Consultation on draft revised guidance on the unfair contract terms provisions in the Consumer Rights Act 2015 - Response from [redacted]

Background

Over the past six years I have helped thousands of people who have experienced problems with holiday accommodation booked through Sykes Holiday Cottages. In many cases these problems have involved contract terms and conditions that I believe to be unclear, unbalanced and unfair; most frequently in relation to cancellations, deposits and refunds.

This is not a problem confined to one company; similar terms and conditions are widely used by other holiday letting agencies and many complaints appear on online forums and review websites.

It appears that some, perhaps many, holiday letting agencies consider that their terms and conditions are consistent with industry practice and their competitors so must be satisfactory. Alternatively, the companies are simply unfamiliar with the requirements of consumer protection legislation.

I believe that robust action is needed to ensure that these companies review and revise their terms and conditions. The draft guidance is a step towards this objective but there are several areas within the guidance that need to be expanded or added to address issues that result in harm to consumers.

I am making this response as an individual but I have tried to reflect the experiences of the Sykes Cottages Unhappy Customers Page on Facebook which currently has 8,300 members and over 4,000 former members. This group, which includes consumers and owners of holiday accommodation, was formed in response to the way the company handled refunds during the first Covid-19 lockdown but has expanded its remit to include a wide range of consumer-related issues.

CONSULTATION QUESTIONS

Q1. Do you have any comments on the new structure and presentation of the Draft Guidance?

A1. In general, the new structure and presentation are welcome, however there are several areas where I think further improvements could be made.

A1.1 The term "guidance" is problematic. Personal experience suggests that some businesses/traders will try to dismiss anything labelled as "guidance" as something that is completely discretionary; more customer service than legal requirement. The risk of casual dismissal by traders is increased by the fact that, as the CMA has explained, the law in relation to unfair contract terms has largely remained unchanged since the previous guidance was issued in 2015.

With this is in mind, consideration should be given to strengthening the rationale for the new document given in Chapter 1 “overview”. There is also a case for stating that the document will be used by the CMA as a starting point for enforcers to determine if contract terms are unfair. Similarly, the overview could be more explicit in encouraging business/traders to review their terms and conditions, in the light of the new guidance document, to ensure that they comply with the terms of the CRA 2015 and related consumer protection legislation.

Without more explicit encouragement to do so, it is unlikely that many companies will be willing to spend time and money to review and revise their established contract terms.

A1.2 The guidance document uses a number of terms that have specific meanings within the CRA 2015 and other related legislation. At present these definitions are presented throughout the guidance document. In some cases (e.g. at the start of Chapter 3 – “prohibited terms and notices”) the definitions appear out of place. Having definitions in one place, perhaps as a glossary, would improve readability, be more efficient and reduce duplication. Terms that have a specific definition within the relevant legislation could be highlighted.

Q2. Does the tone strike the right balance between comprehensive explanation of the legal provisions and readability for non-specialist users of the Draft Guidance?

A2. Although the draft guidance is more readable that than the existing version, the passages on fairness, transparency and exemptions deal with complex, and largely abstract concepts, and are not easy to understand. The level of detail may be appropriate for lawyers and para-legals preparing and reviewing terms and conditions, but the document is probably too long and technical for most non-specialist users and the general public.

The document could be made more readable and comprehensible by including some more tangible real-world examples of how terms and conditions might be unfair and unbalanced and have a negative impact on consumers.

I believe a key target audience for the guidance document should be senior personnel in companies. Senior personnel, such customer service directors, commercial and operational directors and chief executive officers, may not be directly involved in the technical drafting of terms and conditions, but will have responsibilities for how a company interacts with consumers and monitoring customer complaints. The guidance should enable these senior company personnel to identify where a company's terms and conditions may need to be revised, and to help them ask appropriate questions of the company's legal advisers. The existing short-form guidance does not provide sufficient detail to facilitate an internal discussion that is likely to identify issues or produce change.

Q3. Do you have any comments on the usefulness, relevance and clarity of the illustrative examples in the Draft Guidance of contract terms that are unlikely to be fair and more likely to be fair?

A3. The illustrative examples are helpful in highlighting how a trader's existing terms might be non-compliant with legislation, unbalanced, or harmful to consumers. However, their usefulness could be improved by always providing the examples in pairs, such "that a more likely to be fair example" provides an alternative to an "unlikely to be fair example". For example, immediately after para 6.65 there are four examples of terms that are unlikely to be fair but there are no corresponding examples on what is more likely to be fair.

Providing the examples in pairs also helps to reinforce the meaning and significance of the concepts and specifics being explained within the guidance.

Q4. Are there any areas where you think other examples could be added to the Draft Guidance, particularly for terms which may have arisen since 2015 and were therefore not reflected in the Current CMA37?

A4. The draft guidance fails to address several situations that are regularly reported by people booking holiday accommodation in the UK and which involve unfair and/or unclear terms and conditions.

A4.1 For many consumer contracts, the Consumer Contract Regulations 2013 provide a 14-day cooling off period. However, many consumers do not realise that the supply of accommodation, such as the booking of a holiday cottage, falls outside the scope of this provision. I believe that all consumer contracts for holiday accommodation (and for other goods and services that are similarly exclude) should make a prominent and clear statement that there is no 14-day cooling off period.

This lack of a cooling off period also has a bearing on the fairness of other terms and conditions, particularly in relation to cancellations and the revised guidance should reflect this.

A4.2 The guidance document does not consider situations where the provision of a service involves contracts being made with more than one trader. For example, when a consumer makes a booking using a holiday letting agency it is normal for two contracts to be created simultaneously, one with the letting agency and one with the owner of the property. This can create a multitude of issues such as;

- Who is responsible for ensuring the contract between the property owner and consumer complies with the CRA 2015 and other consumer protection legislation?
- Who is responsible for the description of a property and the facilities provided?
- Who is responsible for taking remedial action?
- Who decides whether, and how, contract terms, such as cancellation fees, should be enforced?

This situation becomes even more complex where are holiday letting agency has partnered with an online platform, such as Airbnb or Booking.com to advertise a property on its books. In this situation the consumer may find that they are signed up to three contracts, creating further uncertainty about which terms and conditions apply, who takes responsibility if things go wrong, and who the consumer should be dealing with.

Experience also suggests that booking platforms may be slow to update property descriptions resulting in consumers making purchasing decisions based on inaccurate or out of date information.

A4.3 When a consumer books a holiday cottage the letting agency or the property owner may require the consumer to agree to a “good housekeeping bond” or damages deposit. Paid in advance, or secured against a credit/debit card, these arrangements have become increasingly common. These bonds amount to a subsidiary contract and can involve large sums of money; £500 or more is not unusual. In principle, these bonds/deposits help protect property owners from guests who cause damage, make a mess or steal property. In practice, however, some guests find that money is taken from their credit cards without notice or explanation. If the consumer challenges the charge, they may be presented with photographs that are not date stamped, invoices that bear little relation to the claim or demands to replace well-worn items with new ones.

Such claims, which can may be made a made a week or more after the holiday has ended, can be the cause of considerable distress and the consumer can find themselves in a situation where they struggle to “prove” their innocence. Spurious claims are becoming increasingly common but the underlying problem is that the terms and conditions relating to these contractual arrangements are vague, do not specify any standard of proof and, I believe, are fundamentally unfair. For example, in the terms and conditions for a contract made with Sykes Cottages, the wording relating to payments secured against a credit/debit card is as follows

> "If we do collect any part of the bond, we will notify you in writing of the reasons for doing so. We have no control over whether the Owner instructs us to collect any part of the bond on their behalf ……."

The draft guidance should be modified to highlight the three areas discussed in **A4.1-3** above, and show how terms and conditions could be modified to ensure consumers are treated fairly.

A4.4 Chapter 7 deals with enforcement action but there are several areas that are incomplete or misleading.

A4.4.1 Although there is plenty of evidence that some companies are using unfair terms and conditions, public enforcement appears to be relatively rare. Covid-19 restrictions and the frustration of contracts resulted in much welcome action by the CMA but it also highlighted how consumers rights have not always been reflected in traders' terms and conditions and business practices. In more normal circumstances, it appears that the CMA and Trading Standards do not, in general, give a high priority to contract terms and conditions, even where the issues are generic across an industry sector.

Para 7.10 mentions a focus on cases that have a market-wide or precedent-setting value. It is not made clear whether the number of consumers affected and the value of contracts is considered. If it were, then the scale of the holiday rental sector, the number of customer complaints (particularly relating to cancellations) and the value of the contracts (monetary and otherwise) would suggest that targeted action is overdue.

From personal experience complaints made to the CMA and Trading Standards, I know that enforcement authorities do not, as is suggested in para 7.7., tell complainants why they have not decided to seek a court order.

A4.4.2 Paras 7.15 to 7.17 refer to private enforcement under the Act. Although this option is available, experience suggests it is unlikely that it would produce any significant change that would benefit other consumers. A trader is more likely to settle an individual case out of court, than change their established terms and conditions.

Private enforcement by groups of consumers may be possible in some circumstances and the guidance should at least mention the options for joint legal action to address unfair terms and conditions.

A4.4.3 The draft guidance makes no mention of the existence of Ombudsmen or trade associations in many business sectors, their role in resolving disputes with consumers and the part they play in providing more general guidance on terms and conditions.

Although these bodies my not have legal powers or duties to take enforcement action, their absence from the guidance document appears to be an oversight.

Q5. Is there anything in the Current CMA37 you wish to retain in the Draft Guidance that has not been included?

A5. No.

Q6. Do you have any comments on the usefulness and clarity of the technical note accompanying the Draft Guidance?

A6. The technical note provides useful information about how the CRA interacts with different parts of consumer protection legislation. However, it would be helpful to have some clear references to the various requirements for pre-contract information within chapter 2 of the main guidance "Key concepts". In my experience not all companies are providing all the required information before a contract is made. And in some cases, this information is withheld even after the contract has been formed. For example, most holiday letting agencies are failing to provide the identity (and contact details) of the owner of the property that is being let out. This is despite the fact that the rental contract is made between the property owner and the consumer/holidaymaker.

Q7. Would you prefer the technical note to be incorporated in the Draft Guidance or to remain separate?

A7. The contents of the technical note should be incorporated into the draft guidance. This would allow some duplication to be avoided (e.g. definitions and introductions) and reduce the number of reference documents. It may appropriate to put sections of the text of the note into the body of the guidance rather than attach the note as an appendix.

Q8. Do you have any other comments on topics not covered by the specific questions above? If so, please structure your responses to separate out your views in relation to each of the Draft Guidance's chapters.

A8. Over the past six years my experience of helping thousands of people who have had problems in dealing with Sykes Cottages has meant I have spent a lot of time reading terms and conditions, become familiar with consumer protection legislation and understanding how the holiday rental sector operates. My conclusion is that the holiday rental sector has changed dramatically since the 2015 guidance was issued. Industry mergers have reduced competition and consumers are suffering harm because individual companies see little advantage in going beyond what is considered standard practice withing the industry. Despite the attention given to frustrated contracts and Covid-19 restrictions, it is evident that compliance with consumer protection legislation is not a priority for many holiday companies. Highlighting the potential penalties that can be imposed by the CMA may bring about change.

The comments made below are based on my experience of how unclear, unbalanced and unfair terms and conditions used by holiday companies for their benefit and to the detriment of the consumer. Some of the areas of concern overlap with one another but where possible I have attempted to link the points to the specific chapters and paragraphs within the draft guidance.

A8.1. Para 2.14 *et seq.* explains that a consumer contract is one between a trader and a consumer. In the holiday rental sector, the situation can be more complex. In booking holiday accommodation, a consumer may 'create' a number of separate contracts, specifically:

- with the owner of the property,
- with a letting agency that is working on behalf of the owner of the property,
- with a booking platform (such as Airbnb), that may be working for the letting agency, or the property owner.

In the two latter examples there may be other contracts, which the consumer is not directly a party two, which nonetheless, may decisions that affect the consumer.

The guidance document should mention the existence and possibility of these interlinked contracts, how they are addressed within the Consumers Rights Act 2015, and how they should be reflected in terms and conditions.

A related issue is the extent to which the different traders are aware of the terms and conditions that a consumer may create in making a holiday booking. In my experience some property owners do not consider themselves to be a business/trader and if a property owner uses a holiday letting agency to advertise their property, the owner often has little understanding of the standard contract terms and their responsibilities to the consumer. In most cases the property owner will defer to the agency if the terms and conditions are questioned or need interpretation. This can result in a serious detriment to the consumer as the agency will often act in its own interest in making decisions. Or the owner's decisions to issue a refund are heavily influenced by the terms of a separate contract they have with the agency. For example, a property owner may be inclined to give a refund to a customer who asks to cancel a booking for personal reasons, but they are constrained by financial terms of the contract between the property owner and agency. Typically, these contracts require the payment of a large commission to the agency (around 25% of the total cost of the holiday) whether or not the holiday goes ahead.

A8.2 Para 2.16 explains the meaning of a contract term including both explicit and implied elements to the contracts. I believe it would be helpful to expand this explanation to cover situations where the goods or services being provided are inherently complex and may include both objective and subjective attributes. This is the case where consumer books a holiday cottage. In selecting a holiday property, a consumer may have very specific needs in terms of location, number of bedrooms and bathrooms but other criteria may be relevant such as accessibility, privacy, sea view etc. So, from a contractual perspective, if the description of a holiday property says that the property has three bathrooms then there should be three rooms with a bath or shower, not two bathrooms and a downstairs toilet. Similarly, if a property is described as being in a quiet location, it should not be next to a busy main road or noisy construction site.

A8.3 Para 2.19 explains the term ‘consumer notice’.

A problematic example is notices in adverts or company websites that promote a specific service or facility and forms part of a marketing strategy, to differentiate one company from another. An example in the holiday rental sector is “24/7 on holiday support”. Although not explicitly referred to within the detailed terms and conditions I believe such statements in adverts or on a company website fall within the scope of the Consumer Rights Act and become, in effect, part of the contract.

Consumers who have need of such support services (due to issues with access or heating systems not working) often complain that the service was not available, or the response was delayed or ineffectual. Companies will rarely treat such failures as a breach of contract, instead the standard response is to apologise for poor customer service and a promise to better in the future.

A8.4 Chapter 4 deals with fairness and transparency. An area of concern that applies across many sectors is where a company promotes a special offer that goes beyond its normal terms and conditions, such as a discounted price for orders placed by a particular date. The offers are often presented to consumers in an eye-catching fashion but the wording of such offers can be misleading and unfair.

In the holiday rental sector, there is a particular issue related to offers such as "secure your holiday for £10". This type of offer is neither fair or transparent and has resulted in many thousands of consumer complaints per year.

- The word "secure" is not explained and, superficially, it appears that a consumer is only committing themselves to paying a small payment. In practice the full terms and conditions, which are often presented elsewhere, explain that the £10 is just an initial payment towards the standard deposit amount. If the consumer wishes to cancel the booking they are obliged to pay the full deposit typically hundreds of pounds more.
- The special terms and conditions for these "low deposit" schemes are often complex and unclear and often require the consumer to first read and understand the standard booking terms and conditions.

A8.5 Sections 4.4 to 4.6 examine the concept of "significant imbalance" and how a term or notice might cause detriment to a consumer. I think that the guidance could be improved by using examples to illustrate the impact on consumers. Here are two examples from the holiday accommodation rental sector.

A8.5.1 - If a consumer cancels a holiday booking after they have made their final payment (typically 6 to 8 weeks before the holiday starts) standard terms and conditions mean that the consumer forfeits all the money they have paid, despite not having received a service. However, if the property owner or the agency cancels the booking, the consumer is only entitled to a refund, there is no entitlement to any compensation for inconvenience or expenses, such as pre-booked travel.

A8.5.2 When booking holiday accommodation, consumers can make mistakes or change their minds. Without the added protection of a 14-day cooling off period, booking contracts often specify that once a booking confirmation is sent consumers have a limited time, typically 24 hours, to identify any errors. However, the letting agency may give itself 48 hours to identify errors in pricing or even longer if, as one company states, "the pricing error is obvious and unmistakeable and could reasonably be recognised by you [i.e. the consumer] as a mispricing."

A8.6. Para 4.40 *et seq.* considers how traders should ensure consumers are given the opportunity to examine and understand terms. This is more difficult where contracts are made over the telephone and is further complicated where there is no cooling-off period. Although the majority of holiday accommodation bookings are now made online, many are still made over the telephone. The guidance should include additional advice on how traders should best go about dealing with contracts made over the telephone and where there is no legal requirement for a 14-day cooling off period.

A8.7. Para 6.5 et seq. deals with binding consumers to hidden terms. The guidance could be improved by having some examples of “hidden terms” and why they are likely to be unfair and may be unbalanced. Here are some examples that might be used in the guidance to illustrate how consumers might be disadvantaged.

> **A8.7.1** In the holiday accommodation sector, it is normal to see have terms and conditions that allow consumers to amend their bookings. In most cases such changes are subject to the approval of the property owner and involve an administration fee. Terms and conditions will normally explicitly state that additional payments will be due if the amended booking is for a more expensive or longer period. However, some companies use hidden terms, sometimes referred to as “company policy”, to determine that if the amended booking is for a less expensive or shorter period then no refunds will be given.
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> Similar hidden terms may also be applied if it is the owner or agency who has to cancel or amend a booking because the property is not available (e.g. due to a double booking or a major problem at the property). In such cases the customer may be offered alternative accommodation but if it is more expensive it is normally the customer who has to pay the additional amount. In this latter case the terms are both hidden and unbalanced.
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> **A8.7.2.** At least one holiday rental company uses a booking term that can be used to penalise consumers for actions in the past, or anticipated actions in the future. In essence the terms say that the letting agency or property owner can cancel a booking after a booking has been confirmed if they reasonably believe that
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> “…you have broken or are likely to break any of the booking terms relating to a previous booking or current booking”
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> The contract term goes onto explain that the agency and property owner has no further responsibility to the consumer, and the consumer may have to pay additional costs and expenses.

A8.8. Para 6.44 examines terms that give a trader rights to vary terms of the agreed contract. If the CRA 2015 requires contracts to be balanced this raises a question about the extent to which a consumer should have a corresponding ability to vary terms, such as changing dates or the duration of a holiday. It does not appear that the guidance covers this issue.

A8.9 Para 6.48 *et seq* deal with terms that allow traders to change or determine what is supplied. This is a major issue in the holiday accommodation sector where standard terms and conditions allow an agency or property owner to cancel a holiday booking with little or no notice, and with no provision for any compensation. It should be noted that cancellations by owners/agents may be for genuine and unavoidable reasons, such as flooding or heating system failure but others can occur because of double bookings, because the owner or agent thinks they can get a higher price from another customer, or the owner wants to use the property themselves.

The guidance document should expand and clarify the obligations a trader has to notify a consumer about cancellations, and the rights a consumer has to receive compensation. Consideration should be given to the need for a balance between the trader's rights to cancel and those of the consumer.

A8.10 Para 6.57 *et seq* deal with terms that allow a trader to transfer their responsibilities to another trader. In the holiday accommodation sector this is most likely to occur if an individual property is sold or a letting agency changes hands. The standard terms and conditions used in these circumstances are often vague and tend to give the agency/trader considerable discretion in terms of whether and when a consumer is informed of the change and whether the consumer is given the option of a refund. In some cases, the issues will not be about whether a consumer's rights are being prejudiced, it may be that the consumer has personal reasons for not wanting to deal with a new trader. In general, the consumer should be not be forced to accept a new trader and should always be offered the alternative of a refund.

A8.11 Sections 6.59 to 6.69 deal with cancellation by consumers. This is an area of major concern in the holiday accommodation sector with thousands of consumers complaining that terms and conditions are unclear and unfair. Common complaints include;

- Companies retaining a 30% deposit even if a cancellation occurs several months before a holiday is due to start.

- If the cancellation is made after the final payment is due, letting agencies will routinely say that no money will be refunded, even if the accommodation is rebooked by another customer.
- Companies saying that they do not provide a "booking resale service".
- Companies refusing to give a refund if the customer makes an error in the booking, even if that error is noticed within a few days.
- Companies refusing to give refunds even if the owner of the property owner agrees, in principle, to give the consumer a refund.
- Companies offering 'low deposit' terms (typically £10 to £50) without making it clear that if a customer cancels a booking, they will be liable to pay extra, to match the typical 30% deposit amount.

The CMA has repeatedly issued various forms of guidance to holiday companies since the CRA 2015 came into effect. Despite this, if a consumer cancels a holiday booking, they often find it difficult or impossible to recover any money that they have already paid. The sums of money can be considerable, deposits of £250 to £1000 are routine and total holiday costs ranging from £750 to £4,000 or more. With many thousands of cancellations by consumers each year, I believe this is an area that urgently requires more robust action.

I suggest the following to be incorporated into the revised guidance.

> **A.8.11.1** All holiday letting contracts should have a 48-hour window in which a consumer can cancel and receive a full refund (including any booking fee) provided that the booking is made 30 days before the holiday period is due to start. This suggestion, based on recent action taken by the Commerce Commission in New Zealand against a holiday letting agency, takes account of the following:
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> - holiday accommodation contracts do not have a 14-day cooling off period
> - selecting suitable holiday accommodation can be challenging, especially when a consumer is booking on behalf of a large group (e.g. accessibility for elderly members of the party, parking, proximity to services etc)
> - mistakes can happen with consumers booking the wrong dates or even the wrong property being booked
> - problems with online booking systems, such that the dates selected by the consumer are changed to align with the nearest available dates or to match restrictions applied to a particular property, such as always starting on a particular day of the week.

A8.11.2 Where a consumer makes a holiday booking through an agency (or booking platform) the terms and conditions should explicitly state that decisions about refunds are to be made by the person with whom they have made the rental contract with. This will normally be the owner of the property. This suggestion is based on the following

- Any decision to enforce the terms and conditions of a contract should be made by the parties involved in the contract
- The standard terms and conditions used by letting agencies mean that currently property owners often have little or no understanding of the contract they have with the consumer, nor the consumer protection legislation that applies.
- Letting agents often have a vested interest in consumers cancelling bookings as the agency will take a large commission from the property owner whether or not the booking goes ahead
- If a booking is cancelled the agency will have an opportunity to earn a second commission and booking fee by getting a replacement booking.

A8.11.3 Where a consumer cancels a holiday booking the trader should contractually obliged to offer at least a partial refund and be obliged to minimise their loses by attempting to resell the booking to somebody else. The revised guidance should highlight that arrangements whereby an agent or owner can resell a cancelled holiday period without compensating a consumer are not compliant with the CRA.

In New Zealand, the holiday rental agency Bachcare has, following legal action by the Competition Commission, changed some of its terms and conditions. These new terms include obligations on the agency and the property owner to facilitate the reselling of a cancelled holiday and compensate the original consumer, subject to a small administration fee.