

The complaint

Mr D has complained about the way Creation Consumer Finance Ltd (“Creation”) responded to claims he’d made in relation to misrepresentation, breach of contract, and an alleged unfair relationship taking into account section 140A (“s.140A”) of the Consumer Credit Act 1974 (the “CCA”).

Mr D has been represented in bringing his complaint but, to keep things simple, I’ll refer to Mr D throughout.

What happened

In October 2014 Mr D entered into a fixed sum loan agreement with Creation to pay for a £17,670 solar panel system (“the system”) from a supplier I’ll call “S”. Mr D contributed £3,534 to the deal through a deposit, so the amount borrowed from Creation was £14,136. The total amount payable under the agreement was £25,672.31 and it was due to be paid back with 120 monthly repayments of £184.48. There was a £135 arrangement fee and interest of £7,867.31.

In December 2021 Mr D sent a letter of claim to Creation explaining he thought the system was mis-sold. He said S told him he’d effectively be paid for the electricity the system generated through the government’s Feed in Tariff (FIT) payments and that the system would be self-funding within the loan term. He said S told him his energy bills would go down; he’d receive a guaranteed income for 20 years; he’d earn up to 10% annually tax free; his property value would increase; and the system was maintenance free with a 25-year life expectancy. He said the system was misrepresented and believed statements and several other actions at the time of the sale created an unfair relationship between himself and Creation.

Creation wrote to Mr D in February 2022 to say it was unable to provide a response due to internal delays.

Unhappy with Creation’s response, Mr D decided to refer his complaint to the Financial Ombudsman in May 2022. Creation wrote to the Financial Ombudsman to say it thought the claim had been brought out of time and that it had no liability.

One of our investigators looked into things and thought S had likely told Mr D the system would be self-funding and that the documentation didn’t clearly set out it wasn’t. She didn’t think the system was self-funding over the course of the loan term, and so she thought S had misrepresented it. She thought a court would likely find the relationship between Mr D and Creation was unfair and that he’d suffered a loss through entering into the agreement. She thought Creation should recalculate the loan based on known and assumed savings and income over the course of the loan so that he pays no more than that, and he keeps the system. She also recommended £100 compensation for the impact of Creation not investigating the s.140A claim.

Mr D accepted the view, but I can’t see we received a response from Creation. As things weren’t resolved, 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.

My findings on jurisdiction

The unfair relationship under s.140A complaint

The event complained of here is Creation's participation, for so long as the credit relationship continues, in an alleged unfair relationship with Mr D. Here the relationship was ongoing at the time Mr D complained to Creation in 2021 and referred his complaint to the ombudsman service in 2022, so the complaint has been brought in time for the purposes of our jurisdiction.

Merits

The unfair relationship under s.140A complaint

When considering whether representations and contractual promises by S 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 S 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 S for which Creation was responsible under s.56 when considering whether it is likely Creation had acted fairly and reasonably towards Mr D.

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?

Mr D says he was verbally misled that the system would effectively pay for itself. So I've taken account of what Mr D says he was told. I've also reviewed the documentation that I've been supplied.

The fixed sum loan agreement sets out the amount being borrowed; the interest charged; the total amount payable; the term; and the contractual monthly loan repayments. I think this was set out clearly enough for Mr D to be able to understand what was required to be repaid towards the agreement. But it doesn't set out any of the estimated benefits of the system.

Neither Mr D nor Creation has been able to supply any other point of sale documentation that shows the estimated benefits of the system. So I can't see there was an easy way for Mr D to have compared the overall costs with the benefits he'd likely receive.

Mr D provided testimony to say he was partially but not fully interested in solar panels before S spoke to him. He was 62 at the point of sale, earning around £25,000 and was self-employed. He said his motivation in buying the system was that he thought it would be a sensible financial move. He said S told him the system would produce free energy and that it would pay for itself.

I've also looked at S's website from around the time Mr D bought the system. I can see the website sets out the option for customers to spread payments to *help bring the start of their investment forward*. It goes on to say *The savings will outweigh the interest paid!* It also markets the systems as being able to generate a return on investment of between 8% and 12%.

I think it follows that if the website sets out the return on investment, and that savings would outweigh interest paid, it's likely this formed a central part of the discussions between S and Mr D when he bought the system.

I think Mr D's account of what he was told seems consistent and credible.

Creation hasn't provided evidence to dispute what Mr D said happened. Yet Mr D left the meeting with S having agreed to an interest-bearing loan, with a monthly repayment of £184.48, payable for 10 years. Given the financial burden he took on I find Mr D's account of what he was told by S, credible and persuasive. The loan is a costly long-term commitment, and I can't see why he would have seen this purchase appealing had he not been given the reassurances he's said he received from S.

For the solar panels to pay for themselves within the loan term, they would need to produce combined savings and FIT income of over £2,200 per year. However, based on the yield of the system importantly the system won't provide enough benefit to be self-funding within the term of the loan. So, these statements were not true. I think S's representative must reasonably have been aware that Mr D's system would not have produced benefits at this level. Whilst there are elements of the calculations that had to be estimated, the amount of sunlight as an example, I think S's representative would have known that Mr D's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to Mr D.

Considering Mr D's account about what he was told, the documentation, the website and that Creation hasn't disputed these facts, I think it likely S gave Mr D a false and misleading impression of the self-funding nature of the solar panel system.

I consider S's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Mr D was expected to receive by agreeing to the installation of the system. I consider that S'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 Mr D went into the transaction. Either way, I think S's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr D'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 S's negotiations with Mr D 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 Mr D and Creation was unfair.

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

The s.75 complaint

Given my above conclusions and bearing in mind the purpose of my decision is to provide a fair outcome quickly with minimal formality, I don't think I need to provide a detailed analysis of Mr D's s.75 complaint. Furthermore, this doesn't stop me from reaching a fair outcome in the circumstances.

Fair compensation

In all the circumstances I consider that fair compensation should aim to remedy the unfairness of Mr D and Creation's relationship arising out of S's misleading and false assurances as to the self-funding nature of the solar panel system.

Therefore, Creation should repay Mr D a sum that corresponds to the outcome he could reasonably have expected as a result of S's assurances. That is, that Mr D's loan repayments should amount to no more than the financial benefits he received for the original term of the loan agreement.

Therefore, to resolve the complaint, Creation should recalculate the agreement based on the known and assumed savings and income Mr D received from the system over the 10-year term of the loan, so he pays no more than that. To do that, I think it's important to consider the benefit Mr D received by way of FIT payments as well as through energy savings. Mr D 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 Mr D's s.140A claim or complaint caused Mr D 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 Mr D £100.

My final decision

For the reasons I have explained my final decision is that I uphold Mr D's complaint and direct Creation Consumer Finance Ltd to:

- Calculate the total payments Mr D has made towards the solar panel system up until the date of settlement of his complaint – A
- Use Mr D's bills and FIT statements, to work out the benefits he received up until the settlement* – B
- Use B to recalculate what Mr D should have paid each month towards the loan over that period and calculate the difference, between what he actually paid (A), and what he should have paid, applying 8% simple annual interest to any overpayment from the date of each payment until the date of settlement of his complaint** – C
- Reimburse C to Mr D

- If required, use Mr D's bills and FIT statements to work out the benefits he will receive for the period between the settlement of his complaint and the end of the original loan term* – D
- Rework the loan so that the remaining balance is D and recalculate the remaining monthly payments equally over the remaining term of the loan or allow Mr D to continue with his current payment so the loan finishes early.
- Pay Mr D an additional £100 compensation

*Where Mr D is unable to provide all the details of his meter readings, electricity bills and/or FIT benefits, I am satisfied he 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 Mr D how much it's taken off. It should also give Mr D a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 30 October 2024.

Simon Wingfield
Ombudsman