

The complaint

Miss W 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 (“s.140A”) of the Consumer Credit Act 1974 (the “CCA”).

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

What happened

In June 2013 Miss W entered into a fixed sum loan agreement with Creation to pay for a £8,200 solar panel system (“the system”) from a supplier I’ll call “P”. The total amount payable under the agreement was £12,928.80 and it was due to be paid back with 120 monthly repayments of £107.74. There was a £135 arrangement fee and an interest charge of £4,593.80.

In February 2022 Miss W sent a letter of claim to Creation explaining she thought the system was mis-sold.

She said P told her she’d effectively be 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 told her she’d receive a guaranteed income for 20 years; she’d earn up to 10% annually tax-free; her property value would increase; and that the panels were maintenance free with at least a 25-year life expectancy. She said P sold the system as being self-funding within the loan term. 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 May 2022 to say it was dismissing the complaint without consideration because it had been brought out of time.

Unhappy with Creation’s response, Miss W decided to refer her complaint to the Financial Ombudsman in July 2022.

One of our investigators looked into things and thought P had likely told Miss W the system would be self-funding. He didn’t think the system was self-funding over the course of the loan term, and so he thought P had misrepresented it. He thought a court would likely find the relationship between Miss W and Creation was unfair and that she’d suffered a loss through entering into the agreement. He 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.

Miss W 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 Miss W. Here, based on what I've seen, Miss W settled the agreement in October 2019. Given Miss W raised her claim and referred her complaint in 2022, 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 was responsible under s.56 when considering whether it is likely Creation had acted fairly and reasonably towards Miss W.

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?

Miss W says she was verbally misled that the system would effectively pay for itself. So I've taken account of what Miss W 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 Miss W 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.

Miss W said she showed an interest in solar panels because they would save money on electricity. She said P showed her calculations on a computer during the sales meeting but didn't leave her with any paperwork. She said P showed her she'd save a substantial

amount of money on her electricity bills and that she was pressured to make the purchase straight away because the FIT payments were due to change. Miss W explained P sold the system as being self-funding within the loan term and that she'd generate enough of a benefit for the loan payments to be covered. Miss W said she didn't complain sooner because she didn't know she could. She said she remembered speaking to P but it told her the issue was with the energy provider.

I've not seen Miss W was left or given documentation that would have enabled her to easily compare the overall costs to the benefits of having the system installed.

I've also looked at a copy of P's website from May 2013 because Miss W 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 Miss W's testimony that P's representative told her the system would pay for itself.

So, I find what Miss W 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 Miss W 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 Miss W'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 in 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, the findings suggest that there were conduct concerns in the same areas that Miss W has complained about, at a similar time she was sold the 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 Miss W's testimony.

Creation hasn't provided evidence to dispute what Miss W said happened. Yet Miss W left the meeting having agreed to an interest-bearing loan, with a monthly repayment of £107.74, payable for 10 years. Given the financial burden she took on I find Miss W'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 nearly £1,300 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. I think the statements that were likely made by P were not true. I think P's representative must reasonably have been aware that Miss W'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 Miss W's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to Miss W.

Considering Miss W'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 Miss W 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 Miss W 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 Miss W went into the transaction. Either way, I think P's assurances were seriously misleading and false, undermining the purpose of the transaction from Miss W'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 Miss W 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 Miss W 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 Miss W 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 Miss W a sum that corresponds to the outcome she could reasonably have expected as a result of P's assurances. That is, that Miss W'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 savings and income Miss W received or ought to have 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 Miss W received, or ought to have received, by way of FIT payments as well as through energy savings. Miss W will need to supply up to date details of all FIT benefits received, electricity bills, current meter readings and the MCS certificate to Creation.

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.

Finally, I note Miss W 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 Miss W'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 my final decision is that I uphold Miss W's complaint. To put things right Creation Consumer Finance Ltd must:

- Calculate the total payments Miss W has made towards the solar panel system up until the date of settlement – A
- Use Miss W's bills and FIT statements to work out the benefits she received, or ought to have received, from the start date of the loan, up until the end of the original loan term – B
- Use B to recalculate what Miss W 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 Miss W

* If Creation Consumer Finance Ltd considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Miss W how much it's taken off. It should also give Miss W 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 Miss W to accept or reject my decision before 5 November 2024.

Simon Wingfield
Ombudsman