DRN-4349033

The complaint

Mr L is unhappy with Creation Consumer Finance Ltd's ('Creation') response to the claims he made under Section 75 ('s.75') and Section 140A ('s.140A') of the Consumer Credit Act 1974 (the 'CCA').

What Happened

In 2014 Mr L entered into a contract with an installer ('A') to supply a solar panel system. He paid partly by cheque, and partly via a fixed term loan agreement with Creation. The price for the panels was £10,945 and this plus the additional costs of the loan made the total amount payable £12,816.82.

The loan agreement was signed the same day as the purchase contract and Mr L repaid the loan in 2021.

Mr L, via his representatives contacted Creation in 2020 to make a claim under s.75 and s140 of the CCA. He said the benefits of the panels had been misrepresented to him. He said he was led to believe the electricity savings and FIT payment income from the panels would cover the costs of the loan he'd taken out and leave him with a profit. In fact, there was a shortfall between the cost of the loan payments and the benefits, causing a financial loss.

Mr L also raised several points which he alleged, in addition to the misrepresentation, created an unfair relationship between him and Creation. He said he had not been made aware that Creation had commission on the sale, which was a breach of fiduciary duty, Creation had failed to ensure A observed the relevant codes at the time of sale, and insufficient credit checks had been carried out.

Creation requested evidence from Mr L but did not respond further, and the complaint was brought to our service in 2021.

An investigator reviewed the complaint and concluded that the benefits of the panels had been misrepresented to Mr L. He recommended that Creation should calculate the benefits from the panels over 10 years (the period of the loan) and ensure that Mr L paid no more than that.

Creation did not accept the investigator's view, and later wrote to Mr L saying it considered the complaint had not been made within 6 years of the sale and was out of our jurisdiction under DISP 2.8. It later added that the complaint was time-barred taking into account the provisions of the CCA and the Limitation Act 1980 (the 'LA').

A second investigator didn't agree, in summary she said that as Mr L had brought his s.75 complaint to us within 6 years of the rejection of his s.75 claim by Creation. However, she considered how Creation had handled the s.75 claim and felt it had not acted unreasonably in applying the LA when considering the arguments made to decline the s.75 claim.

However, she concluded that Mr L's unfair relationship complaint was made in time, as the starting point for both our time limits under DISP and the LA was the point the unfair relationship ended. Therefore, Mr L - who settled his loan in 2021 - had brought his complaint to us in time taking into account the approach the courts would likely take.

She concluded that misrepresentations made to Mr L at the time of the sale had created an unfair relationship. She recommended that Creation should recalculate the loan and ensure that Mr L paid no more than the likely benefits he would receive over the loan period. She also recommended that Creation pay Mr L £150 for how the complaint had been handled.

Creation did not agree and sought several extensions to enable it to obtain external legal advice before responding. As nothing further was received, I issued my provisional decision on 3 May 2023.

My Provisional Decision

In my provisional decision, I reached broadly the same outcome as the investigator, and set out in detail my reasoning for concluding why the complaint was in our jurisdiction, my assessment of the merits and my suggested redress.

My reasoning was as follows

Our approach to our jurisdiction to consider the complaint

Our powers to consider complaints are set out in the Financial Services and Markets Act 2000 (the 'FSMA') and in rules and guidance contained in the FCA's Handbook known as DISP.

These form part of the FCA Handbook. The rules surrounding time limits are set out in DISP 2.8.2R.

> *"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)).

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 they are relevant to any disputes raised by Creation about our jurisdiction to consider Mr L's complaint.

In order to explain how I have approached our jurisdiction to consider the complaint, I have set out how I have construed the complaint as it relates to acts or omissions surrounding the s.75 claim and acts or omissions surrounding the alleged unfair relationship taking into account s.140A separately.

This is because the basis for the ombudsman service being able to look at these different categories of acts or omissions complained of has an important bearing on how I construe the events complained of for the purposes of DISP 2.8.2R (2)(a) on the six-year time limit, notwithstanding that how I construe Mr L's complaint points is also relevant to my consideration of the merits. I have not found it necessary to go on to consider the application of the three-year rule under DISP 2.8.2R (2)(b) in this matter because in both cases I consider the complaint is brought within scope of the six-year rule under DISP 2.8.2R (2)(a).

Jurisdiction to look at the s.75 claim complaint

What are the acts or omissions complained of within our jurisdiction under DISP 2.3.1R?

Where Creation is exercising its rights and duties as a creditor under a credit agreement it is carrying on a regulated activity within scope of our compulsory jurisdiction under Article 60B(2) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the 'RAO').

The regulated activity in question is that of exercising, or having the right to exercise, the lender's rights and duties under a regulated credit agreement. The part of those rights and duties to which the present complaint relates is the lender's duty to give Mr L credit for a liability allegedly owed to him as borrower, as the complaint alleges that Creation failed to do this when it rejected his s.75 claim. Mr L says that was a valid claim, when he notified it to Creation and he complains that Creation should have been accepted it as a liability. So, the events complained of are not the alleged representation by A but Creation's alleged failure to

accept the s.75 claim which Mr L maintains was valid when made. That is not to say that the six-year limitation period for bringing claims for misrepresentation in court is irrelevant. Indeed, I find below that the expiry of that limitation period gave Creation justification for declining Mr L's s.75 claim. But that is a point that goes to the merits of Mr L's complaint under s.75, rather than our service's jurisdiction to investigate it.

Have the events complained of in relation to the s.75 claim been brought in time?

Taking into account what I consider the events complained of are for the purposes of DISP 2.8.2R(2)(a) – the failure to accept the s.75 claim – I am satisfied Mr L has brought that element of his complaint in time where he referred it to the ombudsman service during 2021 which is within six years of the date Creation failed to accept the s.75 claim (on or around June 2020 when Mr L sought to make the s.75 claim).

Jurisdiction to look at the complaint about an unfair relationship taking into account s.140A

What are the acts or omissions complained of within our jurisdiction under DISP 2.3.1R?

Mr L's complaint points in relation to his allegations of an unfair relationship with Creation taking into account s.140A are matters which in the circumstances of this particular complaint fall in scope of our jurisdiction to consider regulated activities under Article 60B(1) and (2). That is both Creation entering into a regulated credit agreement as lender, and it exercising its rights and duties as creditor under a credit agreement.

This is because Mr L's complaint about an unfair relationship is constituted of several complaint points including:

- *allegations of misrepresentation by A for which Creation is responsible under s.56 of the CCA and which can be considered within scope of our jurisdiction under DISP 2.3.1R taking into account the guidance in DISP 2.3.3G which states complaints about acts or omissions include those for which firms are responsible;*

- *Creation's provision of the financial service of making restricted-use loans where Mr L alleges:*

    - *he had not been made aware that Creation had commission on the sale;*

    - *Creation had failed to ensure A observed the relevant codes at the time of sale; and*

    - *Insufficient credit checks had been carried out.*

However, it would be wrong to construe the complaint by reference to the singular acts or omissions which Mr L alleges rendered his relationship with Creation unfair. The proper construction of an event complained of for the purposes of a complaint about an unfair

relationship, is that the 'event' complained of is the lender's participation in an unfair relationship in having and asserting rights as lender

Therefore, whether the relationship is unfair or not, and for what duration that unfairness has persisted, is something I have to consider not only with respect to the merits of the complaint, but also for the purposes our jurisdiction under DISP 2.8.2R (2)(a). Because of this it may be of assistance to read my detailed findings on the merits of the complaint to understand why I consider the relationship was likely to be unfair in all the circumstances of the complaint for the duration of Mr L's agreement with Creation when reading my summarised version of these findings within this jurisdiction section of this decision.

Have the events complained of in relation to an unfair relationship taking into account s.140A been brought in time?

With reference to the later sections of this decision on the merits of the unfair relationship element of the complaint, I have concluded – in summary – that the relationship between Creation and Mr L was likely to be unfair taking into account relevant law and evidence because I consider that Mr L was induced into entering a contract with Creation by misrepresentations of A as to the likely benefits he was going to receive under that contract.

I further consider that the unfairness caused by that misrepresentation, persisted throughout the duration of the agreement with Creation as it caused financial losses which persisted until Mr L paid off the loan and his agreement ended.

In short, where the event complained of is the alleged unfair relationship, and I have found that this relationship was unfair and that the unfairness persisted until the end of the agreement I consider the six-year period under DISP 2.8.2R (2)(a) runs from the date the agreement ended in 2021.

Mr L referred his complaint to the ombudsman service within the six-year period, and therefore it is not necessary for me to go on to consider the three-year rule under DISP 2.8.2R (2)(b) in the circumstances.

In reaching this decision on jurisdiction, I have derived assistance from the Court's approach to limitation in Patel v Patel [2009] EWHC 3264 (QB) ('Patel') where the Court considered when the relevant limitation period would run from under the LA in respect of a claim under s.140A and found that the debtor's cause of action under such a claim was "a continuing one which accrues from day to day until the relevant relationship ends".

I have also considered the Court of Appeal's judgment in Smith v Royal Bank of Scotland Plc [2021] EWCA Civ 1832 ('Smith') which is currently subject to an appeal in the Supreme Court and – at time of writing – has been heard but judgment is yet to be handed down. However, that case is not in my view as relevant to circumstances of the complaint I am concerned with here, as I am making a finding that the unfairness in the relationship was likely to have persisted until Mr L paid off the loan, and – in my view - there are no circumstances where it can be concluded unfairness ended at some earlier date. In any event, I am satisfied I have jurisdiction to consider the unfair relationship aspect of the complaint in the circumstances.

Merits of the complaint

The relevance of the LA for the purposes of the s.75 claim complaint

In the context of the s.75 claim it is important to consider that if the relevant limitation period under the LA had expired for the purposes of a claim against A, any 'like' claim under s.75 against Creation would also be extinguished. The relevant limitation period for a claim based on misrepresentation by A in these circumstances would be six years calculated from the date when the cause of action accrued and this – in my view – would be when the benefits of agreement were misrepresented to Mr L on 2 February 2014.

Based on what I have seen, Mr L raised his s.75 claim with Creation during June 2020, so this would be outside the six-year period for the purposes of the LA and therefore I don't consider Creation had to do anything further in relation to his claim in the circumstances. I don't uphold this aspect of Mr L's complaint on the merits.

Can misrepresentations be considered under s.140A?

As I have previously explained, I am required to take into account relevant law to determine what is fair and reasonable in all the circumstances of a complaint and I have considered the Court's approach to considering misrepresentations under s.140A claims to inform my approach to the unfair relationship complaint on that basis.

I have considered Scotland & Reast v British Credit Trust [2014] EWCA Civ 790 ('Scotland'), in which said the following when considering if a misrepresentation could be relevant to an unfair relationship claim under s.140A:

> *"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 in s.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."*

Applying the approach explained in Scotland, I consider it would be fair and reasonable in all the circumstances for me to consider as part of the complaint about an unfair relationship those negotiations and arrangements by A for which Creation were responsible – as per s.56 of the CCA - when considering whether it is likely the relationship was unfair for the purposes of s.140A taking into account what the Court's approach likely would be.
What happened?

When speaking to our investigator, Mr L said that he was told by the representative of A that the benefits of the panels (energy produced and FIT payments) would quickly cover his electricity usage, his loan costs and the cash amount he paid. Mr L says he was told the system would pay for itself. Mr L also said he paid half of the cost of the panels in cash, as he didn't want to take on a large interest-bearing loan and wanted to keep the cost down.

I've considered Mr L's account about what happened when he spoke to A. I find this to be credible and persuasive. I think it is unlikely that he would've agreed to the solar panel system and a loan with Creation unless he'd been led to believe that it would be self-funding and come at no additional cost to him.

Creation has not supplied any evidence or reasoning to challenge Mr L's testimony, and as I consider it persuasive, I accept Mr L's version of events.

The documentation

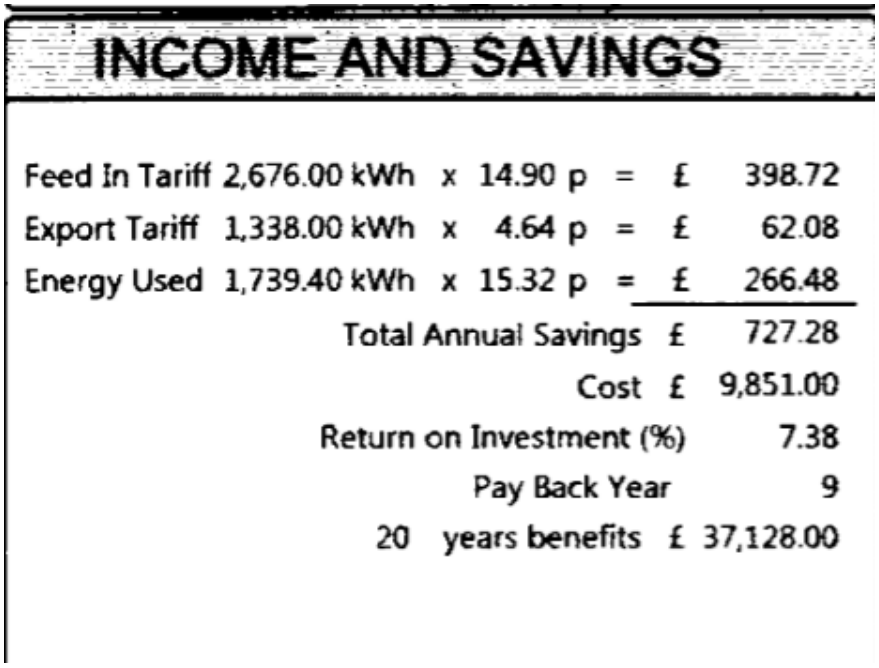
I've gone on to consider the paperwork that has been provided to see if there was anything contained within it that made it clear that the solar panel system wouldn't be self-funding.

What I am considering is whether or not all the documentation Mr L had access to at the time of the sale would have made it evident that, despite what he says he was told, the solar panels would not be self-funding.

In order for him to make an informed decision about the benefits of the panels in relation to the overall costs to him he needed to be able to compare the cost of the solar panel system to any benefit he may have received or have been promised.

I've considered the loan agreement. This is dated 2 February 2014, and sets out, amongst other things, the amount being borrowed, the interest to be charged, total amount payable, the term of the loan and the contractual monthly loan repayments.

I'm satisfied that this is clear. I've also considered the contract signed by Mr L and the installer on the same date, which includes the following:



INCOME AND SAVINGS

Feed In Tariff	2,676.00 kWh	x	14.90 p	=	£ 398.72
Export Tariff	1,338.00 kWh	x	4.64 p	=	£ 62.08
Energy Used	1,739.40 kWh	x	15.32 p	=	£ 266.48
			Total Annual Savings		£ 727.28
			Cost		£ 9,851.00
			Return on Investment (%)		7.38
			Pay Back Year		9
	20		years benefits		£ 37,128.00

There's no explanation here as to how these numbers were calculated and nothing to easily enable Mr L to compare these future benefits with the actual cost of the system, including the finance. In fact, given the reference to the payback year, and 20-year benefits figure, I think this would encourage Mr L to accept what he was told about the panels paying for themselves.

Taking the above into account, I consider that the various documents provided to Mr L presented in such a way that it would have been difficult for him to make an informed decision without relying on what he was told by the representative of A. So, I'm persuaded it is reasonable for Mr L to have relied on what he was told when he entered into the contract.

Were the representations made to Mr L untrue statements of fact?

For the solar panels to pay for themselves as Mr L says he was told, they would need to cover the costs of the loan and Mr L's cash payment and produce combined savings and fit income of over £1,282.68 a year. I have not seen anything to indicate Mr L's system is not performing as expected but Mr L's system has not produced this. So, these representations were not true.

I think the salesman from A would have been aware Mr L'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 Mr L's system would not produce enough benefits to cover the overall cost of his panels in the timescales stated in the documentation or verbally to Mr L.

Did the representations induce Mr L to enter into the purchase and loan agreement?

Taking into account Mr L's testimony about what he was told, and the documentation he was shown at the time of the sale, I am satisfied that the actions of A's salesman, acting at that time as an agent for Creation, did induce Mr L into entering into a contract that he otherwise would not have done.

The salesman, acting in a position of knowledge about the effectiveness of the panels, would have been aware that they would not pay for themselves in way Mr L was led to believe. I've not seen anything to demonstrate Mr L decided to purchase the solar panel system for anything other than the cost savings this would produce for him on his energy bills. And as I have found, the system would not actually produce the savings he was led to believe he would receive.

Would a court be likely to make a finding of unfairness under s.140A?

In line with the reasoning above, it follows that if I accept that Mr L was induced into entering the contract with Creation due to the misrepresentations made by A, acting as an agent of Creation at that point, I consider that a court would be likely to conclude that because of this the relationship between Mr L and Creation was unfair.

Had Mr L been aware of the actual benefits he was likely to receive from the panels, and that they would not pay for themselves until far later than he was led to expect, he would not

have entered into the contract. Because of this shortfall between his costs and the actual benefits, each month he has had to pay more than he expected to cover the difference between his solar benefits and the cost of the loan. So, clearly Creation has benefitted from the interest paid on a loan he would otherwise have not taken out.

It is clear to me that without the misrepresentations made by Creation's agent at the point of sale, Mr L would not have bought the panels, or entered into the loan contract. Therefore, I am persuaded taking into account the Court's approach that this has caused an unfair relationship.

Mr L expected his costs in relation to the panels to be covered by the benefits, but in fact each month he has had to pay more than he had made, so Mr L lost out and Creation has benefitted. Had Mr L been aware of the true state of affairs, he would not have bought the panels or entered into the contract for the loan.

I consider these misrepresentations and the resulting financial cost which persisted until the agreement with Creation ended caused the relationship between Mr L and Creation to be unfair and that it is likely a court would find it so under s.140A. It follows that I do not consider Creation have acted in a fair and reasonable way in all the circumstances of the complaint concerning the unfair relationship and, because Mr L has suffered financial losses, I consider Mr L's complaint should be upheld.

Fair compensation

The role of this service is to help settle disputes between consumers and businesses providing financial services fairly and reasonably with minimum formality. In cases like this one, determining compensation isn't an exact science. My role is to arrive at fair compensation taking account of the particular circumstances of the complaint.

Our approach in these circumstances is to award redress based on putting Mr L into the position he would have been but for the unfair relationship which I consider likely existed between him and Creation taking into account relevant law when determining what a fair and reasonable conclusion to this complaint should be.

I have considered if a full unwind of the agreement, where the panels are removed and Mr L is returned all the money paid to the loan, less any benefits received, is suitable redress. I'm mindful that whilst this puts Mr L back to his original position, it's likely to be a complicated and disruptive process and incur considerable expense arranging for the panels to be removed, along with any associated work.

I've also borne in mind that Mr L's complaint is not about any issue with the panels themselves, but about the unfairness caused by the misrepresentation of the benefits he would receive.
He believed the panels would pay for themselves. So, I consider it fair to both parties to put Mr L into that position. This removes any unfairness to Mr L.

To achieve this, Creation needs to ensure that the amount Mr L paid for the panels is no more than the likely benefits he would have received.

To do this Creation needs to:

- *Calculate the total payments (the deposit and monthly repayments) Mr L made towards the solar panel system up until he repaid the loan - A*
- *Use his bills and Fit statements, to work out the benefits he received up until he repaid the loan - B*
- *Use B to recalculate what Mr L should have paid each month towards the loan over that period and reimburse Mr L the difference, between what he actually paid (A), and what he should have paid, applying 8% simple interest to any overpayment from the date of payment until the date of settlement - C*
- *Use his bills and Fit statements, to work out the benefits he received for the period between the loan being paid off and the original loan term - D*
- *Deduct D from the amount Mr L paid off the loan – E*
- *Calculate 8% interest on E, applied from the date he paid off the loan until the date of settlement – F*
- *Reimburse C + F*

I also think the way Creation handled Mr L's complaint has caused him trouble and upset, and an award of £150 is appropriate.

Responses to my provisional decision

Creation responded on 4 May 2023 after the provisional decision was issued providing a copy of a letter dated, but not sent on, 21 April 2023 addressing the view of 20 December 2022 issued by the investigator. Creation's letter set out its disagreement with the investigator's position on our jurisdiction, reserved its rights on the merits of the case, and asked that we consider a Court case when considering redress in the event we decided we could look at the complaint. On 26 May 2023, Creation asked the case be reconsidered in the light of its letter, and requested a further provisional decision.

Mis-Sold Claims Assist, on behalf of Mr L, accepted the provisional decision.

It is important to highlight that in my provisional decision I made the finding that the proper construction of an event complained of per DISP 2.8.2R (2) (a) for the purposes of a complaint about an unfair relationship, is that the 'event' complained of, is the lender's participation in an unfair relationship in having and asserting rights as lender. That remains my finding for the purposes of this final decision.

However, later in the provisional decision under the section on whether a complaint had been brought in time in respect of the unfair relationship element of the complaint I stated, *"the event complained of is the alleged unfair relationship"*. For the avoidance of doubt, I did not intend to suggest the event complained of was other than the lender's participation in an unfair relationship in having and asserting rights as lender, and as per my final decision below I do not make the finding that the unfair relationship is the event complained of.

Further, on reflection it was more accurate to title one of my sub-headings in the provisional decision *"Have the events complained of in relation to an unfair relationship taking into account s.140A been brought in time?"* as have the events complained of in relation to an unfair relationship taking into account s.140A been complained of in time.

I responded to Creation's further submissions in a letter to both parties on 7 September 2023.

Request to issue another provisional decision

I want to make it clear to both parties that my provisional decision was issued following a full review of the case file. Whilst the arguments Creation belatedly made had not been raised in this case previously, they have been made on other cases, and I was aware of them. In any event, I consider these points are sufficiently addressed in my provisional decision taking into account the particular circumstances of Mr L's complaint.

While I note Creation wishes to reserve its position on the merits of the case, the rules and guidance on our process under DISP in the FCA Handbook enable me to proceed to consideration of a complaint where a respondent fails to comply with a time limit fixed for any aspect of the consideration of a complaint, and allow me to reach a decision on the basis of what has been supplied while taking into account the failure by a party to provide information requested (see DISP 3.5.9R (3), DISP 3.5.13R and DISP 3.5.14R (1)). Creation has been provided a reasonable period of time and several opportunities to respond to the merits of the complaint Mr L has brought, and it has declined to do so.

Therefore, I do not consider Creation's late response to the view to be a good reason to delay the complaint's progression to a final decision. The ombudsman service's scheme is one under which disputes are to be resolved quickly and fairly with minimum formality, and DISP 3.5.1R explains that I am required to attempt resolution of complaints at the earliest possible stage by whatever means appear to be most appropriate. I am satisfied it is appropriate to move to determination of this complaint by a final decision in the circumstances.

Approach to redress

Creation also requested that in the event I did consider the merits of the case, I take account the High Court judgment in Hodgson v Creation Consumer Finance Ltd [2021] EWHC 2167 ('Hodgson') when looking at redress.

Where an ombudsman considers it appropriate to determine a complaint in a complainant's favour and make a money award it is required to consider what constitutes fair compensation. However, this has to be considered in light of our statutory scheme to resolve complaints quickly and fairly with minimum formality.

Further, under DISP 3.6.4R (1)(a), I am required to take into account relevant law when considering what is fair and reasonable in all the circumstances of the complaint, but as per R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service [2008] EWCA Civ 642 ('Heather Moor') I am free to depart from relevant law so long as I state I am doing so in my

decisions and explain why (see paragraph 49 of the Court of Appeal's judgment in that case).

In my provisional decision I consider I have set out a fair way to compensate the consumer which is proportionate to the situation. That is, to require that the benefits and income from the system are set against the overall costs during the term of the loan. That means that there is no overall loss to the consumer as a result of entering the unfair contract. It also means that when the unfair relationship ends or was due to end, both parties are left in a fair position.

I have considered the methodology set out in Hodgson. But it does not change my view on what amounts to fair redress in the particular circumstances of this complaint. Although I accept that a Court may adopt the approach in Hodgson in cases which involve facts which are the same or similar to Mr L's complaint the ombudsman service is not bound to follow that approach where it considers its application would produce an outcome which is unfair or otherwise inconsistent with the nature of its statutory scheme.

Therefore, to an extent I accept that Hodgson is likely to be relevant law which I ought to take into account in the circumstances of this complaint, but as per Heather Moor it is appropriate, I set out my reasons for not following Hodgson in this correspondence. I will reiterate any relevant points in my final decision to the extent that may be required.

<u>Hodgson was considering assessment of damages under the Misrepresentation Act 1967</u>

It is important to note that in Hodgson the Court was considering an assessment of damages payable by a Defendant under the Misrepresentation Act 1967, and the Court was not undertaking an assessment of an appropriate remedy required to address the unfairness of a relationship between debtor and creditor under s.140A of the Consumer Credit Act 1974 (the 'CCA') as would be the case if Mr L's complaint were before the Courts.

It follows that Hodgson is not as relevant to my assessment of fair compensation as Creation considers it to be. Where a Court would have a considerable discretionary latitude to remedy an unfair relationship under s.140B of the CCA, the ombudsman service considers it has a wide latitude in respect of determining what would be a fair remedy in respect of complaints involving an unfair relationship taking into account relevant law and the nature of its statutory scheme.

Therefore, I have considered the approach of the Court's to remedies for unfair relationships. In the case of Kerrigan v Elevate Credit International Ltd (t/a Sunny) (In Administration) [2020] EWHC 2169 (Comm) ('Kerrigan') which relied on dicta in Patel v Patel [2009] 3264 (QB) ('Patel') the Court explained that it must ensure the remedy for an unfair relationship reflects and is proportionate to the nature and degree of the unfairness which it has found and is not to be analysed "in the sort of linear terms which arise when considering causation proper" (see [79] of Patel and [214] of Kerrigan). Further the Court in Kerrigan at [214] explained that the remedy should avoid giving:

> *"…the claimant a windfall, but should approximate, as closely as possible, to the overall position which would have applied had the matters giving rise to the perceived unfairness not taken place"*

In my view, the judgments in Kerrigan and Patel confirm that it would be fair for a Court to take a more flexible approach to assessing loss arising from an unfair relationship and would not be required to follow the approach in Hodgson which was applying the general principle under s.2(1) of the Misrepresentation Act 1967 that a claimant is to be put in the position that they would have been in had the relevant representation not been made.

I consider the flexible approach set out in Kerrigan aligns with the approach I have adopted in my provisional decision to redress, and to the extent it is relevant law (and more relevant in my view than Hodgson) I consider it appropriate to take into account for the purposes of my decision on what would be fair compensation in Mr L's complaint.

<u>Hodgson's approach to deductions and maintenance costs would not produce a fair outcome nor would be consistent with our statutory scheme in the circumstances</u>

As per Kerrigan, and because I found in my provisional decision that a Court would likely conclude that the relationship between Mr L and Creation was unfair arising from misrepresentations I've considered the similarities and differences between my proposed redress and that set out in Hodgson in order to establish whether it would be appropriate to follow it so as to avoid Mr L receiving a windfall while considering whether its application would, as closely as possible, achieve a result whereby Mr L is put in a position which would have applied had the matters giving rise to the unfair relationship not taken place.

By way of summary, in Hodgson the judge effectively made Mr Hodgson's panels self-funding, by accounting for deductions in four stages –

Stage one – The benefits received up until the point the case was decided upon

Stage two – The benefits from the point the case was decided upon to the end of the loan

Stage three – The benefits from the term of the loan to the 20th anniversary of installation, with a 40% deduction applied. As the judge felt the likelihood of Mr Hodgson benefitting from the solar panels, for all or part of this period, was reduced due to his age.

Stage four – a 100% deduction was applied to the benefits from the 20th anniversary of installation to the 25th (which the judge considered to be the whole lifetime of the panels), because he didn't think Mr Hodgson would benefit from the panels at all in this period of time due to his age.

The redress I am proposing is in line with Hodgson in respect of stages one and two but deviates from that point onward for several reasons.

In relation to stages three and four, the judge decided deductions based on the age the average man, the same age as Mr Hodgson, would die. Whilst I understand the judge's approach, I am conscious no evidence of Mr Hodgson's health was taken into account. If I were to apply the Court's approach at the ombudsman service, which has an inquisitorial remit, I consider such evidence would need to be taken into account (or at least requested) on every complaint, as individual health factors could significantly reduce a consumer's life expectancy, and the average deduction could be lower than it actually needs to be. I'm not aware of Mr L's medical history, but in order to determine whether or not an average reduction would be fair in the particular circumstances of the complaint I would need to engage in substantial data gathering and analysis.

As previously explained, I must be mindful of the nature of the ombudsman service's scheme to be a quick and fair dispute resolution service which has minimum formality. Any consideration of deductions for future contingencies (such as on the basis of the risk of mortality by reference to age and health) as part of an assessment of the losses suffered by a complainant following Hodgson would require what I consider would be disproportionately complex submissions on the amount of compensation which ought to be awarded or how it should be calculated which would be contrary to the minimum formality of the ombudsman service's scheme and its purpose to quickly and fairly resolve disputes. To that end it would appear inappropriate to adopt the approach in Hodgson to deductions as described above in the circumstances.

Another reason why I do not consider it appropriate to follow Hodgson in Mr L's complaint is that the judge did not deduct an amount for the maintenance and upkeep of the panels. He discussed the replacement of the inverter, however he didn't know the cost, and suspected that it wouldn't be a considerable amount. Our service has previously seen this issue raised on multiple cases, and the energy saving trust website sets out it is likely that the inverter will need to be replaced within the lifetime of the panels.

The energy saving trust website also states that panels should be cleaned to ensure optimal performance. So, I am satisfied that maintenance costs are likely if Mr L wants to receive the full benefits from his panels. In summary where Hodgson makes a deduction for the benefits of the panels over their lifetime but makes no allowance for likely costs I consider it fair and reasonable in the circumstances to award compensation which would put Mr L, so far as is possible, in a 'cost-neutral' position such that he is not put in a position whereby he will be unable to meet unexpected financial costs arising from the solar panel system in future where that would – in my view – lead to a continuation of unfairness arising out of the unfair relationship.

Mr L entered the relationship with Creation on the basis that once the loan was repaid, from that point onwards any benefits would then accrue to him, and I don't think it's unreasonable for him to expect this, nor do I think these benefits amount to a windfall as Kerrigan suggests is to be avoided when considering a remedy for an unfair relationship. When a consumer takes out a loan to pay for goods over a certain period and the loan is repaid, it is entirely reasonable for that consumer to enjoy the benefits of their purchase in the years after the loan is repaid. These benefits will also cover the ongoing costs associated with the upkeep of the panels, meaning he won't be left out of pocket.

Creation have failed to explain how applying Hodgson would produce a fairer outcome and has failed to engage on the merits of the complaint generally

While the ombudsman service's remit is inquisitorial, as per our procedural rules on evidence in DISP I can also take into account that Creation have so far failed to properly engage with the ombudsman service about the merits of the complaint to explain the particular aspects of the methodology in Hodgson which it considers ought to be taken into account with reference to any evidence or submissions it has, and why the ombudsman service's methodology for redress as set out in its provisional decision would be unfair in the circumstances of Mr L's complaint.

I asked each party to let me have any further information that they'd like me to consider by 14 September 2023.

Mis-sold Claims Assist confirmed they had nothing further to add.

Creation requested an extension of time of seven days which I granted in the circumstances, but it failed to respond by 21 September 2023 in any event. As per our service's procedural rules at DISP 3.5.9R (3) and 3.5.14R (1) I am entitled to reach a decision based on the information which has been supplied by the parties so far and can proceed with my consideration of the complaint where Creation has failed to respond by the deadline I set for providing further information.

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.

Having done so, I'm satisfied that

- Mr L brought his complaint about Creation's failure to accept the s.75 claim, and an unfair relationship in accordance with s.140A of the CCA, in time with reference to our jurisdiction rules on time limits for bringing complaints under DISP 2.8.

- In relation to the s.75 claim element of the complaint, Mr L has brought this in time where he complained within six years of the date when Creation failed to accept that claim.

- However, it was fair for Creation not to accept the s.75 claim on the basis that the claim against Creation under s.75 is likely to have been extinguished where the relevant limitation period for a claim against A for misrepresentation is likely to have expired taking into account the LA. Therefore, I do not uphold this aspect of the complaint.

- In relation to the s.140A unfair relationship element of the complaint, the event complained of for the purposes of DISP 2.8.2R (2)(a) was the lender's participation in an unfair relationship in having and asserting rights as lender. Further, in circumstances where I consider the unfair relationship to have ended when the

agreement between Mr L and Creation came to an end and taking into account the approach of the Court's to limitation periods under the LA to the extent appropriate, I am satisfied Mr L brought this aspect of his complaint within six years of the event complained of.

- The representations made to Mr L when he entered into the contract to buy the panels were false and mis-leading and induced him to enter into the contract. Therefore, I am satisfied that a court would likely conclude that due the misrepresentations made by A (acting as agent of Creation) a court would be likely to conclude the relationship between Mr L and Creation was unfair under s.140A. It follows that I do not consider Creation have acted in a fair and reasonable way in all the circumstances of the complaint concerning the unfair relationship and uphold this aspect of the complaint.

- I have considered the redress methodology applied by the courts in the case of *Hodgson* but do not consider it is appropriate to apply it to this case for the reasons which I provided in my correspondence of 7 September 2023 as incorporated into this final decision.

- It is appropriate for Creation to work out the likely benefits of the solar panels over a period of 10 years, based on actual date where available and estimations where not, and ensure that Mr L pays no more than that.

As neither party has provided any further information to alter my opinion of this complaint, I see no reason to depart from those findings.

My final decision

My final decision is that I uphold this complaint.

I require Creation to

- Calculate the total payments (the deposit and monthly repayments) Mr L made towards the solar panel system up until he repaid the loan - A
- Use his bills and Fit statements, to work out the benefits he received up until he repaid the loan - B
- Use B to recalculate what Mr L should have paid each month towards the loan over that period and reimburse Mr L the difference, between what he actually paid (A), and what he should have paid, applying 8% simple interest to any overpayment from the date of payment until the date of settlement - C
- Use his bills and Fit statements, to work out the benefits he received for the period between the loan being paid off and the original loan term - D
- Deduct D from the amount Mr L paid off the loan – E
- Calculate 8% interest on E, applied from the date he paid off the loan until the date of settlement – F
- Reimburse C + F

I also think the way Creation handled Mr L's complaint has caused him trouble and upset, and an award of £150 is appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 20 October 2023.

Sarah Holmes
Ombudsman