

## **The complaint**

Mr S complains about the way Santander UK Plc dealt with a claim he raised under the connected lender liability provisions of section 75 of the Consumer Credit Act 1974.

## **What happened**

Mr S made some room bookings with T, a third party. He used his Santander credit card to pay in full. The rooms were booked on a non-refundable basis in the event of cancellation. Mr S subsequently cancelled his bookings. He hasn't specified his reasons for doing so. He sought a refund from T, taking the matter to court as a breach of contract claim where he obtained default judgment in his favour.

T didn't settle the judgment debt and Mr S turned to Santander to pursue the claim, as under section 75 liability is both joint and several. Santander didn't agree to meet the claim. It said Mr S had made the booking on a non-refundable basis, and suggested he pursue recovery under the judgment he'd already obtained against T.

Mr S was unhappy with Santander's stance and referred the matter to us. He says the non-refundable term breaches the unfair contract terms provisions in the Consumer Rights Act 2015 ("CRA").

Our investigator didn't think the complaint should be upheld. He noted the court hadn't made a ruling in respect of the contract terms, having issued default judgment in the absence of a response from T to Mr S's claim. The investigator also found it relevant that Mr S had obtained a lower rate for his bookings on the basis that they were non-refundable. He didn't think that Mr S had satisfactorily demonstrated a breach of contract such that Santander ought to have treated his claim differently.

Mr S hasn't accepted the investigator's conclusions. He's asked for this review, reiterating his point about the term being unfair under the CRA (which also formed the argument in his court claim). In addition, he's supplied a transcript of a county court judgment he believes supports his position.

## **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.

None of the key facts in this case appears to be in dispute. It's accepted that Mr S made the bookings on a non-refundable basis, that he subsequently did cancel, that he paid using his credit card, and that the transaction amounts and structure meet the requirements for him to seek to make a claim under section 75.

Our investigator mentioned the possibility of using the chargeback facility under the card scheme rules, but discounted this because the time period for doing so had long passed. I note this for the sake of completeness, as I appreciate Mr S's complaint isn't founded in whether Santander ought to have raised the claim via chargeback.

For what it's worth, I share the investigator's view on whether this was an avenue open to Santander. I would simply add that, as the cancellation policy appears to have been clearly brought to Mr S's attention when he made his bookings, there would appear to be little purpose in attempting a chargeback on these grounds even if it had been in time.

On the matter of whether Santander has acted unreasonably in the way it responded to the section 75 claim, I accept that Santander's response didn't set out its position on whether it considered the cancellation term unfair. That doesn't make the bank's response to the claim unreasonable; the position it's taken is that it considers it would be able to rely on the term.

The CRA gives courts and certain regulators the power to determine whether a term is unfair. While our service isn't one of those listed in the CRA, I must have regard for (among other things) relevant law when dealing with a complaint. The judgment Mr S has provided is in some ways helpful. It doesn't offer any form of precedent and isn't in my view sufficiently similar – it deals with the return leg of a flight booking rather than a hotel booking. But it does set out the test a court will apply as to whether a term is unfair.

Under the CRA, *"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 *"Whether a term is fair is to be determined—*

*(a) taking into account the nature of the subject matter of the contract, and*

*(b) by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends."*

Mr S has based his claim on the list of terms appearing in Schedule 2, Part 1 of the CRA, which sets out consumer contract terms which may be regarded as unfair – the so-called 'grey list'. According to the CRA, the terms on the list are not automatically unfair, but may be used to assist a court when considering the application of the fairness test I've mentioned. So it doesn't follow that a term that makes the hotel booking non-refundable in the event of cancellation would be deemed unfair simply because it could meet the definition in the grey list. It would still need to be assessed based on the fairness test above.

While I can see the argument Mr S has made, I think it's quite possible a court could nevertheless determine that the term doesn't meet the threshold for unfairness. As I understand it, Mr S would have had the option to use T or other accommodation providers. He also had the option to book the rooms with T at a different price under which he would have been able to receive a refund if he cancelled. These are just some of the circumstances existing when the term was agreed, and could well affect the conclusion in respect of whether the term caused a significant imbalance.

With this in mind, I don't consider it's sufficiently clear that the term would be deemed unfair and could not be relied upon such that Santander was acting unreasonably when it declined to meet Mr S's breach of contract claim. That doesn't mean a court would deem the term fair, of course – and as Mr S has a default judgment against T, that question has yet to be determined. However, based on the current position I can't properly say that the fair way to resolve this complaint would be for Santander to reimburse Mr S. In my view, the bank hasn't treated him unfairly in the way it responded to his claim.

### **My final decision**

My final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 22 September 2023.

Niall Taylor  
**Ombudsman**