DRN-4329537

The complaint

Mr S complains about the way Creation Consumer Finance Ltd (Creation) responded to claims he'd made in relation to misrepresentation, breach of contract, and an alleged unfair relationship taking into account section 140A ("s140A") of the Consumer Credit Act 1974 (the "CCA"). Mr S's claims were in relation to solar panels that he had bought and were paid for through a loan with Creation.

Mr S is represented in his complaint by a third party.

What happened

In February 2013 Mr S entered into a fixed sum loan agreement with Creation. The loan was for a solar panel system which cost £11,895. The loan was to be repaid by two payments of £228.77 and regular instalments of £153.77 over the 120 month term. Although the amount borrowed was £11,895, with interest and charges the total amount repayable under the loan was £18,502.40.

Mr S complains that the solar panel system was missold. More specifically, Mr S's representative has said *'…the sales representative made a number of misrepresentations to our client, the main misrepresentation which induced our client to enter into the contract was that the system was 'self-funding'. Our client was advised that the electricity which was generated by the system would lead to them being paid the feed-in tariff which would generate an income under the government backed scheme. Our client was also told that they would make significant savings on their electricity bills. The sales representative was adamant that the financial benefits from the system would make it a self-funding system which would pay for itself through the income and savings it would generate.'*

Creation responded to Mr S's claim and explained why in its view that Mr S's claim had been submitted too late. Mr S remained unhappy and his representative brought his complaint to our service, where it was considered by one of our investigators. They found that Mr S's claim had not been submitted too late, but they had seen insufficient evidence to determine Mr S had been missled about the benefits of the solar panel system. They did not therefore consider the complaint should be upheld.

Mr S's representative did not accept the investigator's findings and asked for the complaint to be passed to an ombudsman to consider. The case was passed to a different investigator, who asked Mr S's representative for some further information. The representative was asked to contact Mr S and for Mr S to explain in his own words why he had decided to take out the solar panels system and what he was told about the panels and costs by the sales representative.

Mr S's representative asked for more time to respond but despite further time being allowed, more than two months has now passed and we have not received anything further. When allowing more time to respond, the investigator explained that no further time would be granted if we had not received a response by the deadline. As no response was received, the complaint has been passed to me to consider as the final stage in our process.

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.

Where the evidence is incomplete, inconclusive or contradictory (as some of it is here), I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in light of the available evidence and the wider circumstances. Mr S has complained about the misrepresentations made by the solar panels supplier have created an unfair relationship, as set out in s.140A CCA.

Mr S is able to make a complaint about an unfair relationship between himself and Creation per s.140A. 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. S.140A doesn't impose a liability to pay a sum of money in the same way as s.75. Rather, it sets out the basis for treating relationships between creditors and debtors as unfair. Under s.140A a court can find a debtor-creditor relationship is unfair, because of the terms of the credit agreement and any related agreement, how the creditor exercised or enforced their rights under these agreements, and anything done or not done by the supplier on the creditor's behalf before or after the making of a credit agreement or any related agreement.

A court must make its determination under s.140A with regard to all matters it thinks relevant, including matters relating to the creditor and matters relating to the debtor. The High Court's judgment in Patel v Patel [2009] EWHC 3264 QB established that determining whether the relationship complained of was unfair has to be made "having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination". The time for making determination in the case of an existing relationship is the date of trial, if the credit relationship is still alive at trial, or otherwise the date when the credit relationship ended.

This judgment has recently been approved by the Supreme Court in Smith v Royal Bank of Scotland Plc [2023] UKSC 34 ('Smith'). Throughout the period of the credit agreement, a creditor should conduct its relationship with the borrower fairly, including by taking corrective measures. In particular, the creditor should take the steps which it would be reasonable to expect it to take in the interest of fairness to reverse the consequences of unfairness, so that the relationship can no longer be regarded as unfair: see Smith at [27]-[29] and [66].

Whether that has, or has not, been done by the creditor is a consideration in whether such an unfair relationship was in existence for the purposes of s.140A when the relationship ended. In other words, determining whether there is or was an unfair credit relationship isn't just a question of deciding whether a credit relationship was unfair when it started. The question is whether it was still unfair when it ended; or, if the relationship is still ongoing, whether it is still unfair at the time of considering its fairness.

That requires paying regard to the whole relationship and matters relevant to it right up to that point, including the extent to which the creditor has fulfilled its responsibility to correct unfairness in the relationship. In Mr S's case the relationship had finished approximately one month before the claim was submitted to Creation and three months before complaining to our service. Mr S has six years in which to bring a complaint from the event complained of and as Mr S was complaining about the unfair relationship with Creation which had only just

ended, the complaint was made within the six year time period.

Therefore, taking into account DISP 2.8.2R(2)(a), I am satisfied it has been brought in time. I am otherwise satisfied the complaint is within the ombudsman service's jurisdiction to consider and it's not necessary to consider whether Mr S's complaint has been brought in time for the purposes of the alternative three-year rule under DISP 2.8.2R(2)(b).

The unfair relationship under s.140A complaint

When considering whether representations and contractual promises by the solar panels supplier 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 the solar panels supplier 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 the solar panels supplier for which Creation was responsible under s.56 when considering whether it is likely Creation had acted fairly and reasonably towards Mr S. 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?

Mr S's representative has set out that Mr S was effectively told the benefits of the solar panels system would cover the cost of the loan with Creation and the system would therefore be self funding. Our service asked that Mr S provide some further details about why he decided to take out the solar panel system and what he was told about the costs and benefits of the system. Despite allowing considerable time for a response, nothing has been submitted to our service and we have no direct submissions from Mr S about exactly what happened in this instance when taking out the solar panels system and loan with Creation.

I appreciate some time has now passed since the system was sold to him and some of the finer details may not be as clear now because of the passage of time. But Mr S's representative was clear enough about Mr S being misled to submit the complaint and it would not therefore be unreasonable to expect Mr S to provide some further clarification about what happened in his specific circumstances.

I have considered the documentation that has been submitted in this case and this includes a number of documents from the time of the sale. The Creation fixed sum loan agreement sets out what the cost of the loan will be each month in repayments, along with the overall cost of the loan. There is a document, dated 7 February 2013, from the supplier that refers to the £11,895 cost of the system and I note this makes no reference to the additional costs through interest and charges on the loan Mr S will need to pay to Creation. But I have not been presented with anything that refers to the likely savings or benefits the solar panels system was expected to produce.

The documentary evidence in this case is somewhat limited and Mr S has not provided a response to our request for further clarification about what he was told at the time of the sale. I have noted what Mr S's representative has said about other complaints with our service involving the same supplier being upheld, but I am required to consider the specific

circumstance of this complaint and what went on in Mr S's case.

Overall, I've not seen enough in this particular case to persuade me on the balance of probabilities that Mr S was told the benefits of the solar panels would have paid for the loan repayments over the course of the loan. It therefore seems unlikely to me that Mr S's relationship with Creation is unfair as a result of a misrepresentation or contractual promise made by the solar panels supplier to Mr S when the solar panels were sold to him. And it is ultimately for these reasons that I do not consider Mr S's complaint against Creation should be upheld.

My final decision

My final decision is that I do not uphold Mr S's complaint against Creation Consumer Finance Ltd.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 10 March 2025.

Mark Hollands
Ombudsman