

## The complaint

Mr H 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 140A ('s.140A') of the CCA.

## What happened

In January 2014, Mr H bought a solar panel system ('the system') from a company I'll call "M" using a 10-year fixed sum loan from Creation. The agreement sets out the amount of credit is £11,800, the monthly payments are £154.28, the total charge for credit is £6,578.60, and the total amount payable is £18,513.60.

Mr H complained to Creation on 2 March 2020, explaining he thought the system was mis-sold. In summary he said:

- M told him the total cost of the system was £11,800 whereas it was actually over £18,513 when including interest.
- M promised a tax-free year 1 benefit of around £1,851, but there was a yearly deficit of around £1266.
- He would not have entered into the agreement if he'd known he'd have to contribute around £1,266 per year for 10 years.
- He was told the system would be self-funding.
- Many other customers of M have stated similar if not identical experiences.
- He was pressured into signing the agreement.
- M told him the inverter would be under warranty for 10 years.
- M didn't tell him the performance of the system would deteriorate over time.

Mr H said he had a like claim against Creation for misrepresentation and breach of contract under s.75. He said section 56 ("s.56") of the CCA deems M the agent of Creation when carrying out antecedent negotiations. And that the relationship between Creation and himself was unfair under s.140A because either Creation or M:

- Failed to assess Mr H's creditworthiness.
- Didn't act honestly, fairly and professionally with his best interests in mind.
- Didn't disclose payment of any commission and/or inducements paid and/or received.
- Didn't provide a cooling off period.
- Didn't notify Mr H of his cancellation rights.
- Didn't comply with the Renewable Energy Consumer Code.

Creation responded to the complaint on 6 March 2020 in its final response. It considered Mr H had brought his claim more than six years after the cause of action occurred under the Limitation Act ('LA').

Unhappy with Creation's response, Mr H referred his complaint to our service on 27 March 2020.

An investigator considered Mr H's complaint, he 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 H and Creation.

He recommended that Mr H keep the system and Creation take into account what Mr H had paid so far, along with the benefits he received, making sure the system was effectively self-funding.

Mr H accepted the investigator's view. I can't see we received a response from Creation, 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.

### **My findings on jurisdiction**

I'm satisfied I have jurisdiction to consider Mr H'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 H's s.75 claim on 6 March 2020. This relates to a regulated activity under our compulsory jurisdiction. Mr H brought his complaint about this to the ombudsman service on 27 March 2020. 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 H. Here the relationship was ongoing at the time it was referred to the ombudsman service on 27 March 2020, 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 13 January 2014. Mr H brought his s.75 claim to Creation

on 2 March 2020 that is more than six years after he entered into an agreement with it. 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.

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 H. 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 H has said 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. Mr H said he was reassured by M's representative he wouldn't be out of pocket and that he'd save money.

Mr H has said he had no interest in solar panels until he was cold called by M about the system, and I haven't seen any other evidence he had any prior interest in purchasing solar panels.

I've looked at the documents provided by Mr H to see if there was anything contained within them that made it clear that the solar panel system wouldn't be self-funding. Here I'm considering what Mr H had access to at the time of sale.

I've considered Mr H's loan agreement. I'm satisfied it 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.

I've considered the contract; the likely financial benefits of the system aren't included on this document. There is a box entitled 'calculating a SAP calculation' but this hasn't been filled out. Given this there was no way for Mr H to compare his total costs against the financial benefits he was allegedly being promised.

Mr H has said the financial benefits were discussed; despite the paperwork I've seen not including information about them. I've looked at a copy of M's website from June 2014, on the Solar PV Panels page, it includes the following –

**Installing Solar PV panels will not only bring down the cost of supplying electricity to your home or business, but will actually bring long-term financial benefits by earning you money for years to come.**

Not only will Solar PV panels help you save money on bills, they will also generate you tax-free income, and a return of investment of up to 15 per cent for 20 years under Government funding incentives to increase levels of green energy.

Our solar panel installation team will ensure your system generates the maximum possible returns. Installation rarely requires planning permission and can be completed within a week on most projects, putting your business at the forefront of green energy.

I think it follows that if the website emphasises the benefits of a solar panel system and the return on the investment (as mentioned above), it's likely this would have been a central part of M's conversation when selling the product.

Mr H has also recently confirmed that he received the following document one month after the point of sale, but it was verbally stated at the point of sale –

YOUR SYSTEM EXPLAINED.

Year 1 benefit from SOLAR PV ~~£185.36~~

Benefit over 25 years from SOLAR PV ~~£55,540.80~~

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LED BULBS will save an extra N/A in year 1 and N/A over 25 years.

VOLTAGE OPTIMIZER will save N/A in year 1 and N/A over 25 years.

I BOOST will save N/A in year 1 and N/A over 25 years.

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TOTAL BENEFIT YEAR 1 ~~£185.36~~ AND OVER 25 YEARS ~~£55,540.80~~

BREAK THIS INTO MONTHLYS \_\_\_\_\_

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SYSTEM COST MONTHLY IS £154.28

YOUR CONTRIBUTION TO THIS IS 0 PER WEEK/MONTH.

AS THIS IS INDEX LINKED TO RPI, YOUR CONTRIBUTION IS REDUCED AFTER YEAR 1.

So, I find what Mr H's said believable, I think M's website and the above document supports his testimony that the potential benefits were discussed. I'm of the opinion that they would be a key reason to purchase the system and his savings on his electrical bills and income from the FIT scheme would have been a central part of the conversation.

Given the contract doesn't contain information about the benefits, Mr H 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.

Mr H has recently told our investigator that at the time of sale the monthly household incomings were around £4,000, and the outgoings were around £3,500, leaving £500 spare per month. However, with no prior interest in solar panels Mr H left the meeting having agreed to an interest-bearing loan, with a monthly repayment of £154.28, payable for 10 years. Given his lack of prior interest and the financial burden he took on I find Mr H's account of what he was told by M, credible and persuasive. The loan is a costly long-term commitment, it makes up 30% of the remaining money Mr H's household had every month, 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 M. Also, Creation hasn't provided evidence to dispute what Mr H's said happened.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £1,851.36 per year. Mr H's system looks like it's performing slightly less than the estimate on his MCS certificate. However, I'm mindful this was an estimate and I've not seen any evidence there are issues with the system. Importantly here the system has not and would not produce enough benefits based on the actual and estimated output, to be self-funding within the term of the loan. So, these statements were not true. I think M's representative must reasonably have been aware that Mr H'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 M's representative would have known that Mr H's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to Mr H.

Considering Mr H's account about what he was told, the documentation he was shown at the time of the sale, and the fact Creation hasn't disputed these facts, I think it likely M gave Mr H a false and misleading impression of the self-funding nature of the solar panel system.

I consider M's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Mr H 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 H went into the transaction. Either way, I think M's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr H'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 M's negotiations with Mr H 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 H 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.

#### Mr H's other 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 cover off Mr H's other 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 fair compensation should aim to remedy the unfairness of Mr H and Creation's relationship arising out of M's misleading and false assurances as to the self-funding nature of the solar panel system. Creation should repay Mr H a sum that corresponds to the outcome he could reasonably have expected as a result of M's assurances. That is, that Mr H's loan repayments should amount to no more than the financial benefits he 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 Mr H 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 H received by way of FIT payments as well as through energy savings. Mr H will need to supply up to date details, where available, of all FIT benefits received, electricity bills and current meter readings to Creation. Mr H has recently told us that his loan has now run to full term, and he has repaid it in full. Therefore, Mr H will only have one option that's tenable as opposed to the 4 the investigator recommended.

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 H's complaint in a reasonable timeframe, with minimal communication, caused Mr H 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 H £100.

### **My final decision**

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

- Calculate the total payments (the deposit and monthly repayments) Mr H has made towards the solar panel system up until the date of settlement of his complaint – A
- Use Mr H's bills and FIT statements, to work out the benefits he received up until the end of the loan term\* – B
- Use B to recalculate what Mr H 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 interest to any overpayment from the date of each payment until the date of settlement of his complaint\*\* – C
- Reimburse C to Mr H
- Pay Mr H £100 compensation

\*Where Mr H has not been able 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 H how much it's taken off. It should also give Mr H 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 H to accept or reject my decision before 27 June 2024.

Helen Boulton-Agg  
**Ombudsman**