

The complaint

Ms B 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

In February 2015, Ms B bought a solar panel system ('the system') from a company I'll call "M" using a ten-year fixed sum loan from Creation.

Ms B complained to Creation on 6 August 2021, she said that she was told by M that the 'feed in tariff' ('FIT') payments and electricity saving from the system would cover the cost of the monthly loan repayments, and the system would pay for itself within eight years. However, that hasn't happened, and she's suffered a financial loss. She also believed that what happened at the time of the sale created an unfair relationship between herself and Creation.

Creation wrote to Ms B on 1 October 2021 and said it was unable to provide a response to her s.75 claim, it did not mention her complaint regarding s.140A. In the letter it said as it was taking longer than expected to resolve things, she could refer her complaint to our service, which she promptly did on 15 October 2021.

Following her referral to our service Creation responded to the complaint in its final response, it considered Ms B had brought her complaint outside of the time limits in the rules we follow.

An investigator considered Ms B's complaint, he thought that –

- 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 Ms B and Creation.

He recommended that Ms B keep the system and Creation take into account what Ms B had paid so far, along with the benefits she received, making sure the system was effectively self-funding over eight years.

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 Ms B'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 Ms B's s.75 claim on 20 October 2021, this relates to a regulated activity under our compulsory jurisdiction. Whilst Ms B initially brought her complaint to the ombudsman service on 15 October 2021, as Creation gave her the option to do so, she reconfirmed she wanted the service to look at it on 28 October 2021. 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 Ms B. Here the relationship was ongoing at the time it was referred to the ombudsman service on 15 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 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 Ms B.

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?

Ms B has said that she was told by M's representative that the cost of the system would be fully paid for by the FIT payments and electricity savings she would receive within eight years.

Ms B has said she and her partner were approached by M about the system, and I haven't seen any evidence she had any prior interest in purchasing solar panels.

The investigator has spoken further to Ms B who told us that she and her partner initially spoke with M about the system, on or around 12 February 2015. Following this her partner was sent an email by M which included a document, containing a graph and a table entitled 'pay as you earn solar loan analysis'. This table compared the yearly benefits of a 2866 KWH system, with a voltage optimiser, to yearly finance costs of £1,182.30, over ten years. Ms B has said she saw this document before she signed both the contract for the system which was estimated to produce 2866 KWH, which included a voltage optimiser, and the loan agreement with a yearly loan cost of £1,184.40, over ten years.

I've looked at the 'pay as you earn solar loan analysis', and it appears to support what Ms B said she was told about the system. The table shows that although the system would generate less benefit than the yearly finance costs in the first two years, by about £227, by the third year it would generate a profit which would increase every year thereafter.

On the basis of those calculations the table suggests the loss of £227 in the first two years would be recouped by profit from the following three years. And from year nine the panels would be paying for themselves with an additional 'profit' until the end of the loan agreement. The table doesn't say it's an estimate or that it's subject to external criteria being met.

Furthermore, the electricity cost savings look potentially inflated. I say this as the calculation suggests that Ms B would use 100% of the energy produced by the system. This is quite high given the standard assessment procedure ("SAP") calculator and FIT scheme at that time were based on 50% self-consumption.

Having considered Ms B's account about what happened when she spoke to M, specifically that the system would pay for itself within eight years, I find this evidence credible and persuasive and supported by the above documentary evidence.

Creation hasn't provided evidence to dispute what Ms B's said happened, or the documentation supplied. Yet with no prior interest Ms B agreed to an interest-bearing loan, with a monthly repayment of £98.70, payable for ten years. Given her lack of prior interest and the financial burden she took on I find Ms B's account of what she was told by M, credible and persuasive. The loan is a costly long-term commitment, and I can't see why she would have seen this purchase appealing had she not been given the reassurances she's said she received from M.

For the solar panels to pay for themselves within eight years, they would need to produce combined savings and FIT income of around £1,480.50 per year. I have not seen anything to indicate Ms B's system was not performing as expected, but her system has not produced this. So, these statements were not true. I think M's representative must reasonably have been aware that Ms B'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 Ms B's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to Ms B.

Considering Ms B's account about what she was told, the documentation she was shown at the time of the sale, and the fact Creation hasn't disputed these facts, I think it likely M gave Ms B 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 Ms B 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 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 Ms B went into the transaction. Either way, I think M's assurances were seriously misleading and false, undermining the purpose of the transaction from Ms B'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 Ms B in respect of its misleading and false assurances as to the self-funding nature of the system, I'm persuaded a court would likely conclude that because of this the relationship between Ms B 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

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 Ms B's s.75 complaint. 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 Ms B and Creation's relationship arising out of M's misleading and false assurances as to the self-funding nature of the system. Creation should repay Ms B a sum that corresponds to the outcome she could reasonably have expected as a result of M's assurances. That is, that Ms B's loan repayments should amount to no more than the financial benefits she received from the start date of the loan to the eighth year of the agreement.

I consider the above to be fair compensation because in this case, there is documentary evidence to suggest that M appears to have gone further than to suggest the loan would be merely self-funding. The 'pay as you earn solar loan analysis' fully supports Ms B's testimony, that she was told by M's representative that the loan would have been repaid early, within eight years, from the income and savings generated by the system. So, the redress should take that into account.

Therefore, to resolve the complaint, Creation should recalculate the agreement based on the known and assumed savings and income Ms B received from the start date of the loan to the eighth year of the agreement, so she pays no more than that. To do that, I think it's important to consider the benefit Ms B received by way of FIT payments as well as through energy savings. Ms B will need to supply up to date details, where available, 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.

Finally, I consider that Creation's failure to fully deal with Ms B's complaint in a reasonable timeframe, with minimal communication, caused Ms B 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 Ms B £100.

My final decision

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

- Calculate the total payments (the deposit and monthly repayments) Ms B has made towards the solar panel system up until the date of settlement of her complaint – A
- Use Ms B's bills and FIT statements, to work out the benefits she received from the start date of the loan, up until the eighth year of the agreement* – B
- Use B to recalculate what Ms B should have paid each month towards the loan over that period and calculate the difference, between what she actually paid (A), and what she should have paid, applying 8% simple interest to any overpayment from the date of payment until the date of settlement of her complaint** – C
- Reimburse C to Ms B
- Cancel the remaining loan balance, and show that it was fully repaid in the eighth year
- Pay Ms B £100 for trouble and upset caused

*Where Ms B has not been able to provide all the details of her meter readings, electricity bills and/or FIT benefits, I am satisfied she 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 Ms B how much it's taken off. It should also give Ms B a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms B to accept or reject my decision before 26 June 2024.

Helen Boulton-Agg
Ombudsman