DRN-3963678

Financial Ombudsman Service

The complaint

Mrs S has complained about the way Creation Consumer Finance Ltd ("Creation") responded to claims she'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").

Mrs S has been represented in bringing her complaint but, to keep things simple, I'll refer to Mrs S throughout.

What happened

In August 2013 Mrs S entered into a fixed sum loan agreement with Creation to pay for a £10,400 solar panel system ("the system") from a supplier I'll call "P". The total amount payable under the agreement was £16,341.60 and it was due to be paid back with 120 monthly repayments of £136.18. There was a £135 arrangement fee and an interest charge of £5,806.60.

Creation has supplied another loan agreement from October 2013 with the same figures, but as the system was installed in August 2013, I think the August fixed sum loan seems to be correct.

In January 2022 Mrs S sent a letter of claim to Creation explaining she thought the system was mis-sold. She said P told her she'd be paid for the electricity the system generated through the government's Feed in Tariff (FIT) payments and that she'd have reduced energy bills. She said P sold the system as being self-funding within the loan term. She said P promised her guaranteed income for 20 years; 10% earnings tax free annually; her property value would increase; and that the system would be maintenance free with at least a 25 year life expectancy. She said the system was misrepresented and believed the statements and several other actions at the time of the sale created an unfair relationship between herself and Creation.

Creation sent a final response letter in February 2022 to say it was dismissing the complaint without consideration because it had been brought out of time.

Unhappy with Creation's response, Mrs S decided to refer her complaint to the Financial Ombudsman in February 2022.

One of our investigators looked into things and thought P had likely told Mrs S the system would be self-funding within the loan term. She didn't think the system was, and so she thought P had misrepresented it. She thought a court would likely find the relationship between Mrs S and Creation was unfair and that she'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 she pays no more than that, and she keeps the system. She also thought Creation should pay £100 for the impact on Mrs S of not looking into the s.140A claim.

Mrs S agreed, 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 Mrs S. Here the relationship was ongoing at the time Mrs S complained, 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 P 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 P 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 P for which Creation was responsible under s.56 when considering whether it is likely Creation had acted fairly and reasonably towards Mrs S.

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?

Mrs S says she was verbally misled that the system would effectively pay for itself. So I've taken account of what Mrs S says she 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 Mrs S 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.

I've looked at the other documents Mrs S has been able to supply. The brochure she's supplied sets out that the payback period being a concern for people investing in renewable energy had been reduced. And that customers could make a 'real profit' through buying a system. I therefore think if the brochure mentions the financial benefits of the system and the return on investment it's likely that would have been a central part of the discussion between P and Mrs S.

Mrs S has also supplied an order form, invoice, and handover information. But these forms don't set out any of the estimated benefits of the system. Mrs S has supplied a contract with the SAP calculation on, but this doesn't set out the estimated benefits either.

We asked Mrs S more about the purchase and she explained she'd heard about solar panels and thought it would be a good way to cut the bills down but wasn't actively looking. She said she agreed to buy the system because P told her it would pay for itself. She said her partner was unwell with a long-lasting heath condition and so they were looking for ways to save money. She said P sold the system as though it would cover the loan payments and that she'd have some money left over. She said P told her once the agreement was paid off, she'd have extra money coming in. I think Mrs S would have looked to P's representative to help her understand how much the system would cost and what benefit she'd receive.

Creation hasn't provided evidence to dispute what Mrs S said happened. Mrs S was looking for ways to save money. Yet she left the meeting having agreed to an interest-bearing loan, with a monthly repayment of £136.18, payable for 10 years. Given her aims and the financial burden she took on I find Mrs S's account of what she was told by P, credible 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 P.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of over £1,600 per year. However, importantly here I don't think the system would provide enough benefit to be self-funding within the term of the loan.

I think the statements that were likely made by P were not true. I think P's representative must reasonably have been aware that Mrs S'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 P's representative would have known that Mrs S's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to Mrs S.

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

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

<u>Would the court be likely to make a finding of unfairness under s.140a</u>

Where Creation is to be treated as responsible for P's negotiations with Mrs S 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 Mrs S 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 Mrs S and Creation's relationship arising out of P's misleading and false assurances as to the self-funding nature of the solar panel system. Creation should repay Mrs S a sum that corresponds to the outcome she could reasonably have expected as a result of P's assurances. That is, that Mrs S'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 Mrs S received from the system over the 10-year term of the loan, so she pays no more than that. To do that, I think it's important to consider the benefit Mrs S received by way of FIT payments as well as through energy savings. Mrs S will need to supply up to date details of all FIT benefits received, electricity bills and current meter readings to Creation.

While our investigator set out various options for how the overpayments could be treated, seeing as though I understand the agreement will now be paid off, I think there's only one viable option for my directions.

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.

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

Finally, I note Mrs S also mentioned claiming damages through section 75 ("s.75"). 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 Mrs S's s.75 complaint. Furthermore, this doesn't stop me from reaching a fair outcome in the circumstances.

My final decision

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

- Calculate the total payments Mrs S has made towards the solar panel system up until the date of settlement – A
- Use Mrs S's bills and FIT statements to work out the benefits she received from the start date of the loan, up until the end of the term * – B
- Use B to recalculate what Mrs S 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 annual interest to any overpayment from the date of payment until the date of settlement** – C
- Reimburse C to Mrs S
- Pay Mrs S £100 compensation

*Where Mrs S is unable 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 to 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 Mrs S how much it's taken off. It should also give Mrs S a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S to accept or reject my decision before 10 October 2024.

Simon Wingfield
Ombudsman