

The complaint

Mrs O has complained about the way Creation Consumer Finance Ltd (“Creation”) responded to claims she’d made under section 75 (“s.75”) of the Consumer Credit Act 1974 (“the CCA”), and an alleged unfair relationship taking into account section 140A (“s.140A”) of the CCA.

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

What happened

In December 2013 Mrs O entered into a fixed sum loan agreement with Creation to pay for a £5,500 solar panel system (“the system”) from a supplier I’ll call “P”. The total amount payable under the agreement was £8,532.04. Mrs O was due to pay back the agreement with 120 monthly repayments of £71.10. I understand the system was installed in January 2014.

In April 2021 Mrs O put in a claim with Creation explaining she thought the system was mis-sold. In summary, she said P pressured her to take out the agreement to buy the system. Mrs O said P told her the system would be self-funding; she would make a profit and benefit from cheaper electricity. She said P misrepresented the system and that several other actions at the time of the sale created an unfair relationship between herself and Creation.

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

Unhappy with Creation’s response, Mrs O decided to refer her complaint to the Financial Ombudsman in December 2021 (after initially contacting us in July 2021).

One of our investigators looked into things and ultimately said that they thought the unfair relationship claim and section 75 claim had been brought in time. They said they thought it likely P had misled Mrs O by telling her the system would be self-funding within 10 years. They thought Creation could be held responsible for the misleading actions of P, and that it should put Mrs O in the position she’d have been in had the system been self-funding within the loan term. They also recommended £100 compensation for the impact of Creation not looking into the s.140A claim.

I can’t see we received a response from Creation, and so 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 s.75 complaint

The event complained of here is Creation's alleged wrongful rejection of Mrs O's s.75 claim in November 2021. This relates to a regulated activity under our compulsory jurisdiction. Mrs O brought her complaint about this to the ombudsman service in December 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 Mrs O. Here I understand the relationship was ongoing at the time it was referred to the ombudsman service in December 2021, so the complaint has been brought in time for the purposes of our jurisdiction. Although I understand the agreement has now been paid off.

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 in December 2013. Mrs O brought her s.75 claim to Creation in April 2021. That is more than six years after she entered into an agreement with it. 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 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 O.

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

Mrs O has supplied a copy of P's notes that say she spoke to it on 3 December 2013 because she'd shown interest. The notes say shown interest *for free panels*.

Mrs O signed the fixed sum loan agreement on 6 December 2013. 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 O to be able to understand what was required to be repaid towards the agreement. But the loan agreement doesn't set out the savings Mrs O would likely make from having the system installed.

I can see an order form was signed for a £5,500 system on 6 December 2013. This was for 8 panels. Although I've also seen that at one point 12 panels were discussed but P could only fit 8 panels on the roof. I think P's notes indicate it gave Mrs O 8 upgraded panels instead of 12 standard ones.

I can see the MCS Installation Certificate sets out the commissioning date as 23 January 2014. The evidence indicates this was the installation date. The MCS certificate sets out the estimated generation for the system in kWh was 1,643.

But I've also seen other documents that set out expectations of the system. I can there's a customer satisfaction note from Creation, signed by Mrs O on 23 January 2014, that sets out:

Expected generation tariff income	£478.24
Expected export tariff income	£74.02
Savings from electricity used	£290.33
Estimated first year annual savings	£842.58

Mrs O also supplied a copy of another document from P that set out a review of the benefits:

Summary of 1 st year figures	£843
Lifetime electricity bills savings	£13,834
Total tariff rate income	£17,448

The form also sets out the payback time was 9 years and that the lifetime benefit was £31,281.53.

Curiously, the forms that were completed were for systems with a yield of around 3,190kWh but Mrs O's system has a yield much lower – around 1,500 to 1600kWh. It's not clear why P didn't recalculate the figures. Mrs O thinks it was because the number of panels were reduced around the installation time. This seems like a viable explanation.

Mrs O has also supplied copies of other documents including the order form, marketing materials, certificates and maintenance instructions, but I can't see those forms adequately informed her the system wouldn't be self-funding. Overall, the documentation I've seen seems to indicate Mrs O was told otherwise.

I've also thought about Mrs O's testimony. She said she wasn't interested in solar panels before being approached by P. But she said her late husband was interested at the time because P sold the system as giving free electricity. She said the motivation in buying the system was because P said the system would be self-funding and that she's get free

electricity most of the time. She said her and her husband were retired at the time and had an income of around £20,000.

It would be difficult to understand why, in this particular case, Mrs O would have agreed to pay for the system if her monthly outgoings would increase. It's a long-term financial commitment. On balance, I find her account to be plausible and convincing.

For the solar panels to be self-funding, they'd need to produce a combined savings of around £850 per year. I've not seen anything to suggest she's achieved anywhere near this benefit. I therefore find the statements that were likely made as to the self-funding nature of the system weren't true.

I think P's representative must reasonably have been aware that Mrs O's system would not have produced benefits at the level required to be self-funding. While 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 O's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to her.

Considering Mrs O's account about what she was told; the documentation; and that Creation hasn't disputed what's been said, I think it likely P gave Mrs O a false and misleading impression of the self-funding nature of the system. Given her lack of prior interest and the financial burden she took on I find Mrs O'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 P not given the reassurances she said she received.

I consider P's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Mrs O 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 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 O went into the transaction. Either way, I think P's assurances were seriously misleading and false, undermining the purpose of the transaction from Mrs O'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 O 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 O 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 O 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 O a sum that corresponds to the outcome she could reasonably have expected as a result of P's assurances. That is, that Mrs O'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 O 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 O received by way of FIT payments as well as through energy savings. Mrs O will need to supply, where available, her last FIT benefits received, electricity bills and meter readings to Creation. Although I understand Mrs O has now moved, so won't have current bills and readings.

While our investigator set out various options for how the overpayments could be treated, seeing as though I understand the agreement is now 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 s.140A claim has also caused Mrs O some further inconvenience. And I think the £100 compensation recommended by our investigator is broadly a fair way to recognise that.

My final decision

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

- Calculate the total payments (the deposit and monthly repayments) Mrs O has made towards the solar panel system up until the date of settlement – A
- Use Mrs O'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 O 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 annual interest to any overpayment from the date of payment until the date of settlement** – C
- Reimburse C to Mrs O
- Pay Mrs O £100 compensation

*Where Mrs O 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 O how much it's taken off. It should also give Mrs O 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 O to accept or reject my decision before 16 August 2024.

Simon Wingfield
Ombudsman