DRN-4841557

Financial Ombudsman Service

The complaint

Mr R complains Santander UK Plc has not treated him fairly in connection with a dispute over a large payment for airline tickets made on his credit card.

What happened

The background to this complaint, and my provisional findings on it, can be found in my provisional decision, which is appended to and forms an integral part of this final decision.

I asked the parties to the complaint to let me have any further submissions they wanted me to consider, by 7 June 2024. Santander responded to say it would accept my provisional decision, which was that it should pay a further £75 compensation to Mr R for customer service-related issues, and to ensure that a previous compensation payment of £50 had been made.

Mr R responded to the decision to say he was disappointed with the decision. He added that a further £75 compensation was a very low amount considering how long the matter had been going on for, and didn't even cover the £3 per month cost of keeping the account open over that period. The case has now been passed back to me to review.

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.

Neither party to the complaint has made any further submissions on the outcome of the chargeback or section 75 claim, and having reviewed the key evidence once again, I see no reason to depart from the conclusions I reached in my appended provisional decision, for the same reasons.

It follows that I don't consider Santander acted unfairly in declining Mr R's claim under section 75 of the Consumer Credit Act 1974, or in deciding not to pursue a chargeback further than it did. I do however think it provided poor service during the claims process, especially in providing unclear or incorrect information to Mr R.

I've considered the comments Mr R has made about the compensation amount I recommended in the provisional decision. I know a total of £125 does not seem like a very large amount when considering how long this matter has been ongoing. However, it covers the service failings which occurred between July/August 2021 when Mr R first contacted Santander for assistance, and when Mr R referred his complaint to the Financial Ombudsman Service in July 2022. As I said in the provisional decision, the service failings were mainly failures to provide accurate information, as well as not addressing Mr R's appeal against the bank's section 75 claim decision in a timely manner. Ultimately, I thought the bank's decisions were correct, but appreciated the poor service would have caused Mr R some frustration and distress over and above what he was already feeling about having lost the money paid for the flights. I remain of the view that an additional £75, bringing the total to £125, is fair compensation for the service failings I identified, and their impact at the time.

My final decision

For the reasons explained above, and in my appended provisional decision, I uphold Mr R's complaint in part and direct Santander UK Plc to pay him £75 compensation, in addition to any amounts it had already paid. If Mr R has not received the £50 sent to him previously by cheque, then arrangements should be made to ensure this amount reaches him as well.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 8 July 2024.

Will Culley
Ombudsman

COPY OF PROVISIONAL DECISION

I've considered the relevant information about this complaint.

Having done so, I broadly agree with the findings of our investigator, but have explained my reasons in more detail. I have also commented on Mr R's concerns about the customer service provided by the bank, which have not previously been addressed.

As a result, I need to give both parties an opportunity to provide further comment, before I make my decision final.

I'll look at any more comments and evidence that I get by 7 June 2024. But unless the information changes my mind, my final decision is likely to be along the following lines.

The complaint

Mr R complains Santander UK Plc has not treated him fairly in connection with a dispute over a large payment for airline tickets made on his credit card.

What happened

The background to the complaint is well-known to all parties, so I will summarise briefly the events leading up to now.

- On 4 July 2021 Mr R purchased a set of airline tickets from an online travel agent ("K"), using his Santander credit card to pay for them. The purchase consisted of one-way tickets for two adults and two children, departing on 24 July 2021 from London Heathrow to Sydney, Australia. There were two connections along the way – one in Istanbul, Turkey and one in Kuala Lumpur, Malaysia. One airline, "TA", was due to fly from London to Istanbul, and Istanbul to Kuala Lumpur, while a second airline, "AX", was due to fly from Kuala Lumpur to Sydney. The total cost of the booking was £7,494.66.

- The booking took place in the midst of the coronavirus pandemic and, given the overall length of the journey, Mr R was unsure if PCR tests taken in London would still be valid by the time he reached Kuala Lumpur. He contacted the Malaysian embassy about this on 6 July 2021 and was informed that the combination of flights he had booked was impossible for him to take.

- The reason the combination of flights was impossible to take was because all TA flights into Kuala Lumpur arrived at terminal 1 ("KLIA"), and all AX flights departed from terminal 2 ("KLIA2"). Due to the layout of the airport, it wasn't possible to transit airside between the two terminals, meaning it was necessary officially to enter Malaysia during the flight connection. Due to restrictive coronavirus controls in Malaysia at that time, Mr R and his family would have been placed in a quarantine hotel for two weeks, meaning they would be unable to fly the final segment of their journey.

- Mr R initially tried to negotiate a cancellation or amendment to the flights with K, but found their customer service to be highly unsatisfactory. K refused a refund, and said it was unable to change the travel arrangements for Mr R, for example by finding alternative flights.

- Mr R approached Santander for assistance the same month. After requesting and

receiving some further information from Mr R, the bank first attempted what's known as a "chargeback" on 5 August 2021 to reclaim the money he had paid. K disagreed with the chargeback, submitting evidence in its defence on 7 September 2021. Santander escalated the chargeback to a stage known as "pre-arbitration" on 14 September 2021. It received no response, and decided not to pursue the matter to the final stage – arbitration – where Mastercard would have made a ruling on the dispute.

- Santander then began considering whether it might have some liability to Mr R under section 75 of the Consumer Credit Act 1974 ("CCA"). It decided that it did not, writing to him in January 2022 to say that the technical requirements for Mr R to make a section 75 claim hadn't been met – specifically the need for there to be a debtor-creditor-supplier ("DCS") agreement in place. After Mr R challenged Santander's interpretation of the claim, the bank gave other reasons for it having no liability under section 75. These included that there had been no breach of contract by K, and that a force majeure clause applied.

- Mr R complained about Santander's decision and its handling of the whole claims process, during which he considered he'd been on the receiving end of poor service and conflicting and confusing information. The bank refused to change its decision, but it sent Mr R a cheque for £50 in respect of customer service failings.

Dissatisfied with this response, Mr R referred his complaint to the Financial Ombudsman Service for an independent assessment. One of our investigators began looking into the case. There were delays in him being able to issue an assessment, which he did on 16 February 2024. I could summarise his findings as follows:

- Santander had not acted incorrectly in deciding not to pursue the chargeback further. K had demonstrated that they'd booked the flights and provided the tickets, and there wasn't a reasonable prospect of the chargeback succeeding.

- It wasn't necessary to make a finding on whether the section 75 DCS agreement was in place, because there no evidence that K had misrepresented something to Mr R, or had been in breach of contract.

- K had not been responsible for any boarding issues, and it was up to the booker to check the latest coronavirus travel restrictions for all parts of the trip. A link had been supplied to check travel restrictions. What had happened was extremely unfortunate, but did not constitute a breach of contract or misrepresentation by K for which Santander could be found liable under section 75.

Mr R disagreed and asked that his complaint be reviewed by an ombudsman. I could summarise the points he made as follows:

- K's terms made it clear that it was responsible for the itinerary and the algorithm responsible for creating it. Santander appeared to have fundamentally misunderstood this, and the nature of his claim, and had accepted a stock reply from K that there was nothing wrong with the services provided.

- He had trusted K to display only routes which were in fact possible to fly. He had been offered an impossible combination of flights.

- K had misrepresented the nature of the transfer required within Kuala Lumpur. It had mentioned the transfer was "within" Kuala Lumpur airport and didn't mention that he would need to leave one terminal and travel 2km to another terminal. Had K

presented accurate information then he'd have been discouraged from booking this route.

- K's contract with him said it would enable him to "manage the risk of missed transportation or related disruptions to travel plans". It had failed to discharge this obligation because it hadn't given full and accurate information about the transfer at Kuala Lumpur.

The case has now been passed to me to decide.

What I've provisionally decided – and why

I've considered all the available evidence and arguments to decide, provisionally, what's fair and reasonable in the circumstances of this complaint.

When a consumer approaches their credit card issuer with a problem with a purchase made using their card, there are two avenues via which the business can help.

The card issuer can try to reclaim the amount (or part of the amount) the consumer paid on their card, via the dispute resolution mechanism operated by the card scheme (Mastercard in this case), and which is often known as "chargeback". They can also consider honouring a claim under section 75 of the CCA. I will consider each of these mechanisms in turn.

Chargeback

Chargebacks are governed by rules set by the card scheme to which the consumer's card belongs. These rules cover things such as the types of dispute or problem which can be raised via the chargeback process, the kind of evidence which is required to support a chargeback, the amount of time allowed for submitting claims and evidence, and so on.

While a consumer cannot require that their card issuer attempt a chargeback, I would expect the issuer to attempt one if their customer's dispute is something they can validly pursue via the chargeback process, and which would have a reasonable prospect of succeeding. I'd expect the card issuer to conduct the chargeback in a competent way, without making errors.

Santander did attempt a chargeback in this case. It was opposed by K. Mr R says the reply from K was essentially a "stock response" which didn't really address the concerns he wanted to raise. Having read K's submissions, I think the point it is making is that it displayed some itineraries to Mr R, he selected and paid for an itinerary, and K then honoured the booking by suppling the e-tickets. By implication, K was arguing that this was the extent of its responsibilities to Mr R.

I've thought about whether Santander should have escalated the chargeback for Mastercard to decide. Chargebacks can only be raised for reasons specified by the card scheme. If a particular dispute doesn't fall neatly within one of those reasons, then it may not be a suitable dispute to raise via chargeback. Having considered the reasons for which a chargeback can be raised under Mastercard's rules, I'm not convinced Mr R's concerns were a good fit for the chargeback process. While it's not possible to determine with certainty what decision Mastercard would have reached, I think the prospects of success were uncertain enough that it was not unreasonable of the bank to have decided not to pursue the chargeback further.

Section 75 of the CCA

Section 75 of the CCA allows consumers who have purchased goods or services using a credit card, to claim against their credit card issuer in respect of any breach of contract or misrepresentation by the supplier of those goods or services, so long as certain conditions are met.

The two main conditions which need to be met for section 75 to apply to a purchase, are that the claim must relate to an item with a cash price of over £100 and no more than £30,000, and there needs to be what is known as a debtor-creditor-supplier ("DCS") agreement in place. In this case, it appears the cash price of each of the flights fell within the relevant range. K's services are not itemised on the invoices I've seen, however I note the company's terms and conditions state that the cost of its services is included in the price paid. I've proceeded on the basis that these services most likely cost more than £100, and this fell within the range specified in the legislation.

The DCS agreement can be a highly complex subject. Distilled into its most simple formula however, it means that for Mr R to be able to make a claim against Santander, he also needs to have a claim in respect of a breach of contract or misrepresentation against the company he paid using his credit card.

At this point I think it is worth subjecting the arrangements Mr R entered into to some brief analysis. K is an online travel agent or broker, and its contractual role was to arrange for the entry of Mr R and his party into contracts of carriage with the airlines TA and AX, in accordance with Mr R's instructions. As part of this service, it undertook to display various combinations of flights for Mr R to choose from, and to deliver the tickets for any flights he booked. It also provided a "guarantee" in the event of "Flight Disruption", which specifically covered the layover at Kuala Lumpur.

There is no dispute that the company Mr R paid was K, and not the airlines TA or AX. It appears Santander has been somewhat indecisive on whether it thinks there is a DCS agreement in place. At times it has argued that, because Mr R's problem was connected with being unable to take the flights he booked, and the flights were to be provided by TA and AX, that this meant there was not a valid DCS agreement in place.

I think it was clear from Mr R's submissions that he was not articulating any kind of claim in relation to a breach of contract or misrepresentation by TA or AX. His claim was in relation to alleged failings on the part of K in connection with the services I've described above. In light of this, I think there is a valid DCS agreement in place. While there *have* been developments in the courts in relation to the DCS agreement, as our investigator noted, I don't think those developments are of significance in this particular case.

I've gone on to consider whether Mr R has a claim against K in respect of a breach of contract or misrepresentation. Before I consider each of these types of claim, I think it would be useful to describe some of the context in which events took place.

Relevant background

As touched on in the introductory section of this decision, Mr R's booking took place at the height of the coronavirus pandemic. Different countries, and sometimes different regions within countries, had put in place various restrictions on the movement of people. These restrictions were subject to change at short notice as coronavirus ebbed and flowed, and were sometimes dependent on a person's vaccination status or whether they could show they were not infected.

Kuala Lumpur International airport has two terminals – generally known as KLIA and KLIA2. Mr R has characterised them as different airports, comparing them to London Heathrow and

London Gatwick, but I don't think that's an accurate comparison. KLIA and KLIA2 share runways and are two terminals at the same airport. They may be 2km apart as Mr R says, but that is not necessarily unusual for terminals at a large international airport. The straight-line distance between terminals 4 and 5 at London Heathrow, for example, is longer than this. However, although it is a short bus or train ride between the terminals, it is not possible to transit airside between KLIA and KLIA2. It is necessary to enter Malaysia to do this, meaning immigration requirements would apply.

In Malaysia, the details of coronavirus restrictions, as in many places, changed over time. It appears there were strict requirements for entry for foreign nationals from early in the pandemic until at least late in 2021. It appears it was not possible to enter the country as a foreign national, unless one fell into a small number of exceptional categories, most of which required application to the Malaysian authorities for a visa[1] or other permission to travel. If someone was permitted to enter Malaysia they were required to quarantine for a number of days which varied depending on factors such as where they had flown from.

I'm not aware of any exceptional status Mr R or his party had which meant they would have been exempt from a requirement to quarantine. It also doesn't appear that they would have been permitted entry to Malaysia even to transit from one terminal to another, and even if they had fallen into a permitted category, it seems they would have needed visas.

Misrepresentation

For the purposes of this case, a misrepresentation is a false statement of fact or law made by one person to another and which induces the person the statement has been made to, to enter a contract.

Mr R says K misrepresented the nature of the transit arrangements in Kuala Lumpur. I've seen copies of the booking information which set out the proposed itinerary. There doesn't appear to be any dispute that this is the information Mr R was presented with before he booked, so I've proceeded on the basis that this is what he saw.

In between the Istanbul to Kuala Lumpur, and Kuala Lumpur to Sydney legs of the itinerary, the following text appeared:

"Self-transfer within Kuala Lumpur International – you must collect and recheck your baggage"

Further down the booking page, another block of relevant text appeared:

"Check your visa requirements

You will leave the visa-free transit zone and enter Malaysia (Kuala Lumpur) during self-transfer. Not sure if you need a visa? Check this guide: [link]. K is not responsible for any visa issue, including airport transit visas; this is the responsibility of the passenger. Without the correct documents, you might not be allowed to board."

I think it's difficult to conclude the information presented with the booking amounted to false statements of fact. K had stated Mr R would need to leave the visa-free transit zone and enter Malaysia, which was an accurate statement. It said he would need to self-transfer within Kuala Lumpur International, which was also accurate as KLIA and KLIA2 are not separate airports. I'm aware Mr R believed that he and his party would not have needed

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[1] While Malaysia, in normal circumstances, allows visa-free entry for citizens of many countries, my understanding is that this was suspended during the coronavirus pandemic.

visas[2], and so it's possible this section didn't stand out to him as being especially important at the time. However, there was nothing about it which I could see as representing a false statement.

Breach of contract

A breach of contract occurs when one party to a contract fails to honour its contractual obligations to the other. These obligations may be expressly included in the contract, or they may be implied into the contract, for example through the operation of legislation.

Mr R's contract with K was a contract for services, and in entering the contract he was acting as a consumer. The Consumer Rights Act 2015 ("CRA") makes it an implied term of any consumer contract for services, that those services will be performed with "reasonable care and skill". What this means is not defined in the legislation, but has generally been taken to mean the level of care and skill that would be expected of a competent practitioner of the service in question.

The relevant part of K's terms and conditions, at the time Mr R entered the contract with it in July 2021, described the nature of its services as follows:

- *Displaying the offered Flights and their combinations on Our Website, utilizing Our algorithms and other data to provide You with a selection of tailored travel itineraries on Our Website which enables You to assess and manage the risk of missed transportation connections and related disruptions to travel plans;*

- *Brokerage of the Contract of Carriage between You and the Selected Carrier;*

- *Delivery of the Flight tickets (itinerary) for the selected Flight(s), which You have purchased in accordance with Art. 1.2.1 hereof, as a result of the Booking, to You in accordance with Art 2.18 hereof;*

A later section of K's terms read as follows:

- *Visas. We are under no obligation to advise You to obtain visas nor assist you in obtaining visas or obtain visas for you to the destinations that You will visit and/or pass through en route to Your Destination. However, We do generally advise You that some of the destinations may require a visa from You and that it is Your responsibility to obtain the required visas early enough, and at Your own expense. Please note that when using Flight Connections You may be required to obtain transit visas even in order to check in for the connecting flight.*

A page on K's website at the time Mr R booked, titled "Traveling during COVID-19", said the following:

"It's your responsibility to check official regulations prior to booking, and again prior to departure, to ensure your eligibility to travel for any layover points during your itinerary and your end destination.

At K we display all itinerary options, to support travelers who do comply with the official regulations. A displayed itinerary is not confirmation of your eligibility to travel, so please ensure you comply so you can have a safe journey."

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[2] I think this belief was likely mistaken, for the reasons given earlier in this decision.

There’s no dispute that K presented Mr R with an itinerary that was impossible for him or his party to complete due to coronavirus restrictions at one of the layover points. And I think Mr R is right to say that this itinerary was probably impossible for anyone on Earth to complete at the time it was booked, and at the time it was due to be flown.

I do not think that K was in breach of any of its express terms however. It did not state that it would display only itineraries that were possible to complete at the point of booking. And I think that the information K provided *did* enable Mr R to *“assess and manage the risk of missed transportation connections and related disruption to travel plans”* – for the same reasons I explained in the “misrepresentation” section of this decision.

I’ve also considered whether K was in breach of the implied term that it would carry out its services with reasonable care and skill. I can see the logic in Mr R’s argument that the fact itineraries which were impossible for any person to complete, ended up being displayed to him, could represent some failure of K’s algorithms.

I have to bear in mind the fact that the situation in the world was changing on a regular basis at around the time Mr R made his booking. The pandemic was an event without precedent in living memory. Travel restrictions were being imposed, lifted or modified across many countries, all the time. And it was entirely possible that restrictions which made a given itinerary impossible at the point of booking, might not be in place when that itinerary was due to be flown. K didn’t pretend to claim that it had checked whether an itinerary was possible – it just said that it would “display all options”. So I don’t think this was some kind of failure of K’s algorithms, nor do I think that displaying impossible itineraries constituted a lack of reasonable care and skill, especially given an itinerary which was impossible at the point of booking might become possible at the point it was to be taken, and because of the speed at which the situation could change.

Finally, I have considered the “Guarantee” K offered in respect of connecting flights, and whether there may have been some breach by K of this guarantee. Having read the terms which applied to the guarantee, I do not think there was any breach of this, as it was clearly intended to provide protection in the event of schedule changes or delays by the airlines involved. It was not intended to cover scenarios like Mr R’s.

While I have considerable sympathy for Mr R and his family, who have lost a large amount of money due to being unable to use the tickets they booked, I do not think Mr R would have had a claim for breach of contract or misrepresentation against K, and it follows that he would also not have a claim against Santander under section 75 of the CCA. While the bank may have declined his claim for the wrong reasons, or not articulated its reasons well, I don’t think it was an unfair decision for it to have made.

I do not know if Mr R ever officially cancelled his tickets, or if he and his family were classed as “no shows” by the airlines. It is sometimes possible to claim a refund of taxes and other fees which have been levied in addition to the air fare, where it has not been possible to take a flight. Mr R may wish to look into whether this is possible in his case, if he hasn’t already done so.

Santander’s Customer Service

Mr R was very dissatisfied with the service provided by Santander over the course of his claim. The bank sent him £50 compensation in respect of service failings it had identified when it considered his complaint. Specifically, this compensation appears to have been for not getting back to Mr R in a timely manner when he was trying to appeal the bank’s section 75 claim decision.

Having looked at the sequence of events from August 2021, I think Santander's chief failing was in the provision of accurate information. The information it provided during the chargeback process was rather cryptic, and I note it incorrectly told Mr R that it hadn't re-debited the card payment when in fact it had. Additionally, its explanation of why it wasn't continuing with the chargeback process – stating that it couldn't help him because his dispute was with the merchant – didn't make sense.

During the section 75 claim, the bank's reasons for declining the claim changed over time and I can see how Mr R would have found this frustrating. It also appears he requested that some new evidence be considered in February 2022 and was promised that it would be, but this was not addressed until April 2022 after he had chased several times.

Looking at the service provided by Santander overall from August 2021 until the complaint was referred to the Financial Ombudsman Service, I don't think the £50 compensation sent by the bank was sufficient to address the impact of its service failings. While clearly the most distressing thing for Mr R has not been getting a refund (and I think the bank's decision on this was ultimately correct), some of the service provided aggravated this. It's clear Mr R was not sure if Santander had understood his claim, and I can understand how he formed that impression from some of the communications he received. He was also inconvenienced after his appeal was not picked up internally at the bank, requiring him to call several times to chase things up.

I think an additional £75 compensation, on top of the £50 already sent, would be fair to recognise the impact of these instances of poor service during the claims process.

My provisional decision

For the reasons explained above, I intend to uphold Mr R's complaint in part and direct Santander UK Plc to pay him £75 compensation, in addition to any amounts it has already paid. If Mr R has not received the £50 sent to him previously by cheque, then arrangements should be made to ensure this amount reaches him as well.

I now invite both parties to the complaint to let me have any new evidence or arguments they would like me to consider, by 7 June 2024. I will then review the complaint again.

Will Culley
Ombudsman