DRN-4279595

The complaint

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

What happened

In December 2013, Mr P entered into a fixed sum loan agreement with Creation to pay for a £9,795 solar panel system from a supplier I'll call "B". The total amount payable under the agreement was £15,403.20 and it was due to be paid back with 120 monthly repayments of £128.36.

Creation has explained Mr P settled the loan agreement on 12 September 2018.

On 20 December 2019 Creation said it received a letter of complaint from Mr P explaining that he considered he had a valid claim against it under s75 due to misrepresentation and breach of contract by B. Later Mr P also claimed there had been an unfair relationship under s140A. Mr P said he'd been told by B that 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.

Mr P told us that B told him the FIT payments and energy savings would cover the cost of the loan repayments. After the loan was repaid Mr P was told he could expect an income from the panels. Mr P told us he would not have entered into the agreement if he knew the benefits would not cover the cost of the borrowing.

On the basis of the above Mr P 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 B 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 B falsely induced Mr P to take out a loan and as a result he has been prejudiced in paying back a loan with a significant interest rate which was not covered by the system installed as promised by B. To resolve the claim and complaint, Mr P requested to be compensated.

Creation sent a final response letter on 21 March 2020 rejecting Mr P'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 P wasn't happy with the response to the complaint so decided to refer it to our service on 13 August 2020.

Creation explained that it considered the s75 claim to be time-barred under the Limitation Act 1980 (the 'LA') due to the limitation period under the LA having expired. Consequently, Creation thought they had no liability to Mr P. 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 13 August 2020, which is the date when Mr P's representative sent details of his complaint to our service.

I'll first consider our service's jurisdiction to consider Mr P'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 P's s75 claim on 21 March 2020. Mr P brought his complaint about this to the ombudsman service on 13 August 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 P'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 P 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 12 September 2018 and the complaint in relation to s140A was referred to the ombudsman service on 13 August 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 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 on 5 December 2013 based on the alleged misrepresentations. The alleged breach of contract isn't defined but I take it to be that B (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 20 December 2019, that is more than six years after the causes of action against B 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 I 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 B to be the agent of Creation in any antecedent negotiations. Creation is responsible for the antecedent negotiations B carried out direct with Mr P.

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 B'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 P.

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 P and B.

Mr P told us he was approached by B and informed he could be entitled to have a Solar System at absolutely no cost to him.

I've also looked at the paperwork that has been supplied to see if there was any evidence to support Mr P's allegation he was told it would be self-funding. The loan agreement sets out Mr P's responsibilities for repaying the loan amount and the monthly cost of that.

I've also been supplied a sales brochure that B gave Mr P. That sales document from B sets out "11 Good Reasons" to install solar panels. These included:

"Will give guaranteed returns of over 12%.
Tax free lump sum every year for 20 years.
Save thousands of your bill over next 25 years.
Get paid for using your own free electricity.
Pay as you earn scheme."

So, this seems to support what Mr P told us; that the cost of the solar panels would be fully met from the income and savings they could generate. So, this does not undermine the testimony Mr W has given us.

I've also looked at B's website from around the time of the sale. There is no cache of the website until April 2014, after Mr P purchased his panels, however the content is copyrighted as 2013. I am satisfied on this occasion it is reasonable to take this content into account when considering what's more likely than not to have been said to Mr P.

On the home page it says:

"Free Solar Panels! Really?? This really proves the point about how beneficial solar power is. When you see companies advertising FREE Solar Panels they are after getting their hands on your rebates Feed In Tariffs for the next 20 years! Which more than covers the Solar panel cost and installation. Makes them a good a profit too. Is that free??"

In the FAQ section it says:

"Q: So if solar panels systems are not free, how much does it cost?

A: Put simply given the generation tariffs that you get (FiTs) for 20 years because you

installed solar and now generate electricity. Nearly all systems become self funding, meaning that the financial rewards far out way the cost of your system. The cost of your system will depend on your roof and system size."

Taking all of this promotional material into account, it seems that consumers were supposed to understand that the solar panels would most likely be self-funding. And it seems to me most likely that the sales representative Mr P dealt with would've used similar lines to those B produced in its promotional literature.

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

I've not seen anything to indicate Mr P had an interest in purchasing a solar panel system before B contacted him. Mr P 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 P would have agreed to install a solar panel system if his monthly outgoings would increase significantly. In saying that I've noted that Mr P was 75 years old and living on pension income at the time the loan agreement was signed.

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 B did tell Mr P the scheme would be self-funding. On balance, I find Mr P'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 £1,540 per year. I've not seen anything to indicate there's a problem with Mr P's solar panel system. But I've also not seen enough to suggest he's achieved this benefit. For the FIT statements I've seen suggest Mr P received significantly less than that amount. I've not been supplied copies of Mr P'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 P 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 B gave Mr P a false and misleading impression of the self-funding nature of the solar panel system. I consider B's misleading presentation went to an important aspect of the transaction for the system, namely the benefits which Mr P was expected to receive by agreeing to installation of the system. I consider that B'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 P went into the transaction. Either way, B's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr P's point of view.

<u>Would a court likely make a finding of unfairness under s140A?</u>

Where Creation is to be treated as responsible for B's negotiations with Mr P 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 P and Creation to have been unfair.

Mr P 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 P otherwise wouldn't have taken out. Therefore, I am also satisfied that Creation has not treated Mr P 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 P and Creation's relationship arising out of B's misleading and false assurances as to the self-funding nature of the solar panel system. I require Creation to repay Mr P a sum that corresponds to the outcome he could reasonably have expected as a result of B's assurances. That is, that Mr P'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 P 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 P received by way of FIT payments as well as through energy savings. Mr P 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. I say this particularly as we have been informed that Mr P is unwell.

Creation has explained Mr P settled the loan agreement on 12 September 2018.

Creation should:

- Calculate the total repayments Mr P made towards the loan up until he repaid it – A
- Use Mr P'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 P 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 P paid off the loan – E
- Add 8% simple annual interest* to E from the date Mr P paid off the loan until the date of settlement – F
- Creation should pay Mr P C + F

I agree Creation's refusal to consider the claim under s140A has also caused Mr P some further inconvenience. And I think the £200 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 P how much tax it's taken off. It should also give Mr P 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 P's complaint about Creation Consumer Finance Limited and require them to calculate and pay the redress detailed above in the section above called **Putting things right**.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 31 May 2024.

Douglas Sayers
Ombudsman