

The complaint

Mrs C has complained about the way Creation Consumer Finance Ltd (“Creation”) responded to claims she’d made in relation to misrepresentation, breach of contract, and an alleged unfair relationship taking into account section 140A (“s1.40A”) of the Consumer Credit Act 1974 (the “CCA”).

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

What happened

In June 2013 Mrs C entered into a fixed sum loan agreement with Creation to pay for a £7,995 solar panel system (“the system”) from a supplier I’ll call “P”. The total amount payable under the agreement was £12,610.80 and it was due to be paid back with 120 monthly repayments of £105.09. There was a £135 arrangement fee and an interest charge of £4,480.80.

In November 2021 Mrs C sent a letter of claim to Creation explaining she thought the system was mis-sold.

She said P told her she’d effectively get paid for the electricity the system generated through the government’s Feed in Tariff (FIT) payments and that she’d have reduced energy bills. She said P sold the system as being self-funding. She said the system was misrepresented and believed the statements and several other actions at the time of the sale created an unfair relationship between herself and Creation.

Creation sent a final response letter in December 2021 to say it was dismissing the complaint without consideration because it had been brought out of time.

Unhappy with Creation’s response, Mrs C decided to refer her complaint to the Financial Ombudsman in April 2022.

One of our investigators looked into things and thought P had likely told Mrs C the system would be self-funding. She didn’t think the system was self-funding over the course of the loan term, and so she thought P had misrepresented it. She thought a court would likely find the relationship between Mrs C and Creation was unfair and that she’d suffered a loss through entering into the agreement. She thought Creation should recalculate the loan based on known and assumed savings and income over the course of the loan so that she pays no more than that, and she keeps the system. She also thought Creation should pay £100 for not looking into the s.140A claim.

Mrs C agreed, but I can’t see we received a response from Creation. As things weren’t resolved, the complaint has been passed to me to decide.

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

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 C. Here the relationship was ongoing at the time it was referred to the ombudsman service in April 2022, 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 P 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 P 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 P for which Creation were responsible under s.56 when considering whether it is likely Creation had acted fairly and reasonably towards Mrs 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?

Mrs C says she was verbally misled that the system would effectively pay for itself. So I've taken account of what Mrs C says she was told. I've also reviewed the documentation that I've been supplied.

The fixed sum loan agreement sets out the amount being borrowed; the interest charged; the total amount payable; the term; and the contractual monthly loan repayments. I think this was set out clearly enough for Mrs C to be able to understand what was required to be repaid towards the agreement. But it doesn't set out any of the estimated benefits of the system.

Mrs C said she didn't have an interest in solar panels and only agreed to the visit from P because it said the system would pay for itself. She said P told her once the agreement was paid, she'd receive free electricity. She said she was given a quote of around £7,500 for the system but it looks like her system cost around £7,995. She's highlighted there were different systems discussed – a 2.5 and 3kWh system. I note the quote Mrs C received was for around £7,500 and the agreement she signed was for £7,995. The paperwork doesn't

clearly set out why there's a discrepancy, but the different size systems that were discussed likely explain the difference.

Neither the quote I've seen or the purchase order supplied have any details of the expected savings Mrs C was likely to make through having the system installed.

I've also looked at a copy of P's website from May 2013 because Mrs C says the financial benefits were discussed. On the main page it states –

'Embrace the benefits of solar power and renewable energy saving systems.

- ✓ *Tax free*
- ✓ *High yield*
- ✓ *No risk*
- ✓ *Inflation proof*
- ✓ *Non depreciating asset'*

Further down the page there is a section titled 'PV Solar Systems', where the following is stated -

'The most common sustainable energy product on the market at the moment is the solar PV systems. These create electricity for your home during daylight hours free of charge and give you a tax-free income guaranteed by the government feed in tariff. Yes you get paid for generating energy and it is TAX FREE!'

And at the bottom of the page there is a section titled 'Finance', which includes –

'We have calculated a Pay As You Go plan to suit each and every client, so that all the savings and tariffs pay for your new products'

I think it follows that if the website emphasises the benefits of a solar panel system, and how they would pay for the products being offered by P it's likely this would have been a central part of P's conversation when selling the product. I think the website also supports Mrs C's testimony that P's representative told her the system would pay for itself.

So, I find what Mrs C said believable. I think P's website supports her testimony that the potential benefits were discussed. I'm of the opinion that they would be a key reason to purchase the system and her savings on electrical bills and income from the FIT scheme would have been a central part of the conversation.

I think Mrs C would have looked to P'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. And as I've said I think the website supports Mrs C's testimony that she was told by P's representative the system would be self-funding.

I think it's also important to note the actions taken by the Renewable Energy Consumer Code ('RECC') against P. My understanding is that the RECC oversees the Renewable Energy Consumer Code and makes sure its members comply with it.

The RECC investigated P's conduct and informed P of its concerns at the end of April 2014. Significantly RECC had concerns about P using false or misleading information and that pressured sales were taking place.

The RECC Panel heard the case and decided the following were proved -

- allegations consumers had been given misleading information about payment and payback
- allegations consumers were not given certain technical information before signing the contract

So, the Panel decided P breached sections of the code which required members not to provide false or misleading information to consumers, and which concerned members providing clear information so consumers could make an informed decision. Given RECC's concern about P's culture and conduct, it made the decision to terminate P's membership of RECC.

Whilst I accept that the above related to findings on different cases the RECC was looking at, and that Mrs C was given some technical information from P, the findings suggest that there were conduct concerns in the same areas that Mrs C has complained about, at a similar time she was sold his system.

Creation has also told this service that following the RECC report it terminated its relationship with P. This is also set out in P's liquidation report produced in June 2016. The report states that mis-selling issues by P were brought up by Creation, which led to it terminating the contract with P and also withholding funds as it expected claims from consumers. I think Creation's actions strongly suggest it had serious concerns about the way P was selling Solar Panels.

I'm of the opinion that all of the above information strongly supports Mrs C's testimony.

Creation hasn't provided evidence to dispute what Mrs C said happened. Yet with no prior interest Mrs C left the meeting having agreed to an interest-bearing loan, with a monthly repayment of £105.09, payable for 10 years. Given her lack of prior interest and the financial burden she took on I find Mrs C's account of what she was told by P, 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 P.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of over £1,250 per year. However, importantly here I don't think the system would provide enough benefit to be self-funding within the term of the loan. The system looks like it's underperforming quite significantly. I arranged for our investigator to contact the parties about this. Mrs C said she thought she was paying for a higher yielding system that what was actually installed. She also said she called back P within the first year and it fitted a new inverter because the system wasn't functioning correctly. She said she wasn't aware the system was underperforming and had no basis of comparison. She said the system is facing East/West as opposed to South facing which she understood would produce less energy. But there was no other indication of a problem. Creation hasn't responded to offer any comments.

On balance, even if the system was performing as expected, it wouldn't likely have provided enough benefit to be self-funding within the term of the loan. And the underperformance has made that even less likely. I think the statements that were likely made by P were not true. I think P's representative must reasonably have been aware that Mrs C'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 P's representative would have known that Mrs C's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to Mrs C.

Considering Mrs C's account about what she was told, P's website, RECC's findings, Creation's actions and that it hasn't disputed these facts, I think it likely P gave Mrs C 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 and savings which Mrs C was expected to receive by agreeing to the 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 Mrs C went into the transaction. Either way, I think P's assurances were seriously misleading and false, undermining the purpose of the transaction from Mrs C'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 P's negotiations with Mrs 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 Mrs C 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.

Fair compensation

In all the circumstances I consider that fair compensation should aim to remedy the unfairness of Mrs C and Creation's relationship arising out of P's misleading and false assurances as to the self-funding nature of the solar panel system. Creation should repay Mrs C a sum that corresponds to the outcome she could reasonably have expected as a result of P's assurances. That is, that Mrs C's loan repayments should amount to no more than the financial benefits she received 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 C received from the 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 C received by way of FIT payments as well as through energy savings. Mrs C will need to supply up to date details of all FIT benefits received, electricity bills and current meter readings to Creation.

While our investigator set out various options for how the overpayments could be treated, seeing as though I understand the agreement will now be paid off, I think there's only one viable option for my directions.

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.

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

Finally, I note Mrs C also mentioned claiming damages through section 75 (“s.75”). 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 Mrs C’s s.75 complaint. Furthermore, this doesn’t stop me from reaching a fair outcome in the circumstances.

My final decision

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

- Calculate the total payments (the deposit and monthly repayments) Mrs C has made towards the solar panel system up until the date of settlement – A
- Use Mrs C’s bills and FIT statements to work out the benefits she received from the start date of the loan, up until the end of the term * – B
- Use B to recalculate what Mrs C 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** – C
- Reimburse C to Mrs C
- Pay Mrs C £100 compensation

*Where Mrs C is unable 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 to 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 Mrs C how much it’s taken off. It should also give Mrs C 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 Mrs C to accept or reject my decision before 30 August 2024.

Simon Wingfield

Ombudsman