DRN-3969217

The complaint

Mr P has complained about the way Creation Consumer Finance Limited ("Creation") responded to a claim he made under s75 of the Consumer Credit Act 1974 (the "CCA") and in relation to an alleged unfair relationship taking into account s140A of the CCA.

What happened

In February 2014, Mr P bought a solar panel system ('the system') from a company I'll call "M" using a 10-year fixed sum loan from Creation.

The price of the panels was £10,950 and this plus the additional costs of the loan (interest of £6,109.80 and an arrangement fee of £135) made the total amount payable £17,194.80.

Mr P via his representatives sent a letter before claim to Creation on 18 February 2020 to propose claims under s.75 for breach of contract and misrepresentation by M and arising out of an unfair relationship under s.140A of the CCA. He said he was led to believe the electricity savings and FIT payment income from the panels would cover the costs of the loan he'd taken out but in fact, there was a shortfall between the cost of the loan payments and the benefits, causing him a financial loss.

Mr P said he had not been made aware that Creation had been paid commission on the sale, Creation had failed to ensure P observed the relevant codes at the time of sale, and insufficient checks had been carried out to make sure he could afford the repayments on the loan.

In response to Mr P's letter before claim Creation sent a final response letter dated 22 March 2020 and treating the matter as a complaint. Creation declined to take further action on the basis that it considered Mr P had brought his claim more than six years after it believed his cause of action had arisen.

Dissatisfied with Creation's response Mr P referred a complaint to our service about the s.75 claim and the alleged unfair relationship under s.140A on 23 March 2020.

An investigator thought Mr P's complaint should be upheld. He said that as Mr P had brought his complaint about Creation's handling of his s.75 claim to us within six years of it declining to meet that claim on 22 March 2020, he had brought it in time under our rules.

However, given his view that the matters giving rise to the s.75 claim took place around the time the agreement was entered into during February 2014 he considered it was likely that the provisions of the Limitation Act 1980 (the 'LA') meant that Mr P did not have a valid claim against M and therefore no like claim against Creation under s.75. So, he didn't think Creation had treated Mr P unfairly by declining his s.75 claim.

However, he thought that Mr P's complaint about Creation's participation in an allegedly unfair relationship per s.140A was made in time where Mr P's loan agreement with Creation was ongoing.

The investigator went on to conclude that that the benefits of the panels had likely been misrepresented to Mr P at the time of the sale and those misrepresentations had created an unfair relationship. He recommended that Creation should recalculate the loan and ensure that Mr P paid no more than the likely benefits he would receive over the loan period.

The investigator recommended that Creation should calculate the benefits from the panels over 10 years (the period of the loan) and ensure that Mr P paid no more than that.

Mr P accepted the investigator's view. Creation said it was seeking further guidance however it did not respond before the deadline it was set. So, the case was progressed to the next stage of our process, an Ombudsman's decision.

Mr P's loan agreement ended in March 2024 having reached the end of its term.

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.

Jurisdiction

I'm satisfied I have jurisdiction to consider Mr P'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 P's s.75 claim on 22 March 2020, this relates to a regulated activity under our compulsory jurisdiction. Mr P brought his complaint about this to the ombudsman service on 23 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 complaint

The event complained of here is Creation's participation, for so long as the credit relationship continued, in an alleged unfair relationship with Mr P. Here the relationship was ongoing at the time it was referred to the ombudsman service on 23 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 from when the cause of action arose, after which they become time barred.

It's not clear from the available paperwork exactly when the contract between Mr P and M began. He signed some sales paperwork and his loan agreement on 10 February 2014, the goods were not installed until March 2014 and his loan agreement was executed on 19 February 2014. Mr P sent his letter before claim to Creation on 18 February 2020, so its possible his claim was not time barred. However, given the conclusions I've reached below and the redress I am awarding, 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 P's s.75 complaint. This doesn't stop me from reaching a fair outcome in the circumstances of this complaint.

The unfair relationship 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 P.

But in doing so, I should take into account all the circumstances and consider whether the relationship with Creation would likely be unfair under s.140A.

Mr P has said he was told by M's representative that the cost of the system would be fully paid for *"from day one*" by the savings he would make on his energy bills and *"some returns".*

Mr P has said he had no interest in solar panels until he was cold called by M about the system, I haven't seen anything within the available evidence to suggest otherwise.

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

Mr P provided us a document called *'your system explained'*. This set out that the *"year one benefit"* of the panels would be £179.48 – which is much less than Mr P's annual loan repayments of £1,719.48. It's possible this was a typo as the number is very similar to the annual loan repayment, its just missing one extra number. But I can't be sure of that. The document also said the system monthly cost would be £143.29 of which Mr P's weekly contribution would be "0" – suggesting also perhaps that the solar panels would indeed pay for themselves. Overall, the position set out in this document is ambiguous and I don't think it gives much support to either Mr P, or Creation.

Mr P's 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.

I've also looked at the sales contract with M. This has a section called 'calculating a SAP calculation' which includes an SAP (standard assessment procedure) calculation of 3,433. No explanation is given however of how this might translate into a financial benefit, or even how Mr P might go about calculating doing this himself.

Overall, it seems that the information within the available paperwork provided at the time of the sale was not clear enough for Mr P to be able to compare the estimated benefits of the solar panels with the total costs of the loan.

I find it likely therefore that Mr P 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.

I've looked at an archived version of M's website from around the time of the sale in 2014. It is mentioned several times on the website that the solar panels will "bring long term financial benefits by earning you money for years to come". I think it follows that if the website heavily emphasises the benefits of a solar panel system and the profit and return on the investment it's likely this would have been a central part of M's conversation when selling the product.

Given Mr P's apparent prior lack of interest in solar panels, and the long term financial burden it appears likely he'd need to take on, I can't see why he would have seen this purchase appealing had he not been given the reassurances about those benefits he said he received from M. I'm conscious also that Creation has not supplied any evidence or reasoning to challenge Mr P's account, or the documentation supplied.

I think it is unlikely that Mr P would've agreed to the solar panel system and a loan with Creation unless he'd been led to believe that it would be self-funding and come at no additional cost to him overall. Therefore, I consider Mr P's account persuasive and I accept his version of events.

For the solar panels to start paying for themselves as Mr P says he was told, they would need to cover the costs of the loan and produce combined savings and fit income of over £1,719.48 per year. I have not seen anything to indicate Mr P's system was not performing as expected but it has not produced this. So, these statements were not true.

I think the salesman from M must reasonably have been aware that Mr P's system would not have produced benefits at this level. Whilst there are elements of a calculation of benefits that had to be estimated, I think the salesman would have known that Mr P's system would not produce enough benefits to cover the overall cost of his panels in the timescales stated verbally to Mr P.

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

Where Creation is to be treated as responsible for M's negotiations with Mr P in respect of its misleading and false assurances as to the self-funding nature of the solar panel system, I'm persuaded it's likely the relationship between Mr P and Creation would be found unfair.

Because of the shortfall between Mr P's 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.

In all the circumstances I consider that fair compensation should aim to remedy the unfairness of Mr P 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 P a sum that corresponds to the outcome he could reasonably have expected as a result of M's assurances. That is, that Mr P'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 P 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 P received by way of FIT payments as well as through energy savings. Mr P will need to supply up to date details, where available, of his 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.

Given my above conclusions and again 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 address Mr P's other complaint points about irresponsible lending and commission. I think the redress I have awarded is fair in all the circumstances of the complaint

The investigator asked Creation to pay Mr P compensation of £100 for distress and inconvenience for not acknowledging his allegation of an unfair relationship. Creation has not challenged this. And it does appear it failed to address the alleged unfairness of its relationship with him when this was pointed out to it – perpetuating it even longer and causing him distress and inconvenience. So, I think the investigator's recommendation was reasonable.

My final decision

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

- Calculate the total payments Mr P has made towards the solar panel system up until the date of settlement of his complaint – A

- Use Mr P's bills and FIT statements, to work out the known and reasonably assumed benefits he received over the term of the loan* – B

- Use B to recalculate what Mr P 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, adding 8% simple interest to any overpayment from the date of each payment until the date of settlement of his complaint** – C

- Pay C to Mr P.

- Pay Mr P £100 compensation for distress and inconvenience.

*Where Mr P 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 P how much it's taken off. It should also give Mr P 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 P to accept or

reject my decision before 5 July 2024.

Michael Ball
Ombudsman