

## **The complaint**

Mrs W has complained about Creation Consumer Finance Ltd's ('Creation') 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**

On 10 June 2014, Mrs W signed a loan agreement to buy a solar panel system ('the system') from a company I'll call "Z" using a 10-year fixed sum loan from Creation.

Mrs W complained to Creation, she said that she was told by Z that the 'feed in tariff' ('FIT') payments would cover the cost of the loan repayments. However, that hasn't happened, and she's suffered a financial loss. Mrs W also believed that what happened at the time of the sale created an unfair relationship between herself and Creation.

Creation told us they received a complaint from Mrs W on 12 October 2021. Creation issued a final response letter dated 29 October 2021. Creation considered Mrs W had brought her claim more than six years after the cause of action occurred under the FCA's rules on dispute resolution and the complaint was too late under the Limitation Act ('LA'). Mrs W brought her complaint to this service on 20 March 2022 as she was unhappy with Creation's response and Mrs W asked us to review her complaint.

An investigator considered Mrs W'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 Mrs W and Creation.

On 12 January 2023, the investigator recommended that Mrs W keep the system and Creation take into account what Mrs W had paid so far, along with the benefits she received, and make sure the system was effectively self-funding.

Mrs W accepted the investigator's view. Creation did not respond. So, the case was progressed to the next stage of our process, an Ombudsman's decision. I consider that Creation have now had over a year to respond to the investigator's findings had it wished to.

## **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**

I'm satisfied I have jurisdiction to consider Mrs W's complaint, both in respect of the refusal by Creation to accept and pay her 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 Mrs W's s.75 claim on 29 October 2021, this relates to a regulated activity under our compulsory jurisdiction. Mrs W brought her complaint about this to the ombudsman service on 20 March 2022. So, her 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 Mrs W. Here the relationship ended only when Mrs W sold her home and repaid the loan with a lump sum on 7 February 2018. The complaint was raised on 12 October 2021. 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 Z 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 Z 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 Z for which Creation were responsible under s.56 when considering whether it is likely Creation had acted fairly and reasonably towards Mrs W.

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?

Mrs W has said that she was told by Z's representative that the cost of the system would be fully paid for by the FIT payments she would receive and the savings she would make. I haven't seen any evidence Mrs W had any prior interest in purchasing Solar Panels before being approached by a representative of Z.

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

The loan agreement, signed by Mrs W on 10 June 2014, sets out Mrs W's responsibilities for repaying the loan amount and the monthly cost of that. I'm satisfied the loan agreement clearly sets out, amongst other things, the amount being borrowed, the interest to be charged, total amount payable, the term of the loan and the contractual monthly loan repayments. So, I'm satisfied the loan was taken in Mrs W's name to solely purchase the system sold by Z.

But the loan agreement contains no mention of the income or savings that may be generated. So, there was no way for Mrs W to compare her total costs against the financial benefits she was allegedly being promised from that document. Given this, Mrs W would have looked to Z's representative to help her understand how much the panels would cost, what they would bring in and how much she would benefit from the system in order for her to make a decision.

We've asked if there was other documentation from the point of sale, but neither Creation nor Mrs W have provided any. Mrs W said she's supplied everything she had.

However, Mrs W has said the financial benefits were discussed. I've looked at Z's website from around the time of the sale. The nearest cache of the website before the sale is 11 October 2013. I am satisfied, it is reasonable to take this content into account when considering what's more likely than not to have been said to Mrs W. On the main page it states –

*'Embrace the benefits of solar power and renewable energy saving systems.*

- ✓ Tax free
- ✓ High yield
- ✓ No risk
- ✓ Inflation proof
- ✓ Non depreciating asset'

Further down the page there is a section titled 'PV Solar Systems', where the following is stated –

*'The most common sustainable energy product on the market at the moment is the solar PV systems. These create electricity for your home during daylight hours free of charge and give you a tax-free income guaranteed by the government feed in tariff. Yes you get paid for generating energy and it is TAX FREE!'*

And at the bottom of the page there is a section titled 'Finance', which includes –

*'We have calculated a Pay As You Go plan to suit each and every client, so that all the savings and tariffs pay for your new products'*

I think it follows that if the website emphasises the benefits of a solar panel system, and how they would pay for the products being offered by Z, it's likely this would have been a central part of Z's conversation when selling the product. I think the website also supports Mrs W's testimony that Z's representative told her the monthly payments and savings she would receive would cover her monthly finance payments.

So, I find what Mrs W's said believable. I think Z's website supports Mrs W's testimony that the potential benefits were discussed. I'm of the opinion that they would be a key

reason to purchase the system and her savings on her electrical bills and income from the FIT scheme would have been a central part of the conversation.

I think Mrs W would have looked to Z's representative to help her understand how much the panels would cost, what they would bring in and how much she would benefit from the system. And it seems to me most likely that the sales representative Mrs W dealt with would've used similar lines to those Z produced in its promotional literature on its website at the time of the sale. So, this evidence supports Mrs W's testimony that she was told by Z's representative the system would be self-funding.

Important to note here are the actions taken by the Renewable Energy Consumer Code ('RECC') against Z. My understanding is that the RECC oversees the renewable energy consumer Code and makes sure that its members comply with it.

The RECC investigated Z's conduct and informed Z of its concerns in 2014. Significantly RECC had concerns about Z using false or misleading information and that pressured sales were taking place.

The RECC Panel heard the case and decided the following were proved -

- allegations consumers had been given misleading information about payment and payback
- allegations consumers were not given certain technical information before signing the contract.

So, the Panel decided Z was in breach of Section 5.2 of the code (which required members not to provide false or misleading information to consumers) and Section 5.3 (which concerned members providing clear information so consumers could make an informed decision). Given RECC's concern about Z's culture and conduct, it made the decision to terminate P's membership of RECC.

Whilst I accept that the above is findings on different cases the RECC was looking at, the findings suggest that there were conduct concerns in the same areas that Mrs W has complained about, at a similar time she was sold her system.

I think it important to highlight the following points the panel considered in its decision:

- *'The Regulator was particularly uncomfortable with the fact that so many consumers appeared not to understand the benefit of the system sold. They were told one thing but the reality was different'*
- *'There is a large volume of complaints with a consistent theme that suggest that some consumers have been given false or misleading information before signing contracts. ... The Panel decided that a fundamental cultural change was needed within the company.... Given the duration, seriousness and breadth of the breaches upheld... [Z's membership of RECC] should be terminated.'*

Following the RECC report Creation terminated its relationship with Z. This is also set out in Z's liquidation report produced in June 2016 available on companies house. The report states that mis-selling issues by Z were brought up by Creation, which led to it terminating the contract with Z and also withholding funds as it expected claims from consumers under s.75. I think Creation's actions strongly suggest it had serious concerns about the way Z was selling Solar Panels.

I'm of the opinion that all of the above information strongly supports Mrs W's testimony.

Creation hasn't provided evidence to dispute what Mrs W said happened. Yet with no prior interest, Mrs W left the meeting having agreed to an interest-bearing loan, with a monthly repayment of around £120 payable for ten years. Given her lack of prior interest and the financial burden she took on, I find Mrs W's account of what she was told by Z to be credible and persuasive. The loan is a costly long-term commitment, and I can't see why she would have seen this purchase as appealing had she not been given the reassurances she's said she received from Z.

I have noted that our investigator thought that Mrs W'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 £1,448 per year. I have not seen anything to indicate Mrs W's system was not performing as expected but Mrs W's system did not produce sufficiently to meet the loan repayments.

So, the statements made by Z were not true. I think the salesman from Z must reasonably have been aware that Mrs W'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 Mrs W's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to Mrs W.

Considering Mrs W's account about what she was told, and the documentation she was shown at the time of the sale, Z's website, RECC's findings, Creation's actions and the fact it hasn't disputed these facts, and in the absence of any other evidence from Creation to the contrary, I think it likely Z gave Mrs W a false and misleading impression of the self-funding nature of the solar panel system. On balance, I find Mrs W's account to be plausible and convincing.

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

The s.75 complaint and additional s.140A complaint points

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 W's s.75 complaint and her other s.140A complaint points. Furthermore, this doesn't stop me from reaching a fair outcome in the circumstances.

### Fair compensation

In all the circumstances I consider that the fair compensation should aim to remedy the unfairness of Mrs W and Creation's relationship arising out of Z's misleading and false assurances as to the self-funding nature of the solar panel system. I require Creation to repay Mrs W a sum that corresponds to the outcome she could reasonably have expected as a result of Z's assurances. That is, that Mrs W's loan repayments should amount to no more than the financial benefits she 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 Mrs W received from the solar panel 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 W received by way of FIT payments as well as through energy savings.

Mrs W 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. And as Mrs W repaid the loan on 7 February 2018 around the time she sold the house, Mrs W thinks there is limited information available from that time.

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

- Calculate the total repayments Mrs W made towards the loan up until she repaid it – A
- Use Mrs W's electricity bills, FIT statements and meter readings to work out the known and assumed benefits she received up until she repaid the loan – B
- Use B to recalculate what Mrs W should have repaid each month towards the loan over that period and reimburse her the difference between what she actually repaid (A) and what she should have repaid, adding 8% simple annual interest\* to any overpayment, from the date of repayment until the date of settlement – C
- Use her electricity bills, FIT statements and meter readings to work out the known and assumed benefits she received between the loan being paid off and the end of the original loan term – D
- Deduct D from the amount Mrs W paid off the loan – E
- Add 8% simple annual interest\* to E from the date Mrs W paid off the loan until the date of settlement – F
- Creation should pay Mrs W  $C + F$

I agree Creation's refusal to consider the claim under s140A has also caused Mrs W 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 Mrs W how much tax it's taken off. It should also give Mrs W a tax deduction certificate if she asks for one, so she 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.

### **Putting things right**

I require Creation Consumer Finance Ltd to calculate and pay the fair compensation as detailed above.

### **My final decision**

For the reasons set out, I'm upholding Mrs T's complaint about Creation Consumer Finance Ltd. 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 Mrs W to accept or reject my decision before 9 September 2024.

Douglas Sayers  
**Ombudsman**