DRN-3935691

The complaint

Mr A has complained about Creation Consumer Finance Ltd's ('Creation') response to a claim he 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 140.A ('s.140A') of the CCA.

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

What happened

On 14 September 2015, Mr A bought a solar panel system ('the system') from a company I'll call "M" using a 10-year fixed sum loan from Creation. The loan was for £11,100 to be repaid over 120 months at £143.49 a month. The total cost of the loan would have been £17,218.80 and Mr A told us the loan is still running.

Mr A complained to Creation, he said that he was told by M that the 'feed in tariff' ('FIT') payments and the savings he would make would cover the cost of the loan repayments, however that hasn't happened, and he's suffered a financial loss. He also believed that what happened at the time of the sale created an unfair relationship between himself and Creation.

Mr A raised his complaint to Creation on 12 May 2022. Creation issued a final response letter dated 19 May 2022. Creation considered Mr A had brought his claim more than six years after the cause of action occurred under the FCA's rules on dispute resolution and later Creation said the complaint was too late under the Limitation Act ('LA'). Unhappy with Creation's response, Mr A asked us to review his complaint. Mr A brought his complaint to this service on 9 June 2022.

An investigator considered Mr A's complaint, she ultimately thought that -

- Given the s.75 claim was more likely to be time barred under the LA, Creation's answer seemed fair.
- The 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 Mr A and Creation.

On 17 January 2023, the investigator recommended that Mr A keep the system and Creation take into account what Mr A had paid so far, along with the benefits he received, and make sure the system was effectively self-funding.

Mr A accepted the investigator's view. Creation has provided no response to the investigator's assessment. So, the case was progressed to the next stage of our process, an Ombudsman's 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.

I'm satisfied I have jurisdiction to consider Mr A's complaint, both in respect of the refusal by Creation to accept and pay his s.75 claim and the allegations of an unfair relationship under s.140A.

The s.75 complaint

The event complained of here is Creation's alleged wrongful rejection of Mr A's s.75 claim on 19 May 2022, this relates to a regulated activity under our compulsory jurisdiction. Mr A brought his complaint about this to the ombudsman service on 9 June 2022. So, his complaint in relation to the s.75 claim was brought in time for the purposes of our 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 A. Here the relationship was ongoing at the time it was referred to the ombudsman service on 9 June 2022, so the complaint has been brought in time for the purposes of our jurisdiction.

Merits

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 14 September 2015. Mr A brought his s.75 claim to Creation on 12 May 2022 that is more than six years after he entered into an agreement with them. 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 unfair relationship under s.140A complaint

When considering whether representations and contractual promises by M 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 M 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 M for which Creation were responsible under s.56

when considering whether it is likely Creation had acted fairly and reasonably towards Mr A.

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 s140A.

What happened?
Mr A has said that he was told by M's representative that the cost of the system would be fully paid for by the FIT payments he would receive and the savings he would make.
Mr A has said he was cold called by M about the system, and I haven't seen any evidence he had any prior interest in purchasing Solar Panels.

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

The loan agreement, signed by Mr A on 14 September 2015 and by Creation on 17 September 2015, sets out Mr A's responsibilities for repaying the loan amount and the monthly cost of that. Looking at the loan agreement it specifies that the goods being purchased were solar panels. So, I'm satisfied the loan was taken in Mr A's name to solely purchase the system sold by M.

But the loan agreement contains no mention of the income or savings that may be generated. So, there was no way for Mr A to compare his total costs against the financial benefits he was allegedly being promised from that document. Given the contract doesn't contain information about the benefits, Mr A would have looked to M's representative to help him understand how much the panels would cost, what they would bring in and how much he would benefit from the system in order for him to make a decision. There is nothing in the documentation I have seen that would have put Mr A on notice that the solar panels were not self-funding.

I have noted that the website that M had at the time contains benefit driven statements including,

"Generate free electricity by installing Solar Panels"

And

"Installing Solar Panels on your roof will generate free electricity for your home and, thanks to the UK Government's Feed-in Tariff scheme, will earn you a guaranteed tax free income for 20 years. With energy prices at an all time high, solar panels are the perfect way to lower your household energy bills and generate you own clean energy."

Nowhere on the website is there any warning that if the solar panels were taken on finance that the income and savings may not be sufficient to meet the loan repayments.

I accept that the above is something that Mr A may not have seen. But I think that the representatives of M are likely to have mirrored the benefit driven tone of M's official website at the time of this sale. And similarly, it seems less likely that M's representatives were making balanced warnings about likely performance of the solar panels, when those same things were entirely absent from M's official website.

Creation hasn't provided evidence to dispute what Mr A said happened. Yet with no prior interest Mr A left the meeting having agreed to an interest-bearing loan, with a monthly repayment of around £143, payable for 10 years. And I have considered that Mr A told us that at that time he had a young family, with two children in private education. Given his

lack of prior interest and the financial burden he took on, I find Mr A's account of what he was told by M to be credible and persuasive. The loan is a costly long-term commitment, and I can't see why he would have seen this purchase as appealing had he not been given the reassurances he's said he received from M.

I have noted that our investigator thought that Mr A's testimony seemed persuasive and explained why they thought that in their assessment. I have noted that Creation has not responded to that assessment.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £1,721 per year. I have not seen anything to indicate Mr A's system was not performing as expected but his system was unlikely to produce that and Mr A's testimony is that it didn't and I've been shown no evidence to contradict that.

So, these statements were not true. I think the salesman from M must reasonably have been aware that Mr A'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 the salesman would have known that Mr A's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to Mr A.

Considering Mr A's account about what he was told, and the documentation he was shown at the time of the sale, and in the absence of any other evidence from Creation to the contrary, I think it likely M gave Mr A a false and misleading impression of the self-funding nature of the solar panel system. On balance, I find Mr A's account to be plausible and convincing.

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

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

Where Creation is to be treated as responsible for M's negotiations with Mr A 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 A 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.

Putting things right

Fair compensation

In all the circumstances I consider that the fair compensation should aim to remedy the unfairness of Mr A and Creation's relationship arising out of M's misleading and

false assurances as to the self-funding nature of the solar panel system. I require Creation to repay Mr A a sum that corresponds to the outcome he could reasonably have expected as a result of M's assurances. That is, that Mr A's loan repayments should amount to no more than the financial benefits he receives 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 Mr A received from the solar panel 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 A received by way of FIT payments as well as through energy savings. Mr A may need to supply up to date details to help Creation make that calculation. But Creation can and should use assumptions when information is not available.

Mr A told us that the loan is still running.

So, to put things right Creation Consumer Finance Ltd must:

- Calculate the total repayments Mr A made towards the loan up until the date of settlement – A
- Use Mr A's electricity bills, FIT statements and meter readings to work out the known and assumed benefits he received and he would have received over the 10 year loan period – B
- Use B to recalculate what Mr A should have repaid each month towards the loan and apply 8% simple interest to any overpayment from the date of his payment until the date of settlement – C
- Reimburse C to Mr A.

Give Mr A the option of offsetting this amount [C] from any outstanding loan amount, recalculating either his monthly payments or remaining loan term, or a refund of the overpayments.

I agree Creation's refusal to consider the claim under s140A has also caused Mr A some further inconvenience. And I think the £100 compensation recommended by our investigator is broadly a fair way to recognise that.

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

Creation Consumer Finance Ltd 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.

My final decision

For the reasons I have explained I uphold Mr A's complaint. I require Creation Consumer Finance Ltd to calculate and pay the fair compensation as detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 20 June 2024.

Douglas Sayers
Ombudsman