DRN-3995512

The complaint

Mr C 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 July 2013, Mr C bought a solar panel system ('the system'), from a company I'll call "M", using a ten-year fixed sum loan from Creation. He was building his own home and was approached by M who said he could install the system to the property. Mr C agreed to this on the understanding that the system was self-funding, in that the benefits from the system would cover the monthly loan repayments.

In January 2022, Mr C made a claim to Creation through a claims management company ("CMC") saying those benefits had not been realised. He was never provided with an MCS certificate and was unable to resolve this with M before it went out of business. This meant he could not receive Feed-In Tariff payments, so has received no income from the electricity generated by the system and has suffered a loss. Mr C also said that what happened at the time of the sale created an unfair relationship between him and Creation.

Creation responded to the complaint in February 2022. It treated the claim as a complaint. And dismissed it without considering its merits. Creation said it was allowed to do this because what Mr C complained about happened more than six years before he made the complaint. Creation said the Financial Conduct Authority's Dispute Resolution (DISP) Rules, about how financial businesses must handle complaints, allowed it to do this.

Unhappy with Creation's response, Mr C referred his complaint to the Financial Ombudsman Service. Creation did not consent to us considering the merits of the complaint, because it said the complaint had been made too late.

Our Investigator considered Mr C's complaint and said that:

- The s.75 claim (about misrepresentation and breach of contract) was likely to be time barred, so Creation's dismissal of this claim was not unreasonable.
- The allegation of an unfair relationship taking into account s.140A was one we could look at under our rules and that it had been referred to us in time.
- Misrepresentations could be considered under s.140A.
- A court would likely find an unfair relationship had been created between Mr C and Creation.

Our Investigator recommended that Mr C keep the system and Creation take into account what Mr C had paid for it, along with the benefits he received, to make sure the system was effectively self-funding within the term of the loan.

Mr C accepted the investigator's view. Creation did not respond. So, I've been asked to make a decision on this complaint.

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.

I've decided to uphold this complaint, and I explain my reasons below.

My findings on jurisdiction

I'm satisfied I have jurisdiction to consider Mr C'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 C's s.75 claim on 11 February 2022, this relates to a regulated activity under our compulsory jurisdiction. Mr C brought his complaint about this to the ombudsman service on 3 March 2022. So, his complaint in relation to the s.75 claim was brought in time for the purposes of our jurisdiction.

Allegations of an unfair relationship under s.140A

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 on 3 March 2022, so the complaint has been brought in time for the purposes of our jurisdiction.

My findings on the merits of the complaint

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 31 July 2013. Mr C brought his s.75 claim to Creation on 27 January 2022. That is more than six years after he entered into the agreement with Creation. 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.

Allegations of an unfair relationship under s.140A

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 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 has said that he was told by M's representative that the system was self-funding, in that the benefits from the system would cover monthly loan repayments.

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

The credit agreement set out the amount he was borrowing and the costs including interest and fees. It clearly showed the total amount payable over the loan term and that he had to make 120 monthly repayments of £129.07 each. So, I think it would've been clear to him how much he had agreed to pay for the system.

The contract, however, only showed the cash price of the system, which was much less than the total amount he had agreed to pay through the loan. And there is no document that sets out the financial benefits Mr C could expect to receive from the system. So, he would've been reliant on what he was told by M about the benefits he would receive and how these related to the costs he'd agreed to incur.

Mr C has explained that he was told the system would be self-funding in that the benefits would cover the monthly loan repayments. However, it appears he was not provided with an MCS certificate, so he was unable to apply for the Feed-In Tariff scheme, which has now closed to new applications. So, he's received no income from the system. In addition to this, it appears unlikely that the system would've generated sufficient benefits to cover the monthly loan repayment – even if he had been receiving an income. I think M ought reasonably to have known this at the time, and that what it told Mr C was not true.

I'm mindful of the actions taken by the Renewable Energy Consumer Code ('RECC') against M. My understanding is that the RECC administers the renewable energy consumer Code and ensures that its members comply with the Code.

The RECC investigated M's conduct. In June 2014, and later in December 2015, it determined that M was in breach of a number of sections of the code including, but not limited to, sections 5.2 and 5.4. As a result of this RECC terminated M's membership, a decision that was upheld on appeal in January 2015.

Sections 5.2 and 5.4 relate to requiring members not to provide false or misleading information to consumers and to providing clear and accurate information about the cost and benefits of the product sold.

Whilst I accept that the above are findings on different cases that RECC were considering, the findings do suggest that there were serious conduct concerns in the areas that relate to Mr C's complaint around the time that he was sold his system (the disciplinary process followed complaints and a mystery shopping exercise in 2013).

Creation hasn't provided evidence to dispute what Mr C's said happened. Yet Mr C left the meeting having agreed to an interest-bearing loan, with a monthly repayment of around

£129, payable for 10 years. Given the financial burden he took on I find Mr C's account of what he was told by M to be 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 he not been given the reassurances he's said he received from M.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £1,548 per year. I'm satisfied that his system has not produced this. So, these statements were not true. I think that M's representative must reasonably have been aware that Mr C's system would not have produced benefits at this level. Whilst there are elements of the calculations that had to be estimated, I think M's representative would have known that Mr C's system would not produce enough benefits to cover the monthly repayments as stated to Mr C.

Considering Mr C's account of 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 C 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 C 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 C went into the transaction. Either way, I think M's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr C'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 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 M'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 M'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 (which I understand has now ended).

Therefore, to resolve the complaint, Creation should recalculate the agreement based on the known and assumed savings and income Mr C received from the system over the 10-year term of the loan, so Mr C 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. Where possible, Mr C will need to supply to Creation up to date details, where available, of all benefits received, including electricity bills and current meter readings.

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 unreasonable dismissal of Mr C's complaint caused Mr C 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 C £100 compensation.

My final decision

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

- Calculate the total payments (the deposit and monthly repayments) Mr C has made towards the solar panel system – A
- Use Mr C's bills (where available) to work out the benefits he received up until the end of the loan term* – 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 interest to any overpayment from the date of payment until the date of settlement** – C
- Reimburse C to Mr C
- Pay Mr C £100 compensation.

*Where Mr C has not been able to provide all the details of his meter readings, electricity bills and 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 reasonable assumptions where necessary.

** 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 J to accept or reject my decision before 25 June 2024.

Phillip Lai-Fang
Ombudsman