DRN-4334600

The complaint

Ms F has complained about Creation Consumer Finance Ltd's ('Creation') response to a claim she made under Section 75 ('s.75') of the Consumer Credit Act 1974 (the 'CCA') and in relation to allegations of an unfair relationship taking in to account Section 140.A ('s.140A') of the CCA.

Ms F has been represented in bringing her complaint but, to keep things simple, I'll refer to Ms F throughout.

What happened

On 27 May 2015, Ms F bought a solar panel system ('the system') from a company I'll call "M" using a 10-year fixed sum loan from Creation. The credit agreement was signed on 27 May 2015. Ms F paid a deposit of £1,000 and the loan amount was for £4,268 with the total amount payable under the agreement including the deposit, interest and fees being roughly £7830. The loan was due to be paid back with 120 monthly repayments of £56.91. I understand the loan is still running.

Ms F complained to Creation, she said that she was told by M that the 'feed in tariff' ('FIT') payments and the savings she would make would cover the cost of the loan repayments. However, that hasn't happened, and she's suffered a financial loss.

Creation told us they received a complaint from Ms F on 16 September 2021. Creation issued a final response letter dated 11 November 2021. Creation considered Ms F had brought her claim more than six years after the cause of action occurred under the FCA's rules on dispute resolution and later Creation said the complaint was too late under the Limitation Act ('LA'). Ms F brought her complaint to this service on 18 November 2021 as she was unhappy with Creation's response and Ms F asked us to review her complaint.

An investigator considered Ms F's complaint, she ultimately thought that -

- Given the s.75 claim was more likely to be time barred under the LA, Creation's answer seemed fair.
- The s.140A complaint was one we could look at under our rules and that it had been referred in time.
- Misrepresentations could be considered under s.140A.
- A court would likely find an unfair relationship had been created between Ms F and Creation.

On 25 July 2023, the investigator recommended that Ms F keep the system and Creation take into account what Ms F had paid so far, along with the benefits she received, and make sure the system was effectively self-funding.

Ms F accepted the investigator's view. Creation has not responded to the investigator's findings. So, the case was progressed to the next stage of our process, an Ombudsman's decision. I consider that Creation has now had time sufficient to have made further submissions had it wished to.

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

I'm satisfied I have jurisdiction to consider Ms F's complaint, both in respect of the refusal by Creation to accept and pay her s.75 claim and the allegations of an unfair relationship under s.140A.

The s.75 complaint

The event complained of here is Creation's alleged wrongful rejection of Ms F's s.75 claim on 11 November 2021, this relates to a regulated activity under our compulsory jurisdiction. Ms F brought her complaint about this to the ombudsman service on 18 November 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 Ms F. The loan was still running when the complaint was brought to this service and is still running. So, the complaint has been brought in time for the purposes of our jurisdiction.

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 on 27 May 2015. Ms F brought her s.75 claim to Creation on 16 September 2021 that is more than six years after she entered into an agreement with them. 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 M 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 M 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 M for which Creation were responsible under s.56 when considering whether it is likely Creation had acted fairly and reasonably towards Ms F.

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 s140A.

What happened?
Ms F has said that she was told by M's representative that the cost of the system would be fully paid for by the FIT payments she would receive and the savings she would make. Ms F has said she was cold called by M about the system, and I haven't seen any evidence she had any prior interest in purchasing Solar Panels.

I've looked at the documents provided by Ms F to see if there was anything contained within it that made it clear that the solar panel system wouldn't be self-funding.

The loan agreement, signed by Ms F on 27 May 2015, sets out Ms F's responsibilities for repaying the loan amount and the monthly cost of that. Looking at the loan agreement it specifies that the goods being purchased were solar panels. So, I'm satisfied the loan was taken in Ms F's name to solely purchase the system sold by M.

But the loan agreement contains no mention of the income or savings that may be generated. So, there was no way for Ms F to compare her total costs against the financial benefits she was allegedly being promised from that document. Given the contract doesn't contain information about the benefits, Ms F would have looked to M'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 in order for her to make a decision.

Creation hasn't provided evidence to dispute what Ms F said happened. Yet with no prior interest, Ms F left the meeting having agreed to an interest-bearing loan, with a monthly repayment of around £56, payable for ten years. And I note at the time of the sale, Ms F and her husband had two young children and modest incomes. So, given her lack of prior interest and the financial burden she took on, I find Ms F's account of what she was told by M to be credible and persuasive. The loan is a costly long-term commitment, and I can't see why she would have seen this purchase as appealing had she not been given the reassurances she's said she received from M.

I have noted that our investigator thought that Ms F's testimony seemed persuasive and explained why they thought that in their assessment. I have noted that Creation has not responded to that assessment.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £682 per year. I have not seen anything to indicate Ms F's system was not performing as expected but Ms F's system did not produce sufficiently to meet the loan repayments. I have seen some FIT statements that show that income was less than half the amount needed for the loan to be self-funding.

So, the statements made by M were not true. I think the salesman from M must reasonably have been aware that Ms F'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 the salesman would have known that Ms F's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to Ms F.

Considering Ms F's account about what she was told, and the documentation she was shown at the time of the sale, and in the absence of any other evidence from Creation to the contrary, I think it likely M gave Ms F a false and misleading impression of the self-funding nature of the solar panel system. On balance, I find Ms F's account to be plausible and convincing.

I consider M's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Ms F was expected to receive by agreeing to the installation of the system. I consider that M'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 Ms F went into the transaction. Either way, I think M's assurances were seriously misleading and false, undermining the purpose of the transaction from Ms F'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 M's negotiations with Ms F 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 Ms F 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.

Putting things right

Fair compensation

In all the circumstances I consider that the fair compensation should aim to remedy the unfairness of Ms F and Creation's relationship arising out of M's misleading and false assurances as to the self-funding nature of the solar panel system. I require Creation to repay Ms F a sum that corresponds to the outcome she could reasonably have expected as a result of M's assurances. That is, that Ms F's loan repayments should amount to no more than the financial benefits she 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 Ms F received from the solar panel 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 Ms F received by way of FIT payments as well as through energy savings. Ms F 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.

Normally, by recalculating the loan this way, Ms F's monthly repayments would reduce, meaning that she would've paid more each month than she should've done resulting in an overpayment balance. And as a consumer would have been deprived of the monthly overpayment, I would expect a business to add 8% simple interest from the date of the overpayment to the date of settlement.

So, to put things right Creation Consumer Finance Ltd must:

- Calculate the total repayments Ms F made towards the loan up until the date of settlement – A
- Use Ms F's electricity bills, FIT statements and meter readings to work out the known and assumed benefits she received and she would have received over the 10 year loan period – B
- Use B to recalculate what Ms F should have repaid each month towards the loan and apply 8% simple interest to any overpayment from the date of her payment until the date of settlement – C
- Reimburse C to Ms F.
- Give Ms F the option of offsetting this amount [C] from any outstanding loan amount, recalculating either her monthly payments or remaining loan term, or a refund of the overpayments.

I agree Creation's refusal to consider the claim under s140A has also caused Ms F 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 Ms F how much tax it's taken off. It should also give Ms F a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate."

Creation Consumer Finance Ltd 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.

My final decision

For the reasons I have explained I uphold Ms F's complaint. I require Creation Consumer Finance Ltd to calculate and pay the fair compensation as detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms F to accept or reject my decision before 26 June 2024.

Douglas Sayers
Ombudsman