DRN-4039728

The complaint

Mr B has complained about the way Creation Consumer Finance Limited ("Creation") responded to a claim he'd made under section 75 (s75) of the Consumer Credit Act 1974 (the "CCA") and in relation to an alleged unfair relationship taking into account section 140A (s140A) of the CCA.

Mr B has been represented in bringing his complaint but, to keep things simple, I'll refer to Mr B throughout.

What happened

In August 2013 Mr B entered into a fixed sum loan agreement with Creation to pay for a £9,820 solar panel system from a supplier I'll call "P". The total amount payable under the agreement was £15,442.80 and it was due to be paid back with 120 monthly repayments of £128.69.

Creation has explained Mr B settled the loan agreement on 28 September 2016.

On 22 November 2019 Mr B sent a letter of complaint to Creation explaining that he considered he had a valid claim against it under s75 due to misrepresentation and breach of contract by P, and also claimed there had been an unfair relationship under s140A. Mr B said he'd been cold called and told he could be entitled to a solar panel system at no cost to him. He says he was told the system would be fully self-funding, and so he agreed to a sales meeting.

In summary, Mr B says:

- P's representative misled him the total cost of the system was £9,820 when the actual cost of the system including interest was £15,442.80.
- P promised him a tax-free, year-1 benefit of £1,544.28 from Feed in Tariff (FIT) payments, whereas after making the loan repayments there was a deficit of around £980 per year.
- P told him the FIT payments would cover the cost of the loan repayments.
- He would not have entered into the agreement if he knew he'd have to pay around £980 per year towards it for 10 years.
- Many other customers of P have stated similar, if not identical experiences.
- He was pressured into signing the agreement. P's representative spent two hours at his home.
- P said this was a government backed scheme to reduce solar emissions and reach carbon targets.
- P told him the government would subsidise any shortfall.
- P told him the inverter would be under warranty for 10 years.
- P didn't tell him the performance of the system would deteriorate over the years.
- He was induced into the agreement by false statements from P. He wouldn't have entered into the agreement had it not been for those statements.

On the basis of the above Mr B said he had a like claim against Creation for breach of contract and misrepresentation under s75. He also said section 56 (s56) of the CCA deemed P the agent of Creation when carrying out antecedent negotiations, and that the relationship between Creation and him was also unfair under s140A because either Creation or P:

- Failed to assess Mr B's creditworthiness.
- Didn't act honestly, fairly and professionally with his best interests in mind.
- Didn't disclose payment of any commission and/or inducements paid and/or received.
- Didn't provide a cooling off period.
- Didn't notify Mr B of his cancellation rights.
- Didn't comply with the Renewable Energy Consumer Code.

To resolve the claim and complaint, Mr B requested:

- A refund of all sums paid for the system.
- The agreement is ended.
- A refund of any commission.
- 8% simple annual interest on the above amounts.

Creation sent a final response letter on 25 November 2019 rejecting Mr B's complaint on the basis it was made out of time based on their understanding of the FCA's DISP rules. Creation did not comment on the s75 claim so far as it concerned a breach of contract nor the s140A aspect of the complaint in its final response.

Mr B wasn't happy with the response to the complaint so decided to refer it to our service on 2 December 2019.

Creation explained that it considered the s75 claim to be time-barred under the Limitation Act 1980 (the 'LA') such that it had no liability to Mr B. It also considered the complaint to be out of our jurisdiction to consider due to the limitation period under the LA having expired. Creation did not comment on the s75 claim so far as it concerned a breach of contract nor the s140A aspect of the complaint in its final response.

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.

Our approach to jurisdiction to consider the complaint

Our powers to consider complaints are set out in the Financial Services and Markets Act 2000 ("FSMA") and in rules and guidance contained in the FCA's Handbook known as DISP.

The rules surrounding time limits within which to refer complaints are set out in DISP 2.8.2R which include that:

"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

(1) more than six months after the date on which the respondent the

complainant its final response, redress determination or summary resolution communication; or

(2) more than:

(a) six years after the event complained of; or (if later)

(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;

unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received"

Further, DISP 2.3.1R sets out the activities which I can consider under our compulsory jurisdiction, and within scope are complaints which relate to acts or omissions by firms in carrying on one or more regulated activities (see DISP 2.3.1R(1)). The regulated activities are set out in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("RAO").

There are several other rules and guidance provisions relevant to our jurisdiction, and for the avoidance of doubt, I have only set out relevant DISP rules and guidance so far as is necessary for the purposes of addressing this complaint.

I consider the complaint to have been referred to the ombudsman service on 2 December 2019 which is the date when Mr B's representative sent details of his complaint to our service.

I'll first consider our service's jurisdiction to consider Mr B's s75 and s140A complaints, before turning to the merits of those complaints.

My findings on jurisdiction

(1) Jurisdiction to look at the s75 complaint

Where Creation exercises its right and duties as a creditor under a credit agreement it is carrying out a regulated activity within scope of our compulsory jurisdiction under Article 60B(2) of the RAO. In undertaking that activity, the creditor must honour liabilities to the debtor. So, if a debtor advances a valid s75 claim in respect of the credit agreement, the creditor has to honour that liability and failing or refusing to do so comes under our compulsory jurisdiction.

The event complained of here is Creation's allegedly wrongful rejection of Mr B's s75 claim on 25 November 2019. Mr B brought his complaint about this to the ombudsman service on 2 December 2019. So, his complaint in relation to the s75 claim was brought in time for the purposes of our service's jurisdiction.

Creation argued the complaint was out of our jurisdiction taking into account the LA, but our service has its own rules under DISP 2.8.2R saying when a complaint is brought too late. The LA does not limit our jurisdiction. However, I do consider that the LA is relevant law for the purposes of the merits of Mr B's complaint about its rejection of the s75 claim, and I have set out why that is the case later in this decision.

(2) Jurisdiction to look at the complaint about an unfair relationship under s140A

Creation has referred us to its final response letter and explained subsequently that the s75 claim was time-barred under the LA but has not explicitly raised any objections to our jurisdiction to consider the s140A complaint. However, to the extent it may be implied that Creation also disputes our jurisdiction to consider the s140A aspect of the complaint, I shall address this.

Mr B is able to make a complaint about an unfair relationship between himself and Creation per s140A. The event complained of for the purposes of DISP 2.8.2R(2)(a) is Creation's participation, for so long as the credit relationship continued, in an allegedly unfair relationship with him. This accords with the court's approach to assessing unfair relationships – the assessment is performed as at the date when the credit relationship ended: *Smith v Royal Bank of Scotland plc* [2023] UKSC 34.

In this case the credit relationship ended on 28 September 2016 and the complaint in relation to s140A was referred to the ombudsman service on 2 December 2019. So, the s140A complaint was brought less than six years after the event complained of and has been brought in time.

I am satisfied I have jurisdiction to consider the complaint about the alleged unfair relationship per s140A in the circumstances.

Merits

(1) My findings on the merits of the s75 complaint

Creditors have no means of knowing what s75 liabilities they may have, nor of investigating such liabilities nor of recovering them from suppliers, unless or until debtors raise s75 claims against them; and (as I have explained above) raising the claim, if it's a valid one, brings the creditor under a duty then to honour its liability.

But it would not be fair or reasonable to require a creditor to respond to s75 claims however long in the past they arose. And our service must decide complaints on the basis of what is fair and reasonable in all the circumstances of a case.

The law imposes a six-year limitation period on the relevant claims, after which they become time barred. Taking into account this time period, the particular nature of liability under s75, and the need for the debtor to raise a s75 claim against their creditor before a cause for complaint to our service can arise, I consider it is fair and reasonable for a creditor not to have to look into or honour a s75 claim that was first raised with it by the debtor after the claim had become time barred under LA. This is in line with our service's long-standing approach to complaints under s75.

Creation has said the s75 claim was brought outside of the relevant six-year limitation period under the LA for misrepresentation claims though it does not address the allegations of the s75 claim arising from a breach of contract. The alleged misrepresentation cause of action arose when an agreement was entered into during August 2013 based on the alleged misrepresentations. The alleged breach of contract isn't defined but I take it to be that P (acting on behalf of Creation) warranted that the solar panel system it agreed to provide had the capacity to finance the loan repayments, when that was incorrect. As such, the alleged breach of contract also occurred as soon as the agreement was entered into.

The s75 claim wasn't raised with Creation until 22 November 2019, that is more than

six years after the causes of action against P for misrepresentation and breach of contract would have accrued for the purposes of the LA around December 2013.

Where it is unlikely a claim against the supplier could succeed due to the expiry of the likely relevant limitation periods of six years, I am persuaded that it was fair and reasonable for Creation to decline the s75 claim. So, I do not uphold this aspect of the complaint.

(2) My findings on the merits of the complaint about an unfair relationship under s140A

I've considered whether representations and contractual promises by P can be considered under s140A.

Therefore, I've considered the court's approach so far as it is relevant to the merits of the s140A complaint I am considering. I have taken into account the Court of Appeal's judgment in *Scotland & Reast v British Credit Trust* [2014] EWCA Civ 790 ("*Scotland*") which said the following when considering what could be relevant to an unfair relationship claim under s140A:

> *"In this regard it is important to have in mind that the court must consider the whole relationship between the creditor and the debtor arising out of the credit agreement and whether it is unfair having regard to one or more of the three matters set out ins.140A(1), which include 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 of relevant and important aspects of the transaction seem to me to fall squarely within the scope of this provision."*

Scotland makes it clear that relevant matters would include misrepresentations and other false or misleading statements as to relevant and important aspects of a transaction. As I've already set out, s56 has the effect of deeming P to be the agent of Creation in any antecedent negotiations. Creation is responsible for the antecedent negotiations P carried out direct with Mr B.

I think the negotiations were antecedent because they preceded the relevant conclusion of the agreement. The scope of 'negotiations' and 'dealings' is wide. And 'representations' covers statements of fact, contractual statements and other undertakings. Taking this into account, I find it would be fair and reasonable in all the circumstances for me to consider P's negotiations and arrangements for which Creation was responsible under s56 of the CCA when deciding whether it's likely Creation had acted fairly and reasonably toward Mr B.

But in doing so, I should take into account all the circumstances and consider whether a Court would find the relationship with Creation was unfair under s140A.

The negotiations

Creation hasn't supplied any evidence on what was (or wasn't) discussed or negotiated between Mr B and P.

Mr B told us he was cold called and informed he could be entitled to have a Solar System at absolutely no cost to him. Mr B told us he agreed for a sales representative to visit to discuss this in more detail. In summary, Mr B said P's salesperson came to visit him and told him he would be paid by the electricity company because he would sell electricity to it.

Mr B said the salesperson stayed for two hours and said that the paperwork needed to be completed during the visit.

I've also looked at the paperwork that has been supplied to see if there was any evidence to support Mr B's allegation he was told it would be self-funding. I've been supplied a sales brochure that P gave Mr B. That sales document from P sets out when discussing funding options:

"Finance over 10 years. The unique self funding scheme means the FIT covers the monthly loan repayments. You will never be out of pocket."

The brochure also seems to indicate the customer could benefit from a tax-free return of between 8% to 15% per annum. Although I should point out the brochure refers to a different finance company to Creation.

So, this evidence clearly supports Mr B's testimony that P told him the scheme would be self-funding.

Mr B has also supplied a copy of the Standard Assessment Procedure (SAP) Calculations and 1st Year Returns form. This sets out that the total benefit for Mr B based on Generations Earnings + Electricity Savings + Export Earnings equalled £1712.93. Given his monthly repayments towards the agreement were £128.69 this document also supports Mr B's testimony that he was told the scheme would be self-funding.

I have also considered the customer satisfaction note that Mr B provided. This shows a decreased estimate of the likely performance of the solar panels and an estimated first year savings of only £722. This document does not support the idea that the scheme would be self-funding. But the document does not explicitly explain that the figures suggest the scheme would not be self-funding. The consumer would have had to closely read the document and work that out for themselves. And the consumer would have had do that and make further enquiries to see if the first year figures this document provides an estimate for would be repeated in subsequent years.

I have not been given any evidence that shows me how this document was intended to be used or how P would have put its contents to Mr B. And I have noted that this document has a box for the customer's signature and the box is unsigned. So, it's not clear to me that Mr B did closely read the document or was supported in so doing during the meeting, as the representative did not get Mr B to sign the document. And it's not clear whether this was provided at the time the loan agreement was completed or after the installation.

However, even had Mr B read the document I also believe that the significance of the figures has not been sufficiently highlighted in the document. And in choosing to provide important information in the way they did, I think P ran the risk that a consumer might miss this important detail. And it seems risk came to pass in this complaint, possibly due to the assurances provided in the other contemporaneous documentation.

So, having considered all the submissions made in this case, I consider that the customer satisfaction note is the only document that does not suggest that the scheme is self-funding and that does not sufficiently highlight that risk to undermine the weight of the other documents that explicitly suggest the scheme is self-funding.

I've not seen anything to indicate Mr B had an interest in purchasing a solar panel system before P contacted him. Mr B has said he only agreed to the purchase because the system would be self-funding. I'm mindful that it would be difficult to understand why, in

this particular case, Mr B would have agreed to install a solar panel system if his monthly outgoings would increase significantly.

Mr B told us that the salesperson told him the income from the solar panel system would pay off the agreement. So, having considered all the submissions made in this complaint, I have seen insufficient evidence that undermines that testimony. On balance, I find Mr B's account to be plausible and convincing.

For the solar panels to be self-funding, they'd need to produce a combined savings and FIT income of around £1,550 per year. I've not seen anything to indicate there's a problem with Mr B's solar panel system. But I've also not seen enough to suggest he's achieved this benefit. For the year's FIT statements I've seen (from 27 September 2013 to 8 September 2019) he received a little over £500 a year. I've not been supplied copies of Mr B's electricity bills, so I don't know what savings he made. But based on what I have seen and taking into account the SAP calculations that I've referred to above, I think it's more likely than not the system wasn't self-funding.

I therefore find the statements made as to the self-funding nature of the system weren't true. I think the salesperson ought to have known this and made it clear that the solar panel system wouldn't have produced enough benefits to cover the overall cost of the fixed sum loan agreement. However, I think it's important to take into account any savings Mr B made, so I will come back to this later on in this decision.

Taking into account what I've said above, I think it likely P gave Mr B a false and misleading impression of the self-funding nature of the solar panel system. I consider P's misleading presentation went to an important aspect of the transaction for the system, namely the benefits which Mr B was expected to receive by agreeing to installation of the system. I consider that P'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 B went into the transaction. Either way, P's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr B's point of view.

Would a court likely make a finding of unfairness under s140A?

Where Creation is to be treated as responsible for P's negotiations with Mr B in respect of its misleading and false assurances as to the self-funding nature of the solar panel system, I am satisfied that a court would likely find the relationship between Mr B and Creation to have been unfair.

Mr B has had to pay more than he expected to cover the shortfall towards the repayments. Creation has benefited from the interest paid on a loan Mr B otherwise wouldn't have taken out. Therefore, I am also satisfied that Creation has not treated Mr B fairly or reasonably in all the circumstances of the complaint. I consider the fairest way to address this is to resolve the matter as I set out below.

Putting things right

Fair compensation

In all the circumstances I consider that the fair compensation should aim to remedy the unfairness of Mr B and Creation's relationship arising out of P's misleading and false assurances as to the self-funding nature of the solar panel system. I require Creation to repay Mr B a sum that corresponds to the outcome he could reasonably have expected

as a result of P's assurances. That is, that Mr B's loan repayments should amount to no more than the financial benefits he 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 Mr B received from the solar panel 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 B received by way of FIT payments as well as through energy savings. Mr B may need to supply up to date details of all FIT benefits received, electricity bills and current meter readings to Creation. Creation can use assumptions when information is not available – if, for example, the electricity company has gone out of business.

Creation has explained Mr B settled the loan agreement on 28 September 2016.

Creation should:

- Calculate the total repayments Mr B made towards the loan up until he repaid it – A
- Use Mr B's electricity bills, FIT statements and meter readings to work out the known and assumed benefits he received up until he repaid the loan – B
- Use B to recalculate what Mr B should have repaid each month towards the loan over that period and reimburse him the difference between what he actually repaid (A) and what he should have repaid, adding 8% simple annual interest* to any overpayment, from the date of repayment until the date of settlement – C
- Use his electricity bills, FIT statements and meter readings to work out the known and assumed benefits he received between the loan being paid off and the end of the original loan term – D
- Deduct D from the amount Mr B paid off the loan – E
- Add 8% simple annual interest* to E from the date Mr B paid off the loan until the date of settlement – F
- Creation should pay Mr B C + F

I agree Creation's refusal to consider the claim under s140A has also caused Mr B 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 Mr B how much tax it's taken off. It should also give Mr B a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate."

My final decision

For the reasons given above, I uphold Mr B's complaint about Creation Consumer Finance Limited and require them to calculate and pay the redress detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 23 May 2024.

Douglas Sayers
Ombudsman