

Notice of Undertaking

James Brearley & Sons Limited

Summary

James Brearley & Sons Limited (trading as James Brearley) has made changes to a term in its Services, Terms and Conditions.

James Brearley has given us an undertaking, under the Consumer Rights Act 2015 (the CRA) and the Unfair Terms in Consumer Contracts Regulations 1999 (the UTCCRs) in relation to the term that sets out the firm's right to end the contract. This is because we had concerns that the term had the potential to be considered unfair under the CRA and the UTCCRs, as it provided the firm with discretion to terminate the contract without necessarily providing consumers with written notice in advance. We were concerned that if this were to happen, consumers may be given insufficient time to make arrangements with an alternative provider.

We summarise our concerns and the action the firm has taken below.

Why did we have concerns?

A term in the contract stated: "*We may terminate our Agreement.....by providing you with written notice at any time.*" We were concerned that the term had the potential to give the firm the discretion to end the contract without giving notice in advance to consumers. If the firm had chosen to do this, we were concerned that this could cause inconvenience and expense for consumers because they would not have sufficient time to make suitable arrangements with an alternative provider.

What has the firm done?

James Brearley has agreed that the relevant term had the potential to be considered unfair.

The firm has amended the term to state that consumers will be provided with at least 20 business days' notice in advance in the event that the firm decides to end the contract. The firm has told us that contracts entered into since 6 September 2018 contain the new term.

James Brearley has informed existing consumers about the new term. Until the new term applied, the firm agreed to give consumers at least 20 business days' notice before cancelling the contract.

The firm has fully cooperated with us in resolving our concerns.

What does this mean for consumers?

The change that James Brearley has committed to making should ensure that consumers are provided with at least 20 business days' notice in advance if the firm decides to end the

contract. This will reduce the risk of consumers being inconvenienced or incurring costs if their contract is ended by the firm.

James Brearley has informed its 4500-5000 existing consumers about the new term.

Undertaking from James Brearley & Sons Limited

James Brearley & Sons Limited (trading as James Brearley) has given this undertaking to the FCA under the Consumer Rights Act 2015 (the CRA) and the Unfair Terms in Consumer Contracts Regulations 1999 (the UTCCRs) in respect of its Services, Terms and Conditions dated August 2012.

James Brearley Services, Terms and Conditions

Term 81.1 of the Services, Terms and Conditions, dated August 2012 stated:

"We may terminate our Agreement to provide services under these Terms and Conditions by providing you with written notice at any time. We can terminate the Agreement for any reason. You can terminate your agreement to these Terms and Conditions by notifying us in writing."

Applying the CRA and the UTCCRs

We considered the fairness of term 81.1 in light of the CRA, the UTCCRs and relevant case law.

Under section 62(4) of the CRA and Regulation 5(1) of the UTCCRs, 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."

In our view, term 81.1 as drafted was likely to be considered unfair under the CRA and the UTCCRs. This was because the term caused a significant imbalance to the detriment of consumers, since it derogated from the position of the consumer under national law. National law does not recognise a unilateral right to terminate a contract of indeterminate duration without reasonable notice or without a repudiatory breach of contract. Additionally, the significant imbalance was caused contrary to the requirement of good faith, since the firm could not reasonably have assumed that a consumer would have agreed to such a term in individual negotiations because, among other reasons:

- the breadth of the term allowed James Brearley to terminate the agreement for any reason and at any time; and
- the absence of any specified period of advance notice may have resulted in consumers having insufficient time to make arrangements with an alternative provider.

How the term has been changed

James Brearley has agreed that the relevant term had the potential to be considered unfair under the CRA and the UTCCRs.

James Brearley has amended the term to state that consumers will be provided with at least 20 business days' notice in advance in the event that the firm decides to terminate their services under the contract. The firm has confirmed that contracts entered into since 6 September 2018 contain the new term.

Until the new term applied, James Brearley provided consumers with at least 20 business days' notice before terminating the contract.

Other information

The firm was fully cooperative in providing this undertaking.

Undertaking published 9 May 2019.

Legal information

As a Regulator, we, the Financial Conduct Authority (FCA), can challenge firms using terms that we view as not being fair under the UTCCRs and the CRA. We review contract terms that we come across in our supervision of firms. This includes contract terms that are referred to us by consumers, enforcement bodies and consumer organisations. This has led to James Brearley & Sons Limited's undertaking to replace the term that we consider is likely to be unfair.

The FCA has a duty under Regulation 15 of the UTCCRs and Schedule 3 of the CRA to notify the Competition and Markets Authority (the CMA) of the undertakings we receive. The CMA may publish details of these undertakings, which it puts on www.gov.uk. We also publish the undertakings on our website. Both publications will name the firm and identify the specific term and the part of the UTCCRs and the CRA that relate to the term's fairness.

Even if firms have not given an undertaking or been subject to a court decision they should remain alert to undertakings or court decisions concerning other firms as part of their risk management. These will be of potential value in showing the likely attitude of the courts, the FCA, the CMA or other regulators to similar terms or terms with a similar effect.

Ultimately only a court can determine the fairness or transparency of a term and, therefore, we do not recommend terms that have been revised by a firm to address our concerns as being definitely fair or transparent. We cannot approve terms for the purposes of the UTCCRs and the CRA; it is for firms to assess the fairness and transparency of their terms and conditions under the UTCCRs and the CRA and in the context of the product or service in question.

It is important to bear in mind that wording that is fair or transparent in one agreement is not necessarily fair or transparent in another. Where we accept an undertaking given to us from a firm to revise a term, this means that, on the evidence currently available we consider the term to be improved enough that further regulatory action is not required.