DRN-4148307

The complaint

Mr M 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").

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

What happened

On 15 January 2014, Mr M entered into a fixed sum loan agreement with Creation to pay for a £11,100 solar panel system from a supplier I'll call "The Supplier Business". The loan amount was for £11,100 and the total amount payable under the agreement was £17,427.60 and it was due to be paid back with 120 monthly repayments of £145.23.

Mr M told us that he paid off the loan from his pension in 2022.

Creation told us that they received Mr M's letter of complaint on 7 February 2020. In the complaint Mr M explained that he considered he had a valid claim against it under s75 due to misrepresentation and breach of contract by The Supplier Business. Mr M said he'd been 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.

In summary, Mr M says:

- The Supplier Business's representative misled him that the system would pay for itself from the FIT payments he would receive and the savings he would make. The income and savings have not been sufficient to cover the cost of the borrowing.
- He was induced into the agreement by false statements from The Supplier Business. He wouldn't have entered into the agreement had it not been for those statements.

On the basis of the above Mr M said he had a like claim against Creation for breach of contract and misrepresentation under s75.

To resolve the claim and complaint, Mr M requested that Creation should make a payment to settle the matter.

Creation told us that they received Mr M's letter of complaint on 7 February 2020. Creation provided a final response letter to the complaint on 18 March 2020. Creation rejected Mr M'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 or the aspect of the complaint about Section 140A (s140A) of the CCA in its final response.

Mr M was unhappy with Creation's final response and brought his complaint to this service on 21 April 2020 and asked us to review the complaint.

Creation explained that it considered the s75 claim to be time-barred. Consequently, Creation believe that it has no liability to Mr M under said Act and so they have no liability under s75 of the CCA.

I have taken this to mean that Creation have rejected Mr M's s75 claim for misrepresentation on the basis it was 'time-barred' taking into account the Limitation Act 1980 (the 'LA').

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 21 April 2020, which is the date when Mr M's representative sent details of his complaint to our service.

I'll first consider our service's jurisdiction to consider Mr M's s75 complaint. I will then consider our service's jurisdiction to consider Mr M's complaint in relation to an alleged unfair relationship taking into account s140A of the CCA, before turning to the merits of the complaint.

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 the 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.

Mr M brought his complaint about this to the ombudsman service on 21 April 2020. The event complained of here is Creation's allegedly wrongful rejection of Mr M's s75 claim on 18 March 2020. 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 M'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 M 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 was still running in 2022 before it was paid off. The complaint in relation to s140A was referred to the ombudsman service before that date, on 21 April 2020. 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 an 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 on 15 January 2014, based on the alleged misrepresentations. The alleged breach of contract isn't defined but I take it to be that The Supplier Business (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 7 February 2020, that is more than six years after the causes of action against The Supplier Business for misrepresentation and breach of contract would have accrued for the purposes of the LA around January 2014.

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 The Supplier Business 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 The Supplier Business to be the agent of Creation in any antecedent negotiations. Creation is responsible for the antecedent negotiations The Supplier Business carried out direct with Mr M.

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 The Supplier Business'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 M.

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

Mr M told us he was informed he could be entitled to have a Solar System at absolutely no cost to him. Creation hasn't supplied any evidence on what was (or wasn't) discussed or negotiated between Mr M and The Supplier Business. So, I have seen no documentary evidence from Creation that undermines Mr M's testimony.

I've also looked at the paperwork that has been supplied to see if there was any evidence to support Mr M's allegation he was told the solar system would be self-funding.

The loan agreement sets out Mr M's responsibilities for repaying the loan amount and the monthly cost of that. But the loan agreement contains no mention of the income or savings that may be generated. And that is true of the MCS Installation Certificate.

There is a disputed document that was provided by Mr M's representative three years after the complaint was raised with us. It seems to suggest that The Supplier Business did suggest the income produced from the Solar panels would be enough to make the loan repayments. But The Supplier Business said this was not a sales form that they used. And this was not undermined by Mr M's testimony, who told us that he couldn't recall having seen the document at the time of the sale. And so, I think it more likely that this document was not one that Mr M relied on in making his decision to act in 2014.

I have considered the document provided by The Supplier Business. It is called the "Customer Re-Cap & Satisfaction Survey". The document contains 10 questions that Mr M had to answer 'yes' or 'no' to. Out of the first six questions, five are asking whether the financial benefits of the solar panels have been adequately explained to Mr M. Mr M has answered these in the affirmative and signed the form at the bottom of the document the same date as the loan agreement. This suggests this document was used at the meeting in which Mr M agreed to the loan.

I've redacted the naming of the Supplier Business in the questions. The questions include,

“Has the energy assessor fully explained in detail how the Solar System installed will save you money off your electricity bill to complete Satisfaction?

Has the energy assessor fully explained in detail how the Solar System will save you money off your gas bill to complete satisfaction?

Do you fully understand how the Passive/Voltage optimizer will reduce your Electricity bill and extend the lift of your electrical products?

Has the government F.I.T. scheme and solar system been fully explained to your Complete satisfaction?

Do you fully understand how the savings you make from the solar panels and the solar system along with the F.I.T. scheme will help pay back Your monthly repayment plan?”

I take this document to be a *‘Re-Cap’* of the discussion that took place as the named document suggests. As such it seems most likely that the meeting was one in which The Supplier Business was stressing the benefits of getting solar energy. Five of the first six questions are about savings that could be made and income that could be produced from the solar system and how these *‘will help pay back your monthly repayment plan’.*

I am not pretending this is straightforward. But I do feel that this document’s focus on the financial benefits of the solar system does make it seem more likely that Mr M was told the benefits of the system would meet his loan repayments. In any event, none of the above undermines the testimony that Mr M has given us.

I’ve not seen anything to indicate Mr M had an interest in purchasing a solar panel system before The Supplier Business contacted him. Mr M 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 M would have agreed to install a solar panel system if his monthly outgoings would increase.

Mr M told us that The Supplier Business told him the income from the solar panel system would pay off the agreement. I have noted that our investigator thought that Mr M’s testimony seemed persuasive and explained why they thought that in their assessment. I have noted that Creation has not responded to that assessment.

So, having considered all the submissions made in this complaint, and in the absence of any other evidence from Creation to the contrary, on balance it seems more likely than not that The Supplier Business did tell Mr M the scheme would be self-funding. On balance, I find Mr M’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 £1,742.76 per year. I’ve not seen anything to indicate there’s a problem with Mr M’s solar panel system. But I’ve also not seen enough to suggest he’s achieved this benefit. The FIT statements I’ve seen do not seem to be complete but they suggest that Mr M was not achieving the kind of benefits that would have made the loan self-funding. I’ve not been supplied copies of Mr M’s electricity bills, so I don’t know what savings he made. But based on what I have seen, 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 M 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 The Supplier Business gave Mr M a false and misleading impression of the self-funding nature of the solar panel system. I consider The Supplier Business's misleading presentation went to an important aspect of the transaction for the system, namely the benefits which Mr M was expected to receive by agreeing to installation of the system. I consider that The Supplier Business'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 M went into the transaction. Either way, The Supplier Business's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr M's point of view.

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

Where Creation is to be treated as responsible for The Supplier Business's negotiations with Mr M 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 M and Creation to have been unfair.

Mr M 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 M otherwise wouldn't have taken out. Therefore, I am also satisfied that Creation has not treated Mr M 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

In all the circumstances I consider that the fair compensation should aim to remedy the unfairness of Mr M 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 M a sum that corresponds to the outcome he could reasonably have expected as a result of The Supplier Business's assurances. That is, that Mr M'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 M 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 M received by way of FIT payments as well as through energy savings. Mr M 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.

Mr M told us he settled the loan agreement in 2022.

Creation should:

- Calculate the total repayments Mr M made towards the loan up until he repaid it – A
- Use Mr M'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 M 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 M paid off the loan – E
- Add 8% simple annual interest* to E from the date Mr M paid off the loan until the date of settlement – F
- Subject to receiving the available up to date FIT benefits, electricity bills, and meter readings Creation should pay Mr M C + F

I agree Creation's failure to consider the claim under s140A has also caused Mr M 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 M how much tax it's taken off. It should also give Mr M 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 M'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 M to accept or reject my decision before 5 June 2024.

Douglas Sayers
Ombudsman