

The complaint

Mr H has complained about Creation Consumer Finance Ltd (“Creation”)’s 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 October 2013, Mr H bought a solar panel system (‘the system’) from a company I’ll call “M” using a ten-year fixed sum loan from Creation.

Mr H complained through a Claims Management Company (“CMC”) to Creation, he said that he was told by M, amongst other things, that the benefits of the system from income and savings would cover the monthly loan repayments. However, that hasn’t happened, and so he’s suffered a financial loss since his loan repayments have exceeded the benefits he received. The CMC 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 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’). It also said that the Financial Ombudsman Service did not have the power to look at the complaint, because it was made too late under the rules we must apply.

Unhappy with Creation’s response, Mr H referred his complaint to our service.

Our Investigator considered Mr H’s complaint, they ultimately 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 Mr H and Creation, so the complaint should be upheld.
- There was no need to assess the s.75 claim since this would not change the outcome.

Our Investigator 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.

The CMC reiterated some of the points it had previously made. Creation did not respond. 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 November 2020, this relates to a regulated activity under our compulsory jurisdiction. Mr H brought his complaint about this to the ombudsman service on 20 April 2021. 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 credit relationship ended on 30 September 2016. The complaint was referred to the Financial Ombudsman Service on 20 April 2020, which is less than six years later. So, the complaint has been brought in time for the purposes of our jurisdiction.

My findings on the merits 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.

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 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 that he was told by M's representative that the benefits of the system from income and savings would cover the monthly loan repayments.

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. There is not. The credit agreement set out what he had agreed to pay, but none of the documents show the estimated benefits through income and savings.

So, I find what Mr H has said is believable. I don't think he would've purchased the system without some idea of the benefits of doing so. 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.

When thinking about the above 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 September 2014, it determined that M was in breach of a number of sections of the code including sections 5.2 and 5.4. These two sections relate to requiring members not to provide false or misleading information to consumers and 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 the RECC looked at, the findings do suggest that there were conduct concerns in the areas that relate to Mr H's complaint around the time that he was sold his system.

Creation hasn't provided evidence to dispute what Mr H's said happened. Yet with no prior interest Mr H left the meeting having agreed to an interest-bearing loan, with a monthly repayment of around £134, payable for ten 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 is both plausible and persuasive.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of more than £1,600 per year. Given how much electricity his system produced, I do not think it is at all likely that it would've generated sufficient benefits to cover the loan repayments – neither on a monthly basis nor within the loan term. So, these statements were not true.

I think M's representative ought reasonably to have been aware that Mr H's system would not have produced benefits at the required level to make the system self-funding within the loan term. They ought to have had sufficient information and expertise available to them in order to accurately calculate the estimated benefits.

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 not otherwise have 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 Miss B's s.75 complaint. Furthermore, this doesn't stop me from reaching a fair outcome in the circumstances.

Putting things right

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 results in 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 original loan term of ten years.

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 original ten-year term of the loan, so Mr H 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.

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 caused Mr H some degree of trouble and upset. In recognition of this Creation should also pay Mr H additional compensation as set out below.

My final decision

For the reasons I have explained I uphold Mr H's complaint. To put things right Creation Consumer Finance Limited 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 – A
- Use Mr H's bills and FIT statements, to work out the benefits he received up until 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 payment until the date of settlement** – C

- Reimburse C to Mr H
- Pay Mr H £100 additional compensation

*Where Mr H is unable to provide all the details of his meter readings, electricity bills and/or FIT benefits, Creation Consumer Finance Ltd should complete the calculations 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 8 July 2024.

Phillip Lai-Fang
Ombudsman