DRN-3921411

The complaint

Miss M has complained about Creation Consumer Finance Ltd ('Creation')'s response to a claim she made under Section 75 ('s.75') of the Consumer Credit Act 1974 (the 'CCA') and in relation to allegations of an unfair relationship taking in to account Section 140A ('s.140A') of the CCA.

What happened

In January 2014, Miss M bought a solar panel system ('the system') from a company, which I'll call "G", using a ten-year fixed sum loan from Creation.

Miss M made a claim to Creation. She said that she was told by G that the system would pay for itself so she would be better off each month, but this was a misrepresentation, and she's suffered a financial loss as a result (the s.75 claim). Miss M also said that her relationship with Creation was unfair on her (complaint about an unfair relationship under s.140A).

Creation treated this as a complaint and dismissed it on the grounds that under the Financial Conduct Authority's Dispute Resolution (DISP) Rules, which set out how financial businesses should handle complaints, the complaint had been made too late – more than six years after the events Miss M was complaining about.

Unhappy with Creation's response, Miss M referred her complaint to our service.

Our Investigator considered Miss M's complaint, they ultimately thought that:

- The s.75 claim was likely to be time barred under the Limitation Act, so dismissing the claim was a reasonable response.
- The unfair relationship (s.140A) complaint was one we could look at under our rules and that it had been referred in time.
- Misrepresentations could be considered under s.140A.
- A court would likely find an unfair relationship had been created between Miss M and Creation.

Our Investigator recommended that Miss M keep the system and Creation take into account what Miss M had paid so far, along with the benefits she received, making sure the system was effectively self-funding.

Miss M accepted the investigator's view.

Creation disagreed. It maintained that the complaint was outside of our jurisdiction due to having been brought too late under the DISP Rules. It said that any alleged unfairness arose due to events that took place more than 6 years before Miss M made her complaint. So, we should not consider the merits of the complaint.

As the complaint has not been resolved, I've been asked to make a decision.

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.

Our approach to our jurisdiction to consider the complaint

Our powers to consider complaints are set out in the Financial Services and Markets Act 2000 (the 'FSMA') and in rules and guidance contained in the FCA's Handbook known as DISP.

These form part of the FCA Handbook. The rules surrounding time limits are set out in DISP 2.8.2R which include that:

> "The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:
>
> > (1) more than six months after the date on which the respondent the complainant its final response, redress determination or summary resolution communication; or
> >
> > (2) more than:
> >
> > > (a) six years after the event complained of; or (if later)
> > > (b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;
> >
> > unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received"

Further, DISP 2.3.1R sets out the activities which I can consider under our compulsory jurisdiction and within scope are complaints which relate to acts or omissions by firms in carrying on one or more regulated activities (see DISP 2.3.1R(1)).

I'll first consider our service's jurisdiction to look at Miss M's s.75 and s.140A complaints before turning to address their merits.

My findings on jurisdiction

Jurisdiction to look at the s.75 complaint

Where Creation is exercising its rights and duties as a creditor under a credit agreement it is carrying on a regulated activity within the scope of our compulsory jurisdiction under Article 60B(2) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the 'RAO').

In undertaking that activity, the creditor must honour liabilities to the debtor. So, if a debtor advances a valid s.75 claim in respect of the credit agreement, the creditor has to honour that liability and failing or refusing to do so comes under our compulsory jurisdiction.

The event complained of here is Creation's allegedly wrongful rejection of Miss M's s.75 claim on 11 November 2021. Miss M brought her complaint about this to the ombudsman service on 5 January 2022. So, her complaint in relation to the s.75 claim was brought in time for the purposes of our jurisdiction.

Jurisdiction to look at the complaint about an unfair relationship under s.140A

Miss M is able to make a complaint about an unfair relationship between her and Creation per s.140A. The event complaint of for the purposes of DISP 2.8.2R(2)(a) is Creation's participation, for so long as the credit relationship continues, in an allegedly unfair relationship with her. This accords with the court's approach to assessing unfair relationships – where if the credit relationship is continuing an assessment of whether a relationship is unfair is made as at the date of assessment, and if the credit relationship has ended, as at the date the relationship ended: Smith v Royal Bank of Scotland plc [2023] UKSC 34.

In this case, the relationship was ongoing at the time it was referred to the ombudsman service on 5 January 2022, so the complaint has been brought in time for the purposes of DISP 2.8.2R(2)(a). I am satisfied that I have jurisdiction to consider the complaint about the alleged unfair relationship per s.140A in the circumstances.

My findings on the merits of the complaint

The s.75 complaint

The law imposes a six-year limitation period on claims for misrepresentation and breach of contract, after which they become time barred.

In this case the alleged misrepresentation and alleged breach cause of action arose when an agreement was entered into on 10 January 2014. Miss M brought her s.75 claim to Creation on 7 October 2021 that is more than six years after she entered into an agreement with Creation. Given this, I think it was fair and reasonable for Creation to have not accepted the s.75 claim. So, I do not uphold this aspect of the complaint.

The complaint about an unfair relationship under s.140A

When considering whether representations and contractual promises by G can be considered under s.140A I've looked at the court's approach to s.140A.

In Scotland & Reast v British Credit Trust [2014] EWCA Civ 790 the Court of Appeal said a court must consider the whole relationship between the creditor and the debtor arising out of the credit agreement and whether it is unfair, including having regard to anything done (or not done) by or on behalf of the creditor before the making of the agreement. A misrepresentation by the creditor or a false or misleading presentation are relevant and important aspects of a transaction.

Section 56 ('s.56') of the CCA has the effect of deeming G to be the agent of Creation in any antecedent negotiations.

Taking this into account, I consider it would be fair and reasonable in all the circumstances for me to consider as part of the complaint about an alleged unfair relationship those negotiations and arrangements by G for which Creation were responsible under s.56 when considering whether it is likely Creation had acted fairly and reasonably towards Miss M.

But in doing so, I should take into account all the circumstances and consider whether a Court would likely find the relationship with Creation was unfair under s.140A.

What happened

Miss M has said that she was told by G's representative that the system would pay for itself so they would be better off each month.

Miss M has said she had no prior interest in solar panels and G cold-called her. The salesperson persisted even when she said she wasn't interested, and made it sound very attractive financially. That it would help her financial situation and she would be no worse off each month. At the time Miss M was the sole income earner, working part-time and receiving working tax credits, and had two dependent children.

I've looked at the documents provided by Miss M to see if there was anything contained within them that made it clear that the solar panel system wouldn't be self-funding.

The credit agreement, dated 10 January 2014, shows the following information about the loan:

- Purchase price £5,995.00
- Interest £3,304.92
- Total payable £9,299.92
- 120 repayments of £77.49 each

So, I think it was clear what Miss M had agreed to pay for the system.

Miss M has provided part of the sales documents which show that the first-year benefit was expected to be £680, with lifetime benefits of £25,249.56. It showed that the payback time would be eight years. Which is less than the ten-year loan term.

I don't think the benefits shown on this document are clear. On the one hand, the first-year benefit shown would be insufficient to cover the first-year loan repayments. But on the other hand, the document indicates that after eight years the benefits would've covered the cost of the system.

Given the lack of clarity in the documents, I think there was plenty of scope for Miss M to misunderstand what they showed. So, she was likely to be reliant on G to explain things to her in terms of how the costs she was agreeing to pay would compare with the benefits of the system.

G was a member of the Renewable Energy Consumer Code ("RECC"), which published a consent order in August 2015. This referred to a number of complaints about G that it received from April 2013 to August 2015. This suggested that G had breached the RECC under sections 5.2, 5.3 and 9.1, and had subsequently failed a compliance audit.

RECC 5.2 concerns the behaviour of sales representatives, including that they must not give false or misleading information and statements to, or pressurise, consumers. RECC 5.3 concerns performance information and predictions – including that where a loan is used, any payback periods stated must take into account the full amount payable including loan interest.

The consent order indicated that G agreed to a full re-audit within six months to determine if the problems identified by the previous audit had been rectified. No further RECC disciplinary action took place following this. But the period of time referred to in the consent order included the time when Miss M purchased her system from G. So, it seems there were issues with how G was selling solar panel systems around that time.

Looking at Miss M's sales documents I am concerned by the payback time shown. She had agreed to pay 9,299.22 in total through using a loan. Using the assumptions shown on the contract, I've calculated that the payback time, taking into account the full amount payable, would be more than 11 years. So, G should not have told Miss M that system would pay for itself within a shorter period.

Overall, I find what Miss M's said believable. Bearing in mind her circumstances at the time, I'm of the opinion that the system being self-funding would be a key reason for her to purchase the system. And she wouldn't have done so if she'd understood that she would be worse off in the short term and only better off overall after more than 11 years.

Creation hasn't provided evidence to dispute what Miss M's said happened. Yet with no prior interest Miss M agreed to an interest-bearing loan, with a monthly repayment of around £78, payable for 10 years. Given her lack of prior interest and the financial burden she took on, I find Miss M's account of what she was told by G is plausible and persuasive. The loan is a costly long-term commitment, and I can't see why she would have seen this purchase appealing had she not been given the reassurances she's said she received from G.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £924 per year. Miss M's system has generated electricity as expected, but it has not provided sufficient financial benefits to pay for itself either on a monthly basis or within the loan term. So, the statements made to Miss M by G were not true.

Whilst there are elements of the calculations that had to be estimated, I think G's representative would have known that Miss M's system would not produce enough benefits to cover the loan repayments in the way she was told.

Considering Miss M's account about what she was told, the documentation she was shown at the time of the sale, and that Creation hasn't disputed what she's said, I think it likely G gave Miss M a false and misleading impression of the self-funding nature of the solar panel system.

I consider G's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Miss M was expected to receive by agreeing to the installation of the system. I consider that G's assurances in this regard likely amounted to a contractual promise that the solar panel system would have the capacity to fund the loan repayments. But, even if they did not have that effect, they nonetheless represented the basis upon which Miss M went into the transaction. Either way, I think G's assurances were seriously misleading and false, undermining the purpose of the transaction from Miss M's point of view.

Would a court be likely to make a finding of unfairness under s.140A?

Where Creation is to be treated as responsible for G's negotiations with Miss M in respect of its misleading and false assurances as to the self-funding nature of the solar panel system, I'm persuaded a court would likely conclude that because of this the relationship between Miss M and Creation was unfair.

Because of this shortfall between her costs and the actual benefits, each month she has had to pay more than she expected to cover the difference between her solar benefits and the cost of the loan. So, clearly Creation has benefitted from the interest paid on a loan she would otherwise have not taken out.

Fair compensation

In all the circumstances I consider that fair compensation should aim to remedy the unfairness of Miss M and Creation's relationship arising out of G's misleading and false assurances as to the self-funding nature of the solar panel system. Creation should repay Miss M a sum that corresponds to the outcome she could reasonably have expected as a result of G's assurances. That is, that Miss M's loan repayments should amount to no more than the financial benefits she received for the duration of the loan agreement.

Therefore, to resolve the complaint, Creation should recalculate the agreement based on the known and assumed savings and income Miss M received from the system over the 10-year term of the loan, so Miss M pays no more than that. To do that, I think it's important to consider the benefit Miss M received by way of FIT payments as well as through energy savings. Miss M will need to supply up to date details, where available, of all FIT benefits received, electricity bills and current meter readings to Creation.

Creation should also be aware that whether my determination constitutes a money award or direction (or a combination), what I decide is fair compensation need not be what a court would award or order. This reflects the nature of the ombudsman service's scheme as one which is intended to be fair, quick, and informal.

Finally, I consider that Creation's failure to fully deal with Miss M's complaint in a reasonable timeframe caused Miss M some degree of trouble and upset. In recognition of this, and in addition to what I have already set out above, Creation should also pay Miss M £100.

My final decision

For the reasons I have explained I uphold Miss M's complaint. To put things right Creation Consumer Finance Ltd must:

- Calculate the total payments (the deposit and monthly repayments) Miss M has made towards the solar panel system up until the date of settlement – A

- Use Miss M's bills and FIT statements, to work out the benefits she received up until the loan term* – B

- Use B to recalculate what Miss M should have paid each month towards the loan over that period and calculate the difference, between what she actually paid (A), and what she should have paid, applying 8% simple interest to any overpayment from the date of payment until the date of settlement** – C

- Reimburse C to Miss M

*Where Miss M has not been able to provide all the details of her meter readings, electricity bills and/or FIT benefits, I am satisfied she has provided sufficient information in order for Creation to complete the calculation I have directed it follow in the circumstances using known and reasonably assumed benefits.

** If Creation Consumer Finance Ltd considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Miss M how much it's taken off. It should also give Miss M a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

I also think the way Creation handled Miss M's complaint has caused her trouble and upset, and an award of £100 is appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss M to accept or reject my decision before 1 July 2024.

Phillip Lai-Fang
Ombudsman