DRN-4036485

The complaint

Mrs D 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 140.A ('s.140A') of the CCA.

Mrs A has been represented in bringing her complaint but, to keep things simple, I'll refer to Mrs A throughout.

What happened

On 6 June 2013, Mrs D signed a loan agreement to buy a solar panel system ('the system') from a company I'll call "M" using a 10-year fixed sum loan from Creation.

Mrs D complained to Creation, she said that she was told by M that the 'feed in tariff' ('FIT') payments would cover the cost of the loan repayments. However, that hasn't happened, and she's suffered a financial loss. Mrs D also believed that what happened at the time of the sale created an unfair relationship between herself and Creation.

Mrs A complained to Creation on 21 June 2022. When she received no response Mrs D brought her complaint to this service on 30 August 2022. Creation issued a final response letter dated 9 September 2022. Creation considered Mrs D had brought her claim more than six years after the cause of action occurred under the FCA's rules on dispute resolution and the complaint was too late under the Limitation Act ('LA'). Unhappy with Creation's response, Mrs D asked us to review her complaint.

An investigator considered Mrs D's complaint and ultimately thought that -

- Given the s.75 claim was more likely to be time barred under the LA, Creation's answer seemed fair.
- 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 Mrs D and Creation.

On 28 February 2023, the investigator recommended that Mrs D keep the system and Creation take into account what Mrs D had paid so far, along with the benefits she received, and make sure the system was effectively self-funding.

Mrs D accepted the investigator's view. Creation told us on 20 March 2023 that they were consulting an external legal team. But we received no response to the arguments made in the assessment. So, the case was progressed to the next stage of our process, an Ombudsman's decision. I consider that Creation have now had over a year to respond to the investigator's findings had it wished to.

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 Mrs D'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 Mrs D's s.75 claim on 9 September 2022, this relates to a regulated activity under our compulsory jurisdiction. Mrs D brought her complaint about this to the ombudsman service on30 August 2022. 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 Mrs D. Here the relationship was still intact at the time Creation sent their business file to us in 2022. That submission showed that Mrs D was still making her payments in September 2022. 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, 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 6 June 2013. Mrs D brought her s.75 claim to Creation on 21 June 2022, that is more than six years after she entered into an agreement with them. 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.

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 Mrs D.

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 s140A.

What happened?
Mrs D 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 she would receive and the savings she would make. Mrs D has said she was cold called by M about the system, and I haven't seen any evidence she had any prior interest in purchasing Solar Panels.

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

The loan agreement, signed by Mrs D on 6 June 2013, sets out Mrs D's responsibilities for repaying the loan amount and the monthly cost of that. So, I'm satisfied the loan was taken in Mrs D's name to solely purchase the system sold by M.

But the loan agreement contains no mention of the income or savings that may be generated. So, there was no way for Mrs D to compare her total costs against the financial benefits she was allegedly being promised from that document. Given the contract doesn't contain information about the benefits, Mrs D would have looked to M's representative to help her understand how much the panels would cost, what they would bring in and how much she would benefit from the system in order for her to make a decision.

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 June 2014, and later in December 2014, it determined that M was in breach of a number of sections of the code including, but not limited to, sections 5.2 and 5.3. 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. The findings were deemed to be serious enough that the company's membership of the RECC was terminated.

Whilst I accept that the above are findings based on cases that the RECC were looking at, and different to this case, yet the findings do suggest that there were conduct concerns in the areas that relate to Mrs D's complaint around the time that she was sold her system.

Creation hasn't provided evidence to dispute what Mrs D said happened. Yet with no meaningful prior interest, Mrs D left the meeting having agreed to an interest-bearing loan, with a monthly repayment of around £154 payable for ten years. Given her lack of prior interest and the financial burden she took on, I find Mrs D's account of what she was told by M to be credible and persuasive. The loan is a costly long-term commitment, and I can't see why she would have seen this purchase as appealing had she not been given the reassurances she's said she received from M.

I have noted that our investigator thought that Mrs D's testimony seemed persuasive and explained why they thought that in their assessment. I have noted that Creation has not responded to that assessment.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £1,848 per year. I have not seen anything to indicate Mrs D's system was not performing as expected but Mrs D's system did not produce sufficiently to meet the loan repayments.

So, the statements made by M were not true. I think the salesman from M must reasonably have been aware that Mrs D'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 the salesman would have known that Mrs D's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to Mrs D.

Considering Mrs D's account about what she was told, and the documentation she was shown at the time of the sale, and in the absence of any other evidence from Creation to the contrary, I think it likely M gave Mrs D a false and misleading impression of the self-funding nature of the solar panel system. On balance, I find Mrs D's account to be plausible and convincing.

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

Putting things right

Fair compensation

In all the circumstances I consider that the fair compensation should aim to remedy the unfairness of Mrs D and Creation's relationship arising out of M's misleading and false assurances as to the self-funding nature of the solar panel system. I require Creation to repay Mrs D a sum that corresponds to the outcome she could reasonably have expected as a result of M's assurances. That is, that Mrs D's loan repayments should amount to no more than the financial benefits she receives 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 Mrs D received from the solar panel system over the 10-year term of the loan, so she pays no more than that. To do that, I think it's important to consider the benefit Mrs D received by way of FIT payments as well as through energy savings. Mrs D may need to supply up to date details to help Creation make that calculation. But Creation can and should use assumptions when information is not available.

So, to put things right Creation Consumer Finance Ltd must:

- Calculate the total repayments Mrs D made towards the loan up until the date of settlement – A
- Use Mrs D's electricity bills, FIT statements and meter readings to work out the known and assumed benefits she received and she would have received over the 10 year loan period – B
- Use B to recalculate what Mrs D should have repaid each month towards the loan and apply 8% simple interest to any overpayment from the date of her payment until the date of settlement – C
- Reimburse C to Mrs D.

I agree Creation's refusal to consider the claim under s140A has also caused Mrs D some further inconvenience. And I think the £100 compensation recommended by our investigator is broadly a fair way to recognise that.

* If Creation considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mrs D how much tax it's taken off. It should also give Mrs D a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate."

Creation Consumer Finance Ltd 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.

My final decision

For the reasons I have explained I uphold Mrs D's complaint. I require Creation Consumer Finance Ltd to calculate and pay the fair compensation as detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs D to accept or reject my decision before 4 July 2024.
Douglas Sayers
Ombudsman