

The complaint

Mr C complains that Sainsbury's Bank plc didn't fairly deal with a claim he made under Section 75 of the Consumer Credit Act 1974 ("Section 75").

What happened

In October 2021 Mr C used his credit card to pay, in part, for a bathroom. The contract was made with the bathroom supplier who I will call M, to both supply and install the goods. Mr C arranged for the goods to be delivered on 1 April 2022 with work to commence on 4 April. Mr C said no goods were delivered and one workman arrived on 4 April but left without doing anything. He brought a complaint to M and cancelled the job. M refunded his money, making various deductions. Mr C then brought the issue to Sainsbury's and made a Section 75 claim.

In its final response Sainsbury's said M had provided a reasonable calculation of incurred losses for the goods and services until the point of cancellation. It also said that M had outlined that it wasn't able to start the works on the date agreed due to health and safety concerns. M had said a deep cleaning of the bathroom was recommended before works could commence. Mr C wasn't satisfied and brought his complaint to this service. Our investigator recommended partially upholding the complaint, refunding Mr C the £450 the merchant charged for 'delivery/collection/restocking' of goods and the £250 charged for the fitter's daily rate because it was foreseeable that he would not be able to carry out the work due to the state of the bathroom. They also recommended Sainsbury's pay Mr C £100 due to the inconvenience caused by the delays in this matter.

Mr C didn't agree. He believed Sainsbury's should refund him the full amount. Sainsbury's disagreed and relied on the terms and conditions of Mr C's contract with M. So the complaint came to me for a decision.

I issued a provisional decision on 30 October 2023. I said:

Mr C paid M using his Sainsbury's credit card and because of this he might have the protection provided by Section 75. Before I go any further, I think it's important to set out my role here. In considering a complaint about a financial services provider I'm not determining the outcome of a claim that a party might have under Section 75. Rather in deciding what's the fair way to resolve Mr C's complaint I must take relevant law into account. Section 75 is relevant law. But that doesn't mean I'm obliged to reach the same outcome as, for example a court might reach if Mr C pursued a claim in court. Our service is an alternative to the courts. The general effect of Section 75 is that if Mr C has a claim for misrepresentation or breach of contract against M he can also bring that claim against Sainsbury's provided certain conditions are met.

When considering whether Sainsbury's has treated Mr C fairly it's also relevant for me to consider the contract Mr C signed. And here the Consumer Rights Act 2015 (CRA) is relevant law. I've seen a copy of this contract. The copy I have is blurry and while I can see that Mr C has signed it, it's not clear if he was given the opportunity to

sufficiently review the terms and conditions at the time. Nor can I tell if he signed accepting those terms and conditions. Sainsbury's has relied on these terms and conditions in its decision not to uphold Mr C's complaint.

Mr C has said that the goods were scheduled to be delivered on 1 April and they did not arrive. Sainsbury's referred to section 5.2 of the terms and conditions which states that failure to deliver goods on the agreed date does not constitute a breach of contract. It also referred to 5.1 which stated the delivery date given was not a definitive guarantee. In its response to Sainsbury's M said the goods had been delivered. But they hadn't, nor were they ever, even prior to or on the morning the workman arrived. This seems unusual to me especially given that this was a bathroom so the new fittings would need to be installed very quickly after the old fittings were removed. So I do consider it possible that something went wrong with the order or delivery.

Sainsbury's also said work did not commence on the agreed day because the premises wasn't in a safe condition for the works to be carried out. There was black mould present. It said it was for Mr C to ensure the premises was in a safe condition not for the surveyor or the sales representative to raise this issue. It relied on the following terms:

9. Providing Works

9.1 Following the technical survey we carry out we may need to make alterations.... 9.5 We will need certain facilities in order to carry out the works. You must ensure: (a) that the existing hot and cold water systems are sufficient in capacity and pressure to provide a suitable level of water without modification. You are advised to obtain a full survey of the water system to ensure this is the case before the works begin if in any doubt. Where any modification is required we will provide a quotation for carrying out such works but we are not automatically responsible for undertaking this work and shall not be responsible for the costs;

(b) if the goods ordered by you require the supply of electricity that the existing supply of electricity and other electrical requirements are safe and suitable for the works required without modification. You are advised to obtain an electrical survey of the premises to ensure this is the case before the works begin if in any doubt.

(c) that the structure and condition of the premises are suitable. You are advised to obtain a full survey of the premises before the works begin if in any doubt. The survey we conduct as part of the works is not intended for the purpose of identifying any such problems as those set out above.

I've thought about what the CRA says about contract terms. The law recognises that a business may not be able to rely on terms which are unfair, an unfair term (within the meaning of the CRA) is not binding on the consumer. It is not for me to say whether a contract term is unfair, that is for a court to decide. Rather, as I mentioned above, I must determine what I consider to be a fair resolution of Mr C's complaint.

Section 62 (4) of the CRA says a term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. And under section 68 (1) a trader must ensure that a written term of a consumer contract, or a consumer notice in writing, is transparent. Transparency means the term must be understandable to the consumer.

From his contract Mr C is required to ensure the structure and condition of the premises are 'suitable'. But the contract does not specify what it means by 'suitable', 'structure' or 'condition'. Unlike 9.5 (a) and 9.5 (b) which are quite specific in relation to water and electricity and Mr C's responsibility with regards to them, by contrast 9.5 (c) is not specific at all. It's not clear what M refers to when it says premises must be suitable. This can be interpreted very broadly. It doesn't give any examples, nor does it define or identify the scope and size of any problems that would render the premises unsuitable or unsafe. And I believe that because 9.5 (c) is not specific enough it isn't transparent, and it would be difficult for a reasonable person to understand what standard deems a premises suitable. Mr C said he was visited by salesmen on 26 October who measured the bathroom and a technical surveyor on 16 November who carried out a technical survey. The terms go on to say the survey it conducted as part of the works is not intended for the purpose of identifying any such problems as those set out in section 9. M has not explained to Sainsbury's or this service what the technical survey does include. But I think it reasonable that a consumer might conclude that a technical survey may include reference to the premises being suitable for the installation.

Mr C said the workman arrived in the morning but stayed less than 15 minutes and left. He was told this was a health and safety matter because the bathroom had visible black mould. After the investigator sent their view Sainsbury's received photos of Mr C's bathroom from M. Having looked at these myself I can see the mould appears throughout the bathroom, although I can't say whether this would be suitable or not for a workman. And I find it striking that even if health and safety issues relating to black mould were not part of the technical survey that Mr C wasn't alerted to the need to have the bathroom assessed for safety by the salesman or the surveyor by M itself following these two visits. There is no evidence that the terms and conditions were explained to Mr C including in regard to health and safety. It seems to me that both the salesman and the surveyor are more likely to know what suitable condition the premises should be in than Mr C.

I consider 9.5 (c) to be open to wide interpretation and that M would be able to determine what premises is suitable after Mr C signed the contract. In addition because the copy of the contract Mr C signed is blurry it's not clear to me that he accepted the terms. But irrespective of this I'm persuaded 9.5 (c) would cause a significant imbalance to the detriment of Mr C. And I think it fair and reasonable this contract term is struck out.

Having been persuaded that 9.5 (c) should be struck out and not binding on Mr C I must now determine whether Sainsbury's acted fairly in regard to Mr C's Section 75 complaint without this term. M didn't deliver any goods prior to or on the day of fitting. As I mentioned above I think this is odd given the nature of the job and the importance of Mr C having a working bathroom. It is possible they would or could have been delivered later in the day. But the workman left after 15 minutes and failed to install the bathroom on the agreed date. Without being able to rely on 9.5 (c) and subject to any further information I might receive I'm persuaded that failure to deliver and install the goods on the date agreed with Mr C is likely a breach of contract.

Sainsbury's relies on the cancellation terms in the contract to deduct costs from Mr C's refund. I'm persuaded there was likely a breach of contract and as Mr C has indicated his desire to end the contract by cancelling it, I think it fair and reasonable he should be refunded in full. In addition Mr C has been inconvenienced by this situation and I also consider it fair that Sainsbury's pay him £100 in compensation.

Mr C accepted my provisional decision. Sainsbury's did not and provided further comments

to which I have responded.

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.

Having done so I've concluded that my provisional decision still stands. Sainsbury's has provided a detailed response to my provisional decision and I have responded to it below under the headings it used in its reply.

Fairness

Sainsbury's said for me to come to a fair resolution to this complaint I should consider the content of the terms and conditions in the context of the services provided under these terms and conditions. It believed that clause 9.5 (c) to be fair and transparent considering the context. It said the consumer would presumably have a better understanding of the premises compared to the merchant so it would be unreasonable to expect the merchant to be aware of the specific circumstances of each customer's premises. It said the clause does not relieve the merchant of all its duties and create a substantial imbalance. Instead it merely confined its responsibility to the extent of its services and expertise, which it believed is fair.

While I accept that Mr C would have an understanding of his premises I still consider the term to be very broad in context with the service that the merchant provides. The merchant is a specialist in providing mobility bathrooms for consumers who need additional help and I think a reasonable expectation would be that the condition of the bathroom itself would be within its expertise.

Technical survey

Sainsbury's said mould can start growing on a damp surface within 24 hours and it had no evidence to confirm the condition of the mould during earlier visits including the technical survey visit. It said it would have been unreasonable to expect the merchant to anticipate that Mr C would let the mould grow to this extent and it didn't believe the merchant could have anticipated there would be mould that causes a health hazard by the time of the installation.

The only evidence provided of the mould is a collection of photos taken presumably at the time of the proposed installation. Neither the merchant nor Sainsbury's has provided any evidence to support the condition of the bathroom at the time of the technical survey. Nor has the technical survey been provided as evidence. So it's not possible to establish the condition of the bathroom when it was inspected.

To try to establish what was included in the technical survey, in the absence of information from M, I visited the its website. The web page entitled Fast Expert Installation says:

"Technical survey

Once you are happy to proceed, you will be assigned a personal installation manager who will look after you for the duration of the project.

The first thing we do is do a full technical survey to check your plumbing, water pressure, electrics and all the necessary things to make sure your installation goes smoothly.

Your surveyor will also advise how long your installation will take."

This implies that the technical survey is not a one-off event as it said the personal installation

manager will look after the customer for the duration of the project. On Mr C's contract agreement under "description of work to be carried out" it says "project manager". The website says this manager checks all the necessary things to make sure the installation goes smoothly. While I accept that this information is current on the website and may not have been on the website at the time Mr C bought his bathroom I do consider it likely that this was the service offered at the time by the project manager noted on the contract agreement. As such I'm persuaded a personal installation manager ought to have been aware or ought reasonably to have been aware of the condition of Mr C's bathroom prior to the installation date.

Legibility of agreement

Sainsbury's said the terms and conditions in dispute are legible and all other documents in the file seem to be legible except for the "contract agreement". It noted that the contract agreement had been scanned against a dark backdrop leading it to suspect that the legibility issues with the contract agreement could merely be due to a scanning mishap. I'm not disputing Sainsbury's comments and most of the text on the contract agreement is legible, nevertheless I'm still not able to see where it says that Mr C had read and understood the terms and conditions.

Cancellation

Sainsbury said that it was important to note that despite the condition of the bathroom the merchant did not cancel the contract. It said as per the terms and conditions there was no requirement for the merchant to complete the installation on that date as delays did not form a breach of contract. It said all Mr C was required to do was have the mould cleaned and the merchant was willing to return at another date and complete the work. Sainsbury's said it was Mr C who ended the contract and therefore it seems unfair to hold the merchant liable for the costs it incurred prior to the cancellation, since Mr C had agreed to cover these by signing the contract agreement.

I'm not disputing that Mr C cancelled the contract, but I'm persuaded he did so because he believed the merchant had breached the terms. His understanding was that the products would be delivered prior to installation, and they still hadn't been delivered when the workman arrived. As I said in my provisional decision this seems unusual to me. On the website under Fast Expert Installation it says:

"Project managed installation

We'll arrange all new bathroom products to be delivered ready for the day your installation starts. We manage all members of the qualified installation team, including plumbers, electricians, and builders where required.

Your personal installation manager will stay in contact with you throughout this process to make sure you are happy as the job progresses.

When the installation is complete, we will make sure your old bathroom and any rubbish remaining are collected and removed from your property, leaving nothing at all for you to do, apart from enjoying your new safer bathroom!"

I've seen no evidence that Mr C's project manager, if he had one as noted he should have on the contract agreement, stayed in contact with him during the process. He wasn't informed that the products wouldn't be delivered on the delivery date and the 'new bathroom products' were not "delivered ready for the day your installation starts".

As I mentioned in my provisional decision the Consumer Rights Act 2015 is relevant here. In

section 49 it says

Service to be performed with reasonable care and skill

(1) Every contract to supply a service is to be treated as including a term that the trader must perform the service with reasonable care and skill.

As I've mentioned previously it's not my role to determine, in this instance, whether the service was performed with reasonable care and skill. It's to determine if Sainsbury's has acted fairly. But I think it's sensible for me to question whether the merchant has performed the service with reasonable care and skill. And it doesn't appear to have done so.

Health and safety

Sainsbury's said it's not reasonable to expect an individual to work in the conditions displayed in the photographs provided. It said the photographs clearly showed there is black mould growing on the walls. It quoted NHS guidance on this. I'm not disputing Sainsbury's position regarding an individual's expectations for work conditions. Nor am I disputing that there was considerable mould present in the bathroom. But it's not for me to determine the level of risk to health. Sainsbury's said the decline of the condition of Mr C's bathroom could not have been anticipated by the merchant. I don't agree.

No evidence has been provided about what the technical survey established including whether "*all the necessary things to make sure your installation goes smoothly*" were completed by the project manager. There is no evidence of what the condition of the bathroom was at the time of the survey. There appears to be no communication from the merchant or project manager between when the survey was conducted and when the goods were supposed to be delivered. The products weren't delivered prior to or on the day of the installation. In summary I'm not persuaded that the service to Mr C was performed with reasonable care and skill.

Putting things right

I don't think Sainsbury's has responded to Mr C's complaint reasonably or fairly so to put things right Sainsbury's Bank Plc must:

- Refund the admin fee of £250
- Refund the cost of the technical survey of £300
- Refund the delivery/collection/restocking fee of £450.
- Refund the fitter wasted day cost of £250
- Pay Mr C £100 in compensation for the inconvenience caused.

My final decision

My final decision is that I uphold this complaint and Sainsbury's Bank Plc must put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 15 January 2024.

Maxine Sutton
Ombudsman