

The complaint

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

What happened

In December 2014 Mr C entered into a fixed sum loan agreement with Creation to pay for a £6,695 solar panel system (“the system”) from a supplier I’ll call “S”. The total amount payable under the agreement was £10,384.80 and it was due to be paid back with 120 monthly repayments of £86.54. I understand the system was installed in January 2015.

In September 2021 Mr C sent a letter of claim to Creation explaining he thought the system was mis-sold. He said S told him he’d 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 he’d receive a guaranteed income for 20 years and that he’d earn up to 10% per year tax free. He said S told him the system would be maintenance free with a 40-year life expectancy; his energy bills would go down; and his property value would increase.

Mr C said the system was misrepresented and believed the statements and several other actions at the time of the sale created an unfair relationship between himself and Creation.

Creation sent a final response letter in November 2021 to say it was dismissing the complaint without consideration because it had been brought out of time.

Unhappy with Creation’s response, Mr C decided to refer his complaint to the Financial Ombudsman in January 2022.

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

Mr C agreed, but I can’t see we received a response from Creation. So 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 C. Here the relationship was ongoing at the time it was referred to the ombudsman service in January 2022, so the complaint has been brought in time for the purposes of our jurisdiction.

The section 75 ("s.75") complaint

Where Creation exercises its right and duties as a creditor under a credit agreement it is carrying out a regulated activity within scope of our compulsory jurisdiction under Article 60B(2) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the "RAO"). In undertaking that activity, the creditor must honour liabilities to the debtor. So, if a debtor advances a valid s.75 claim in respect of the credit agreement, the creditor has to honour that liability and failing or refusing to do so comes under our compulsory jurisdiction.

The event complained of here is Creation's allegedly wrongful rejection of Mr C's s.75 claim in November 2021. Mr C brought his complaint about this to the ombudsman service in January 2022. So his complaint in relation to the s.75 claim was brought in time for the purposes of our service's jurisdiction.

Creation argued the complaint was out of our jurisdiction taking into account the Limitation Act 1980 (the "LA"), but our service has its own rules under DISP 2.8.2R saying when a complaint is brought too late. The LA does not limit 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 C.

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 C says he was verbally misled that the system would effectively pay for itself. I've taken account of what Mr C says he was told, and I've 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 C to be able to understand what was required to be repaid towards the agreement. But it doesn't set out what savings Mr C could expect to make from the system.

None of the documents we've been supplied show any estimates of the savings Mr C would make. I've not seen there was an easy way for Mr C to compare his total costs against the financial benefits he was allegedly being promised.

I've not seen anything to indicate Mr C had an interest in purchasing a solar panel system before S contacted him. He said S knocked on his door to sell the panels. Mr C has said he only agreed to the purchase because S told him the system would be self-funding, and that he'd receive a return on his investment. He said S told him they'd pay for themselves within 5 years. Mr C said the financial benefits were discussed despite the paperwork I've seen not including information about them. He said he retired from his main job in 2004 and at the time he purchased the system he was working part time. I'm mindful that it would be difficult to understand why, in this particular case, Mr C would have agreed to the installation if his monthly outgoings would increase significantly.

I think Mr C would have looked to S'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.

I've also looked at S's website from around the time Mr C bought the system. I can see it promoted the system as enabling customers to generate their own electricity to avoid the uncertainty of rising energy costs. It said the customer would be able to create their own energy with no price increases for 20 years and an index linked tax free investment. So I think it follows that if the website emphasises the benefits of a solar panel system and the return on the investment, it's likely this would have been a central part of S's conversation when selling the product.

For the solar panels to be self-funding, they'd need to produce a combined savings and FIT income of around £1,000 per year. But I've also not seen anything to suggest Mr C's system achieved the benefits required to make the system self-funding within the term of the agreement. I therefore find the representations that were likely made weren't true. I think the salesperson ought to have known this and made it clear the system wouldn't have produced enough benefits to cover the overall cost of the fixed sum loan agreement during its term.

Considering Mr C'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 C a false and misleading impression of the self-funding nature of the system. Given his lack of prior interest and the financial burden he took on I find Mr C'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 S not given the reassurances he said he received.

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

Fair compensation

In all the circumstances I consider that fair compensation should aim to remedy the unfairness of Mr C and Creation's relationship arising out of S's misleading and false assurances as to the self-funding nature of the solar panel system. Creation should repay Mr C a sum that corresponds to the outcome he could reasonably have expected as a result of S's assurances. That is, that Mr C's loan repayments should amount to no more than the financial benefits he received for the duration of the loan agreement. I note Mr C has mentioned S said the panels would pay for themselves within 5 years and that he initially thought the agreement was for that long. He's accepted our investigator's recommendation to have the panels self-funding within the loan term. And I think it's more likely than not that the system was sold as being self-funding within the loan term. So I think the loan term is the fairer period to use.

Therefore, to resolve the complaint, Creation should recalculate the agreement based on the known and assumed savings and income Mr C received (or will receive) 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 C received by way of FIT payments as well as through energy savings. Mr C will need to supply up to date details 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.

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

Finally, I note Mr C 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 Mr C'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 Mr C's complaint and direct Creation Consumer Finance Ltd to:

- Calculate the total payments (the deposit and monthly repayments) Mr C has made towards the solar panel system up until the date of settlement of his complaint – A
- Use Mr C's bills and FIT statements to work out the benefits he received up until the date of settlement of his complaint* – B
- Use B to recalculate what Mr C 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** – C
- Reimburse C to Mr C
- Use Mr C'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 C to continue with his current payment so the loan finishes early.
- Pay Mr C an additional £100 compensation

*Where Mr C 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 C how much it's taken off. It should also give Mr C 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 C to accept or reject my decision before 23 August 2024.

Simon Wingfield
Ombudsman