and provided further evidence that he thought would support his assertion that the contract he'd entered into had been breached. But our investigator wasn't persuaded to change their view.

As an informal resolution couldn't be achieved, Mr Z's complaint was passed to me to consider further.

### **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 considering what's fair and reasonable, DISP 3.6.4R of the FCA<sup>1</sup> Handbook means I'm required to take into account; relevant law and regulations, relevant regulatory rules, guidance and standards and codes of practice; and, where appropriate, what I consider was good industry practice at the relevant time.

Section 75 of the CCA ("S75") provides consumers with protection for goods or services bought using credit. Mr Z made a payment for the purchase under a pre-existing credit card agreement with Tesco. So, it isn't in dispute that S75 may apply (subject to any restriction or limitation). This means Mr Z may be afforded the protection offered to borrowers like him under those provisions. And as a result, I've taken this section into account when deciding what's fair in the circumstances of this case.

Given the facts of Mr Z's complaint, relevant law also includes the LA. This is because the original transaction - the purchase funded under the credit card agreement with Tesco - took place in January 2017. Only a court is able to make a ruling under the LA, but as it's relevant law, I've considered any effect this might also have.

Where evidence is incomplete, inconclusive, incongruent or contradictory, my decision is made on the balance of probabilities – which, in other words, means I've based it on what I think is more likely than not to have happened given the evidence that's available from the time and the wider circumstances. In doing so, my role isn't necessarily to address in my decision every single point that's been made. And for that reason, I'm only going to refer to what I believe are the most salient points having considered everything that's been said and provided.

#### What did Mr Z purchase?

The documentation from the Time of Sale includes:

- an LPA incorporating an Adherence Agreement; and
- a Cancellation Agreement

The LPA relates to a Limited Partnership established in November 2016 which I'll refer to as "BL". The parties to the LPA were:

- (1) company SL (the General Partner) and
- (2) another company I'll refer to as "SLS" (the Limited Partner Company).

Part 3 of the LPA is headed "Adherence Agreement". It incorporates Mr Z's application to be admitted as a "*Limited Partner*" under the terms of the LPA subject to payment to BL of "*the Capital Contribution stated above*". The Capital Contribution is shown as £26,183 to acquire 5% of units within a specified unit series.

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<sup>1</sup> Financial Conduct Authority

Tesco believe that the total purchase price for the contract Mr Z entered into was £669,855. And this exceeded the limit permitted under S75. However, based upon the evidence I've seen, Mr Z was only contracted to pay £26,183 to become a Limited Partner and acquire the units under it. So, I'm not persuaded that the limit within S75 was exceeded here.

The Cancellation Agreement - which appears to relate to Mr Z's existing holiday product at the time - is headed up with another company name, which I'll refer to as "M". It confirms cancellation of a purchase agreement between M and Mr Z for a payment of £1.00.

#### What payments were made?

Mr Z says that he made two payments:

- £2,000 using his Tesco credit card. This payment was paid to SL and appears on Mr Z's Tesco credit card statement dated 8 January 2017.
- £24,183 which Mr Z says he paid from a joint current account at another bank. I've seen no evidence confirming completion of this payment or to whom it was made.

I've seen no evidence of any payment relating to the Cancellation Agreement.

#### The claim for misrepresentation under S75

Mr Z's claim is essentially that the A (as the supplier) misrepresented the purchase he was making by inflating the purchase price to suggest a discount was being offered. And that A was operating a "*switch and bait*" tactic.

Whilst I acknowledge Mr Z's recollections from the Time of Sale, I've seen no documentary evidence or otherwise linking A to the purchase in question. Nor have I seen any evidence to show that any payment was made to A using Mr Z's Tesco credit card.

In any event, I don't think it would be fair or reasonable to uphold Mr Z's complaint for reasons relating to his S75 misrepresentation claim. As a general rule, creditors can reasonably reject S75 claims that they are first informed about after the claim has been time-barred under the LA. It wouldn't be fair to expect creditors to look into such claims so long after the liability first arose and after a limitation defence would be available in court. So, it's relevant to consider whether Mr Z's S75 claim was time-barred under the LA before it was put to Tesco.

A claim under S75 is a "like" claim against the creditor. It essentially mirrors the claim Mr Z could make against the seller or the supplier. A claim for misrepresentation against the supplier would ordinarily be made under Section 2(1) of the Misrepresentation Act 1967. And the limitation period to make such a claim expires six years from the date on which the cause of action accrued (see Section 2 of the LA).

But a claim under S75, like this one, is also "*an action to recover any sum by virtue of any enactment*" under Section 9 of the LA. And the limitation period under that provision is also six years from the date on which the cause of action accrued.

The date on which the cause of action accrued here was the Time of Sale. I say this because Mr Z entered into the Adherence Agreement at that time based upon the alleged misrepresentations of A – which Mr Z says he relied upon. And as it's suggested the Credit Card issued by Tesco provided funding to help finance that purchase, it was when he made that payment (January 2017) that he allegedly suffered the loss.

Mr Z first notified Tesco of his concerns in April 2023. And as more than six years had passed between the Time of Sale and when the complaint was first put to Tesco, I don't think it was ultimately unfair or unreasonable of Tesco to reject his concerns about the alleged misrepresentations.

#### The claim for breach of contract under S75

Mr Z's claim was initially based upon the allegation that A (as the seller) had ceased trading. But as I've already explained, I haven't seen any evidence that A received any payment. Nor have I seen any documentary evidence to suggest that A was under any contractual obligation to provide any product or service to Mr Z.

Mr Z has since explained that SL (as the "General Partner" under the LPA) has since entered into an insolvency process together with BL (the Limited Partnership). To support that argument, Mr Z has provided copies of correspondence received from a third-party professional purporting to be handling that insolvency process. However, enquiries at Companies House show that both SL (as the recipient of the credit card payment) and BL both remain active. Companies House records provide no evidence to suggest that either entity have entered into an insolvency process. Furthermore, Companies House also shows all returns as being up to date, having continued to be submitted since the date of the correspondence provided by Mr Z. Based upon this, I can't reasonably conclude that there's been a breach of contract resulting from any alleged insolvency of either entity.

I've also considered the content of the LPA on the basis that the Adherence Agreement Mr Z signed refers to it. Having done so, I've found nothing within the LPA that provides any contractual guarantees or warranties about the performance of that Partnership such that they might support a claim for breach of contract. The LPA serves to set out the BL's purpose, plans and objectives rather than forming a contractually binding purchase agreement.

Mr Z suggest that he was contractually obliged to receive rental payments. And I've seen evidence that a payment of £3,294 was received by him from SL on 8 February 2023 with the reference "Lodge Rental". However, section 7.3 of the LPA says:

*"the General Partner [SL] shall not be obliged to cause the partnership to make any payment to Partners:*

- 7.3.1 unless there is sufficient cash available for that payment;*
- 7.3.2 which would render the Partnership insolvent;*
- 7.3.3 which, in the opinion of the General Partner, would or might leave the Partnership with insufficient funds to meet any future contemplated obligations or contingencies; or*
- 7.3.4 if, following that payment, the aggregate of the balances on the revenue account, advance account and capital account of any Limited Partner, or the revenue account of the General Partner, would be less than nil.*

Having found nothing else within the LPA to suggest there was any defined contractual obligation to pay a rental income to Limited Partners, I can't reasonably conclude there was such a commitment. And because of that, I also can't say that there was an actionable breach of contract as a consequence.

I note that the named Limited Partner Company (SLS) has since entered into an insolvency process. However, section 9.1.1 of the LPA states:

*"The death, bankruptcy, insolvency, dissolution or liquidation of a Limited Partner shall not cause the dissolution of the Partnership [...]"*

So, I can't see that the insolvency of SLS would have any impact upon the LPA such that it might lead to an actionable contract breach.

Mr Z has also provided copies of correspondence from another third-party professional dealing with the insolvency of another company (who I'll refer to as BLM). However, as BLM doesn't appear to have been a party to any of the contractual agreements referred to above, I'm not persuaded that this would have any bearing upon Mr Z's claim.

Ultimately, the Adherence Agreement is between Mr Z and SL with a payment having been made by Mr Z to SL using his Tesco credit card. It appears this was an application for Mr Z be admitted as a Limited Partner with units acquired under that agreement. I've seen no evidence to suggest that Mr Z didn't become a Limited Partner. Or that the units detailed under that agreement weren't registered in his name. So, it would seem that the contract (under the Adherence Agreement) has been fulfilled.

### Summary

I would like to reassure Mr Z that I've carefully considered everything he's said and provided. While I appreciate that he will be very disappointed, I can't reasonably conclude that Tesco's response to his claim was ultimately unfair or unreasonable. Because of that, I won't be asking them to do anything more.

### **My final decision**

For the reasons set out above, I don't uphold Mr Z's complaint about Tesco Personal Finance PLC.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr Z to accept or reject my decision before 24 October 2024.

Dave Morgan  
**Ombudsman**