

## **The complaint**

Mrs M is unhappy Santander UK Plc won't refund her for flight tickets and a taxi fare she paid for using her Santander credit card.

## **What happened**

In September 2019, Mrs M bought two return flight tickets, with an airline ("N"), to America for a total of £729.60 using her Santander credit card. The flight departed on 17 February 2020 and was due to return on 31 March 2020.

Mrs M flew out with her husband to America on 17 February 2020. However, on 21 March 2020, Mrs M received an email from N where they said her return flight had been impacted by Covid-19. Mrs M says she called N upon receiving this email and was told, during this call, the return flight had been cancelled. Mrs M said N offered a refund of the return flight or an alternative flight back to the UK scheduled on 17 April 2020 – around two weeks after Mrs M's original return date. Mrs M says N told her there was no guarantee the flight due to happen on 17 April 2020 would actually go ahead.

As a result of the fast-moving situation with the Covid-19 pandemic and travel becoming impacted, Mrs M says she wanted to return to the UK as quickly as possible. So, Mrs M searched for another return flight. Mrs M found two first class tickets for a return flight, departing on 30 March 2020, with another airline which cost a total of £4,746.56. Mrs M said she didn't want to risk being stranded in America, incurring further expenses as a result.

The return flight Mrs M booked was to another airport in London and not the original airport Mrs M departed from. As a result, Mrs M had to get a taxi to the original airport to pick up her car which was parked there when she left the UK on 17 February 2020. Mrs M has provided evidence to show this taxi trip cost her £85.

Through a chargeback claim raised with Santander in June 2020, Mrs M received a partial refund of £319.80 for the original return flight that didn't go ahead. But Mrs M has asked for a refund for the two first class tickets costing £4,746.56 as well as the £85 taxi journey as she feels she had no option but to pay for these to be able to get home in good time before further government restrictions were put in place.

Santander say they don't feel there's been a breach of contract as Mrs M agreed, when making the original booking with N, that should the flight be cancelled by N, they would then offer a flight on the next available journey or a refund of the cancelled flight. Mrs M confirmed N offered her and her husband a place on the next available flight, however, she didn't accept this. As Mrs M has received a partial refund for the flight that didn't go ahead, Santander don't feel they're liable for the loss Mrs M has suffered for the new flight and the taxi fare.

Our Investigator looked into Mrs M's concerns. In summary, she said N's terms and conditions accept that they'll be liable for any consequential loss as required by law, which in this case would be the general entitlement in common law to damages in the event of a breach of contract. So, our Investigator recommended Santander refund the cost of the new

flights (with a deduction made for the partial refund Mrs M received of £319.80) as well as reimbursing Mrs M for the £85 taxi fare.

Mrs M agreed to this recommendation, but Santander didn't. They reiterated Mrs M was offered an alternative flight which she didn't accept and that she received a partial refund via a chargeback dispute. Santander again said they didn't think there had been a breach of contract as Mrs M received what was agreed in her contract with N should a flight be cancelled. So, the complaint has been passed to me to decide.

### **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.

The crux of Mrs M's complaint is she doesn't feel she should be liable for the costs she incurred as a result of the return flight being cancelled by N.

Mrs M has provided us with a copy of the email she received from N on 21 March 2020 where they said her flight had been affected by Covid-19. I don't have a copy of the call recording where Mrs M says N told her the return flight was, in fact, cancelled. However, even without this, I've seen evidence to show Mrs M was reimbursed with the cancelled flight costs. So, I've got no reason to disbelieve what Mrs M has told us – that N cancelled the return flight.

There are typically two avenues in which the credit card issuer can request a refund from a supplier, where one of their customers uses their facilities, to make a purchase for goods or services.

The first of these is the chargeback scheme. In this case, Mrs M received a refund of the return flight through the scheme, which Mrs M is happy with, so I don't feel the need to go into this further. What's in dispute here is whether there is a breach of contract and if Santander should be liable for the additional losses Mrs M incurred.

This brings me on to the second avenue. Section 75 of the Consumer Credit Act 1974 says that, in certain circumstances, if Mrs M paid for goods and services, in part or whole, on her Santander credit card, and there was a breach of contract or misrepresentation by the supplier, Santander can be held responsible. For Section 75 to apply, certain criteria needs to be satisfied relating to things like the parties to the transaction, the way the payment was made and the cost of the goods. I'm satisfied this is met and Section 75 applies here, and I've noted Santander haven't disputed this when replying to our Investigator.

Santander didn't meet Mrs M's claim under Section 75. Instead, Santander have argued that there isn't a breach of contract by N – they say Mrs M was offered an alternative flight or a refund which was in line with N's terms and conditions. However, I disagree with Santander's rationale. The cancelled flight is, in itself, a breach of contract. I say this because having read N's "General Conditions of Carriage", it is clear that there is a contractual entitlement for N to provide carriage on the booked flight in the event Mrs M produced a valid ticket in her name. N then failed to fulfil this obligation by cancelling the return flight she'd booked. So, with this in mind, I think there was a breach of contract.

Mrs M says the alternative flight N proposed wasn't suitable as this was scheduled two weeks after she was due to return to the UK. Even then, Mrs M says N told her they couldn't guarantee the flight would go ahead on this date due to the Covid-19 pandemic which was impacting countries worldwide. Having considered this, alongside the Government restrictions on travel that were being announced as a result of the unprecedented pandemic,

I don't find Mrs M's actions of finding another flight herself to be unreasonable. I say this because Mrs M wanted to get back to the UK before further restrictions were imposed which made entering the UK difficult. I note that the new return flight Mrs M booked for her and her husband was considerably more expensive than the original return flight Mrs M had booked with N. But Mrs M told us she had no alternative but to find her own flight back to the UK given the extraordinary circumstances – she said all reasonably priced flights were booked by other travellers wanting to return to the UK which doesn't seem unreasonable to me given the state of affairs at that point. The new flight Mrs M booked departed on 30 March 2020 (one day before Mrs M's original return date). Overall, I accept Mrs M mitigated her costs and I don't find this to be an unreasonable option.

Having looked at N's terms and conditions, the section about cancellation sets out the following under 'Article 11':

*11.2.3 One of the following remedies will be available to you in the event that your flight is cancelled, re-routed or delayed by four hours or more for flights from Brazil, and five hours or more for all other flights:*

- a) We will take all reasonable measures to carry you to your final destination under comparable transport conditions at the earliest opportunity.*
- b) We will provide re-routing to your final destination at a later date at your convenience under comparable transport conditions, subject to availability of seats.*
- c) In the case of re-routing to airports other than those in your Itinerary, we will, at our own expense, ensure that you are carried to the agreed destination.*
- d) If you do not accept the alternative options, we will provide a refund in accordance with Article 12.*

*11.2.4 Should some of the circumstances mentioned in 11.2.3 a), b), c) and d) occur, except as provided by applicable law, the remedies in Article 10 will be the only remedies available to you and we will accept no further liability to you. Liability will be limited in accordance with clause 16.4.*

If this is, as it appears to be, a drafting error, and in fact the reference to Article 10 should be substituted with a reference to Article 11, the term is qualified with a general exception for where 'applicable law' provides otherwise. I see no reason why this wouldn't include the applicable common law that where there has been a breach of contract, a consumer can claim damages resulting from that breach. Likewise, seeking to limit liability purely to the listed remedies could be considered unfair in terms of the Consumer Rights Act 2015 (CRA).

Under the common law, where a party has breached a contract, the other party can pay for a third party to cure the breach to put them in as good a position as if the original party had performed. Such cost will be recoverable from the original party providing it was not unreasonable. In Mrs M's case, the action she took to cure the breach was reasonable in all the circumstances. The cure was proportionate – if Mrs M stayed in America until the replacement flight N were able to offer on 17 April 2020, she would have incurred further costs such as accommodation, food etc which likely would have cost more than the flights Mrs M chose to book to be able to get back to the UK quicker. But it's possible that Mrs M and her husband could have been stuck in America for longer than the two weeks due to the Covid-19 pandemic and further travel restrictions imposed - this would have led to Mrs M incurring even more costs. In addition, I think this type of loss was reasonably foreseeable at the time the contract was entered into. It was not unlikely that a failure to provide carriage would result in an alternative flight being purchased to cure the breach.

Clause 11.2.4 also limits N's liability in accordance with clause 16.4. It says the following:

*16.4.1 We are liable for Damage occasioned by delay in the carriage by air of passengers, Baggage or cargo. Nevertheless, we shall not be liable for Damage occasioned by delay if we prove that we and our servants and agents took all measures reasonably be required to avoid the Damage, or that it was impossible for it or them to take such measures, cf. Article 19 of the Montreal Convention 1999.*

*16.4.2 In the case of losses due to the delayed carriage of persons, liability is limited to 5,346 SDRs.*

*16.4.3 In the case of losses due to the delayed carriage of Checked Baggage, liability is limited to 1,288 SDRs.*

I don't find there is anything here which limits Mrs M's claim for additional losses. The amount she is claiming does not exceed 5,346 SDRs. And I've not been provided with anything from N to show they sought to prove they took all reasonable measures to avoid the damage.

As a result of the new return flight going to a different airport, Mrs M had to get a taxi to the airport she departed from to be able to collect her car. Again, I don't think Mrs M's actions were unreasonable and I don't think Mrs M would have suffered these losses had N not cancelled the return flight. Mrs M has provided evidence of the cost of the taxi and I'm satisfied this loss, alongside the loss Mrs M suffered for the new return flight, were incurred as a result of the breach of contract – which was when Mrs M's return flight got cancelled. So, I uphold this complaint and I think Santander should put things right for Mrs M.

Mrs M paid for the additional flights and taxi for both her and her husband. I'm persuaded here that Mrs M had a common interest with her husband in the success of the contract. So, Mrs M personally suffers a loss to the extent that the common interest is defeated and may recover that loss.

### **Putting things right**

Mrs M has provided us with evidence to show she paid a total of £4,746.56 for the first-class tickets back to the UK for her and her husband. But as Mrs M has already received a partial refund of £319.80 for the return flight with N that was cancelled, I think this should be deducted from the £4,746.56. With that said, Santander should:

- Pay Mrs M £4,426.76.
- Pay Mrs M £85 for the taxi fare.
- Pay 8% simple interest on the above amounts from the date of payment to the date of settlement.\*

*\*If Santander UK Plc consider that they're required by HM Revenue & Customs to withhold income tax from that interest, they should tell Mrs M how much they've taken off. They should also provide Mrs M with a tax deduction certificate if she asks for one so she can reclaim the tax from HM Revenue & Customs if appropriate.*

### **My final decision**

For reasons explained above, I uphold this complaint and I require Santander UK Plc to carry out the actions as set out in the "Putting things right" section of this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or

reject my decision before 11 January 2023.

Leanne McEvoy  
**Ombudsman**