DRN-4521335

The complaint

Mr O complains about the way Santander UK Plc has handled a breach of contract claim he made in relation to a fitted kitchen he paid for using his credit card.

For ease of reading, while both Mr and Mrs O have been involved in relevant correspondence, I'll refer to all such communications as being from Mr O.

Background

I issued a provisional decision setting out the events leading up to this complaint and how I thought the dispute should be resolved. I've reproduced the content of that provisional decision below, and it forms part of this final decision.

What happened

Mr O contracted with "A", a third party, who undertook to supply and fit a kitchen. The total cost of the arrangements – which included units and appliances – was £26,760.72, with payments due at certain specified stages of the work. Mr O paid an initial deposit using his Santander credit card. In the course of discussions between Mr O and A, some changes to specifications were made that had a modest impact on the total cost. Following a further payment from Mr O delivery and installation was scheduled for early November 2021.

Unfortunately, the delivery was delayed with A citing supply chain problems. Over the ensuing weeks Mr O corresponded with A by phone and email, setting out concerns over missing and wrongly ordered items. On 17 and 20 January 2022 Mr O emailed A listing the outstanding items and work yet to be completed, referencing provisions in the Consumer Rights Act 2015 ("CRA") he believed were relevant to the circumstances.

A's response indicated that the problems lay with its supplier, and that the contract between A and Mr O excluded liability on this basis. A also said that the contract didn't provide for a confirmed completion date and that as a result it wasn't in breach of contract.

It appears that at this stage relations between Mr O and A broke down. Mr O appointed an alternative company ("B") to source the missing units and complete the outstanding work. He also went elsewhere to obtain the missing and incorrectly supplied appliances. In July 2022 Mr O issued a court claim against A. He obtained judgment in default, though as I understand it A has made no payment under the judgment.

Mr O turned to Santander to pursue his claim under the connected lender liability provisions of section 75 of the Consumer Credit Act 1974 ("section 75"). Santander disputed it was liable to Mr O, saying that the necessary debtor-creditor-supplier agreement wasn't in place between him, the bank and A, due to the involvement of a further party "S". Mr O complained to Santander about its stance and subsequently referred matters to us.

Our investigator didn't think the involvement of S was a significant factor that prevented section 75 from being engaged. He noted that S had acted only as the card payment processor facilitating Mr O's payment to A. The investigator was otherwise satisfied that

section 75 applied to the transaction and that the circumstances indicated A had breached its contract with Mr O. He considered it would be fair for Santander to compensate Mr O for his distress and inconvenience and for the losses he'd incurred arising from the breach, which he assessed at £15,958.34.

Santander didn't dispute the investigator's conclusion in respect of S's involvement. But it said it wanted to speak with A to clarify the position regarding outstanding work, as A's correspondence had indicated the kitchen was 90% complete. The bank subsequently told us that A was seeking to have the default judgment set aside, and that it didn't think we should deal with the underlying claim. It offered to pay Mr O £100 in recognition of the way it had responded to his complaint.

Our investigator put the bank's proposal to Mr O, explaining that the legal position was such that it wouldn't be appropriate for us to proceed as the claim had been considered by a court which affected our ability to determine the complaint. A's application to have the judgment set aside was dismissed by the court in April 2023 and Mr O asked for this review.

My provisional findings

Our power to deal with the complaint

Before I can express an opinion on the merits of a complaint, I have to be sure I have the power to do so. In its correspondence with our investigator Santander asked us to confirm whether we have jurisdiction in the matter, in light of the court action taken in relation to Mr O's claim.

I don't think there's any real doubt in this case that Mr O's complaint falls within our jurisdiction. But for the avoidance of any doubt, Santander is a firm with relevant Financial Conduct Authority (FCA) permissions to carry on the lending activity that gives rise to his claim. That lending activity is covered by our compulsory jurisdiction and was provided to Mr O from the UK. Mr O is a customer of Santander and his complaint arises from his relationship with the bank. It was referred to us within the time limits set out in our rules[1]. As such, I have the power to deal with the matter.

It seems to me that the question of our jurisdiction has been conflated with the issue of whether we should exercise the discretion we have under our rules to dismiss a complaint without considering its merits[2]. There are sometimes circumstances where, although we can deal with a complaint it's *inappropriate* for us to do so. That includes situations where the subject matter of the complaint has been the subject of court proceedings where there has been a decision on the merits, or where it is subject to current court proceedings.

Mr O's complaint is about the way Santander dealt with his claim, rather than the claim itself. However, as the former is almost invariably linked to the latter, I consider it relevant to consider the court judgment Mr O obtained in July 2022. It appears to be accepted by all parties that this was a default judgment, rather than a decision of the court on the merits of his claim against A. The court has declined to set aside that judgment and I've seen nothing to suggest there are current court proceedings ongoing in relation to the dispute.

Under section 75, a creditor's liability for a claim is both joint and several. This has the effect that – subject to Mr O having a breach of contract claim covered by section 75– he can pursue the bank separately from any action he has taken to pursue the breach of contract claim against A, including where judgment has been granted. Of course, any payment he

[1] Our rules can be found in the DISP section of the FCA Handbook, available on the FCA website
[2] DISP 3.3 in the FCA Handbook

has received in settlement of the judgment debt will affect the amount he might be able to claim from Santander. But I don't see that the action Mr O has taken in relation to A offers suitable reason for me to dismiss his complaint. So I've gone on to consider its merits.

Mr O's claim in breach of contract

Mr O used his Santander credit card to fund his transaction with A. His credit card agreement is one that is regulated by the Consumer Credit Act 1974, which makes certain provisions detailing a lender's responsibilities in relation to the actions of a third party supplier of goods or services.

One effect of section 75 is that, where an individual buys goods from a supplier using credit provided under pre-existing arrangements between the lender and the supplier, that individual can bring a claim for breach of contract or misrepresentation against the lender in the same way he could against the supplier. The supplier here was A; Santander was the lender. Mr O made a claim for breach of contract against A. He potentially has the same claim against Santander.

I find that Santander was incorrect in telling Mr O that section 75 didn't apply to his transaction with A. The involvement of S in the capacity of payment processor didn't interfere with the arrangements between Mr O, Santander and A. I'm satisfied that the transaction fulfilled the key requirements to enable Mr O to claim against Santander under section 75. His claim is one of breach of contract. He alleges that, contrary to the provisions of the CRA, A (and by extension, Santander) failed to act in a way that conformed to the contract it entered into with him, both in the supply of goods and in the way it carried out the services element of the contract.

Santander appears to have acknowledged the claim to a point, subsequent to our investigator's initial assessment. However, it has fallen some way short of stating a formal position on its potential liability for the breach of contract claim. It didn't say it wouldn't meet Mr O's claim; rather, it said it needed to discuss the claim further with A to establish key facts such as the extent to which the contract was performed.

That was the position the bank took in November 2022. I understand from Santander's correspondence with the investigator that it received A's response in December. While I appreciate what Santander was told in respect of the application A had made to have the judgment set aside, that didn't mean the bank didn't have to consider its own position or potential liability at that point.

As I've already observed, Santander was jointly and severally liable for any breach, and the state of the proceedings between Mr O and A didn't change that. It was open to Santander to seek further evidence to establish whether the contract had been satisfactorily performed. The suggestion that it was at best 90% complete alone should have suggested to Santander that it had not, and that there was a potential liability to be addressed.

I've seen no persuasive evidence that would allow me to reach the conclusion that the contract was successfully – or even 90% successfully – performed by A. Nor do I find the points A raised in response to Mr O's original correspondence particularly persuasive. The contract wording might not have made time of the essence, but the CRA contains a provision incorporated into all consumer contracts that services are to be performed within a reasonable time. What is a reasonable time might fall to be determined by a court, but I'm inclined to say that for a kitchen to be fitted, this would be measured as a matter of days or weeks, rather than months.

It's also questionable whether A would be able to rely on such a wide-ranging exclusion of liability for events considered to be *force majeure* as set out in the contract. Even if such a clause were operable, not all of the problems were down to supply chain issues. Further, as Mr O pointed out to A, it ought to have been capable of supplying some of the missing items such as appliances, by sourcing them elsewhere as he ultimately had to do.

In the absence of suitable evidence to show that A performed its contractual obligations to the required standard, I'm minded to find that Santander hasn't had proper regard for its liability to Mr O in breach of contract, and as such, hasn't treated Mr O fairly.

putting things right

Mr O has provided what I consider an accurate and persuasive account of the extent to which A failed to meet certain of its obligations under the contract. His email exchanges with A identified the outstanding work and items at various points along the way. He has supplied invoices to show the amounts he spent on appliances that A should have supplied under the contract. And he obtained quotes from alternative providers to set out and undertake the supply and fitting work that needed to be done. I've no reason to think that any of the remaining work he detailed was unnecessary or that it wasn't part of the contract with A.

I understand that our investigator provided Santander with a breakdown of the relevant costs to bring the contract up to conformity, which totals £15,458.34. Under the original contract Mr O was to have paid A £27,660.72. Mr O says he paid A £25,760.72 in total. So overall he spent £41,219.06 to have the kitchen supplied and fitted, when his anticipated cost was £27,660.72. The difference between these two sums – £13,558.34 – represents Mr O's direct loss in terms of the supply and fitting of his kitchen. I intend to direct Santander to pay this amount to him.

Mr O has also effectively sought to claim damages arising from the breach of contract relating to the cost of dining out while he had a non-working kitchen. He advises that he has no receipts for this expenditure. I don't think that in itself is a barrier to a successful claim; there's little doubt that for at least some of the time in question, Mr O had no access to cooking and food storage at home. Granted, this is often the case when undertaking kitchen renovation and so some such expenditure is almost inevitable. But it's clear that Mr O was without access to these facilities for rather longer than might reasonably be expected.

Against that, if Mr O had had a working kitchen he'd still have spent money on food. I'm not sure there's enough evidence to enable me to reach an accurate figure in terms of Mr O's out-of-pocket costs, though it seems to me fair that there is some recognition of this in assessing Santander's liability to him. In the absence of a more accurate way of establishing this sum, I propose an amount of £250.

Mr O has included in his submissions legal costs relating to his action against Santander. I'm not minded to propose Santander pays these costs. Mr O has a judgment against A awarding these costs and to my mind enforcing that judgment is the appropriate way for him to look to recover these costs.

Turning to Mr O's request for compensation for stress and anxiety, I need to draw a distinction between the problems he experienced with A, and the difficulties he's had in his dealings with Santander. I appreciate he feels the bank should be penalised, but that isn't a power I have under our rules.

Given my findings above I can accept that Santander could (and should) have handled Mr O's claim better than it did. The protracted nature of the dispute would not necessarily have been avoided. Santander wasn't obliged to agree Mr O's claim when he raised it, had it

taken appropriate steps to obtain evidence to support such a position. But the bank's initial response that section 75 didn't apply at all, and its subsequent failure to provide much in the way of material evidence that it looked properly into the claim, has contributed towards the impact the situation has had on Mr O. I think it's only fair that Santander compensates him for this.

In summary I informed both parties that I intended to issue a final decision directing Santander to pay Mr O a total of £14,200 to settle his complaint. I invited Mr O and the bank to let me have any further comments they wished to make in response to my provisional conclusions before I reached my final determination.

Response to my provisional findings

Mr O broadly accepted my provisional findings, but felt that the proposed redress didn't go far enough. He said, again in summary:

- the quantum of redress should be the full contract amount he paid – £25,760.72 – plus the amount he has had to pay out to have the kitchen fitted to standard. Mr O attributes to this latter element the amount of £14,200 referenced in my provisional decision. He contends that this would otherwise send a message to Santander and other banks that their delays and failure to investigate claims would enable them to reduce the amount they had to pay out under such claims
- his dining out costs were significantly greater than I had recognised in that element of the proposed award, even when offsetting the usual cost of grocery shopping over the same time period
- If Santander had looked at his claim properly in the first instance, as the provisional decision recognised it should, he would not have incurred the court costs and legal fees that he did. It was unfair that he should have to pursue these against A, particularly given it was his understanding that there was little reasonable prospect of recovery from A

Santander also responded. It agreed that it hadn't considered Mr O's section 75 claim correctly and said it would review its position. It asked for further information to do this. That information included details of the court proceedings between Mr O and A, details of costs and invoices relating to work and items provided by A and for the additional work by B, quotes and receipts for replacement items Mr O purchased. Santander also sought copies of the email communications between Mr O and A, along with evidence to support that the contract wasn't completed to a suitable standard.

Following our response to that request Santander has continued to seek further information about the court action, receipts for payment to B, clarification of certain elements of the overall claim and details of any payment Mr O has received or is due to receive from A.

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.

I'm aware that in its most recent correspondence, Santander has asked that I delay the issuing of this decision until it has been provided with the information it has cited. I haven't seen any persuasive reason why I should agree to any further delay in resolving matters.

All of the information Santander has sought from us is presumably information that, had it undertaken to look into Mr O's claim properly from the outset, it would have in its

possession. Throughout the process Santander has had ample opportunity to gather any evidence it felt necessary either to meet or defend Mr O's claim. It could have done so by approaching Mr O and/or A. It has all of the information we hold relating to the legal proceedings between Mr O and A, which the bank could have obtained in the same way, or through Registry Trust, which holds the register of court judgments.

This does to my mind speak to a rather fundamental point, which is that it is for Santander to present me with the evidence and arguments that form its defence to Mr O's claim, which I can then consider when seeking to establish whether the bank has had due regard to its potential liability to Mr O.

Our role is to receive such evidence and arguments, consider them in the context of the complaint and, where appropriate, express a view on how best to resolve matters. In doing so, while we of course share key information and evidence on which our findings are based, that is no substitute for a firm investigating and presenting its own case; nor do I consider Santander has been in any way denied the opportunity of doing so. With this in mind, I shall address those matters Santander has raised within the body of this final decision.

Neither party has sought to query my findings either in respect of my power to deal with the complaint, or that it is appropriate for me to do so. I therefore adopt here the reasoning and conclusions set out in my provisional decision in both respects. Mr O, as might be expected, hasn't challenged my conclusion over whether A was in breach of contract. It's disappointing that Santander has still not made clear its position in this respect, noting this was a point I highlighted in my provisional decision.

As I said then, I was satisfied that Mr O had presented an accurate and persuasive account of the extent to which A failed to meet certain of its obligations under the contract. Nothing that Santander has submitted in response to my provisional decision leads me to reach a different conclusion in this respect. The main thrust of Santander's argument appears to be that it has accepted and adopted the position of A, in that it considers an apparent willingness to complete the work and difficulties with suppliers sufficient to find that the contract wasn't breached.

I've explained in my provisional decision why I don't think that's a position likely to meet with much success. Mr O had, in my view, already demonstrated a significant degree of patience beyond that which might reasonably be expected for the installation of a kitchen. He took the view, as the CRA entitles him to, that the contract had not been performed within reasonable time. It's also worth noting that, while the possibly of *force majeure* has been suggested, Santander has emphasised that A did not terminate the contract and Mr O was himself able to source alternatives. So I don't see that there would be much to support a suspension of A's contractual obligations during that time. It's not for me to speculate on any other underlying reasons that might explain the delay.

Taking this into consideration, I remain of the opinion that Mr O has sufficiently demonstrated a breach of contract and that Santander is liable to him for that breach. Santander has acknowledged that it hadn't considered that position correctly when Mr O brought his claim, and that prompts the question of the appropriate way to recognise this.

I appreciate Mr O's strength of feeling. He's deeply unhappy with the way he's been treated and I can to some extent understand why he feels the bank has acted as it has. I don't happen to share his view on the bank's motivations – I think they're probably born of frustration rather than founded on anything more sinister. But in any event it's important to note that I've no power to make an award of a punitive nature.

There is no proper basis on which I can reasonably expect Santander to entirely fund the

cost of his new kitchen at its own expense, which would be the effect of the proposal he's made in his response to my provisional decision. I still think the right way for Santander to recognise its liability is for Mr O to have his kitchen installed to the appropriate standard without him incurring additional cost. The proposal in my provisional decision – the £13,558.34 difference between what Mr O has paid and what he expected to pay – serves this purpose and so I adopt it in this final decision.

Santander has raised a query over whether Mr O received a payment of £1,000 from A as outlined in A's email dated 30 April 2021. I have no record of any email with this date. It's possible Santander is referring to an email from A dated 30 June 2021, in which the parties discuss payment terms. However, this doesn't appear to refer to a payment offer from A to Mr O; rather, it reads as being in relation to the instalment arrangements for Mr O to make payment to A.

Mr O sought to make an arrangement whereby his final payment to A would be £2,000 payable on completion, whereas A was willing only to agree to a remaining balance of £1,000 at that point. The question of whether Mr O received such a payment from A doesn't arise. But to be as clear as I can, my understanding is that because of the performance issues that arose during the contract, Mr O didn't make that final payment to A. That was accounted for in my original calculation – as mentioned above, Mr O didn't pay the full amount of £27,660.72. Instead he paid £25,760.72.

Santander has also queried the provision of estimates from B rather than receipted payment. I would remind the bank that our awards cover prospective loss as well as actual loss. After all, in many cases a claimant may be unable to pay for remedial work until a claim is satisfied, and thus unable to provide a receipt for payment.

If Santander had reason to think that Mr O has not and will not incur such costs, it has been open to the bank to provide those reasons. Absent them, I'm satisfied the costs shown are consistent with the email chain of correspondence that covers Mr O's dissatisfaction with the worktops and workmanship provided by A. I'm sure Mr O would be willing to provide Santander with receipts if he has already paid for the work in question, should it need them for its records.

I've noted Santander's comments regarding the mixer tap and spotlights forming part of the claim for remedial work. Although the bank has said A disputes the lighting being part of the contract, emails in December 2021 suggest that the arrangements did include undercabinet lights. Further, the cost of the mixer tap appears to me a reasonable inclusion in the claim given the contention that the tap A supplied was incorrect. I see no reason to remove either of these from the overall claim.

I don't accept Mr O's line of argument that Santander should reimburse the costs associated with his claim against A. Mr O didn't incur those costs because Santander failed to agree his claim at the outset; he did so because he decided to pursue A through the courts. Mr O could have avoided those costs by referring his dissatisfaction with Santander's response to our service instead of instigating the legal action. They may flow from A's breach of contract, but that doesn't mean it's necessarily fair that Santander stands liable to reimburse them.

Mr O has mentioned the difficulty he may face in recovering under the court judgment (for the purposes of addressing Santander's direct query, I've not seen any indication that he has received any payment under that judgment, but Santander is entitled to make its own enquiries of Mr O). While I'm aware from Companies House records that there have been directorial changes at A, the company appears to still be a going concern. My finding in this respect remains as set out in my provisional decision; that the appropriate way for Mr O to recover those costs is by enforcement of the judgment he holds.

I would add, however, that any money Mr O recovers under the judgment in relation to the rest of his claim will affect the sum he would be entitled to receive from Santander. My decision here is not intended to affect any right the bank might have in law to recover from Mr O money it has paid him that he may subsequently receive from A under the same head of claim. With this in mind, Mr O might wish to obtain legal advice as to how any enforcement action might be progressed. I can't provide either party with advice.

I've thought about Mr O's comments about the award in recognition of the additional cost of food for the period in question. Again, I can understand why he took the decision he did in terms of eating out. Like anyone who has had this sort of renovation work carried out at their home will appreciate, there was always going to be a degree of disruption to the usual meal routine. But this disruption turned out to continue for much longer than anticipated. Noting what Mr O has said about the costs, I think he makes a fair argument that the compensation for this should be higher than £250.

I've also had cause to rethink the appropriate amount for Mr O's distress and inconvenience as outlined in my provisional decision. In light of Santander's handling of the claim I think an increase to this amount is also appropriate. Adding these factors to the aforementioned £13,558.34 in respect of Mr O's loss, I direct Santander to pay Mr O £15,000 in total, rather than the £14,200 I proposed in my provisional decision.

My final decision

My final decision is that I uphold this complaint. To settle it, Santander UK Plc must, within 28 days of receiving Mr O's acceptance, pay Mr O £15,000.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O to accept or reject my decision before 22 February 2024.

Niall Taylor
Ombudsman