DRN-4785431

The complaint

Mrs R is unhappy with Ikano Bank AB (publ) (Ikano's) response to a claim she made under s.75 of the Consumer Credit Act 1974 (the 'CCA') and to an unfair relationship she claims to have with it taking account s.140A of the CCA.

What happened

On 13 May 2015 Mrs R entered into a contract with an installer ('N') to supply and fit a solar panel system. She paid for the panels using a fixed sum loan from Ikano.

The price of the panels was £10,676 and this plus the additional costs of the loan (interest of £5,913.87 and an arrangement fee of £135) made the total amount payable £16,489.57.

Mrs R via her representatives sent a letter before claim to Ikano on 13 October 2021 to propose claims under s.75 of the CCA for breach of contract and misrepresentation by N and arising out of an unfair relationship under s.140A of the CCA. She said she was led to believe the electricity savings and FIT payment income from the panels would cover the costs of the loan she'd taken out but in fact, there was a shortfall between the cost of the loan payments and the benefits, causing her a financial loss.

Mrs R said she had not been made aware that Ikano had been paid commission on the sale, which was a breach of fiduciary duty, Ikano had failed to ensure N observed the relevant codes at the time of sale, and insufficient checks had been carried out to make sure she could afford the repayments on the loan.

Ikano didn't respond to Mrs R's letter before claim and she subsequently referred a complaint to our service about the s.75 claim and the alleged unfair relationship under s.140A on 22 May 2022. We made Ikano aware of this on 30 May 2022.

Ikano said it then issued a final response to Mrs R's complaint. It said it would not meet her s.75 claim because she made it than more than six years after the alleged mis-sale took place. So, it considered the claim was time-barred by the Limitation Act 1980 ("LA"). Ikano said Mrs R had also referred her complaint to this service too late so we didn't have the power to look at it under our rules.

An investigator reviewed the complaint and issued his provisional assessment on In May 2023. He said that Mrs R had brought her complaint about Ikano's handling of her s.75 claim to us in time under our rules.

However, given his view that the matters giving rise to the s.75 claim took place around the time the agreement was entered into during May 2015, he considered it was likely that the provisions of the LA meant that Mrs R did not have a valid claim against N and therefore no like claim against Ikano under s.75. So, he didn't think Ikano had treated Mrs R unfairly by declining her s.75 claim.

However, he thought that Mrs R's complaint about Ikano's participation in an allegedly unfair relationship per s.140A was made in time where Mrs R's loan agreement with Ikano was ongoing (and remains so).

The investigator went on to conclude that that the benefits of the panels had likely been misrepresented to Mrs R at the time of the sale and those misrepresentations had created an unfair relationship. He recommended that Ikano should recalculate the loan and ensure that Mrs R paid no more than the likely benefits she would receive over the loan period.

The investigator recommended that Ikano should calculate the benefits from the panels over 10 years (the period of the loan) and ensure that Mrs R paid no more than that.

As the loan was still running the investigator offered a choice of four options to Mrs R as to what she would like to do with any overpayments she had made to the loan so far.

a) the overpayments are used to reduce the outstanding balance of the loan and she continues to make her current monthly payment resulting in the loan finishing early,
b) the overpayments are used to reduce the outstanding balance of the loan and she pays a new monthly payment until the end of the loan term,
c) the overpayments are returned to Mrs R, and she continues to make her current monthly payment resulting in her loan finishing early, or
d) the overpayments are returned to Mrs R, and she pays a new monthly payment until the end of the loan term.

Mrs R accepted the investigator's assessment and chose option d).

Ikano did not agree with the investigator's assessment and asked an ombudsman to review the complaint. It said N would have given a page of information to Mrs R as standard before the contract was entered into which set out the estimated benefits the solar panels would generate. It said that while it had not been given the page of information, it was likely (seeing as the sales contract estimated production of 2,535 kwh per year), that it would have made clear that the benefits would not have been enough to pay for the contractual monthly repayments on the loan.

Ikano did however accept that Mrs R had referred her complaint about an unfair relationship to this service in time.

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.

(1) My findings on the merits of the s75 complaint

Creditors have no means of knowing what s.75 liabilities they may have, nor of investigating such liabilities nor of recovering them from suppliers, unless or until debtors raise s.75 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 s.75 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 from the cause of action, after which they become time barred.

The alleged misrepresentation cause of action arose when an agreement was entered into on 13 May 2015 based on the alleged misrepresentations. The alleged breach of contract isn't defined but I take it to be that N (acting on behalf of Ikano) 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 breach of contract also occurred as soon as the agreement was entered into.

In these circumstances Mrs R had brought her s.75 claim to Ikano on 13 October 2021 which is more than six years after she entered into an agreement with them on 13 May 2015 – which I consider to be around the time when the causes of action for misrepresentation and breach of contract to have accrued.

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 Ikano to decline the s.75 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 s.140A

I've considered whether representations and contractual promises by N can be considered under s.140A.

Therefore, I have considered 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 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."

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. s.56 of the CCA has the effect of deeming N to be the agent of Ikano in any antecedent negotiations, and so Ikano is responsible for the antecedent negotiations N carried out direct with Mrs R.

I think the negotiations in this case 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 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 N for which Ikano was responsible under s.56 when considering whether it is likely Ikano had acted fairly and reasonably toward Mrs R. But in doing so, I should take into account all the circumstances and consider whether Mrs R's relationship with Ikano was unfair under s140A.

What happened?

Mrs R said that she was told by the representative of N that the benefits of the panels (energy generated and FIT payments) would cover her electricity usage and her loan costs.

Like the investigator, I've not seen anything that makes me think Mrs R had an interest in buying solar panels before she was contacted by N and Mrs R has said she would not have bought them had she known the real cost to her. Mrs R came out of her meeting with N having purchased a £10,000 solar panel system using a ten-year loan costing nearly £6,000 in interest, which increased her monthly outgoings over that period. It seems unlikely to me from what I've seen in this case that Mrs R would have agreed to buy the system had she not been told the installation would be self-funding and come with no extra financial burden.

Ikano said Mrs R would have been given a document before she bought the solar panels which would have shown the benefits generated by them would not be sufficient to meet her monthly loan repayments and electricity usage. It hasn't provided such document, or anything else for that matter that would lead me to believe this information was provided to Mrs R. The contract with N estimates the amount of energy Mrs R's solar panels would produce in a year, but this wasn't enough for Mrs R to work out how that translated into a monetary benefit. So, Mrs R was unable to compare the cost and benefits of the system.

I think this meant Mrs R would have placed considerable weight on what she was told by N about the benefits the solar panels would generate. And from everything I've seen, including Mrs R's persuasive testimony, it seems most likely to me that N told Mrs R those benefits would cover her monthly loan repayments.

For the solar panels to pay for themselves as Mrs R says she was told, they would need to cover the costs of the loan and Mrs R's cash payment and produce combined savings and fit income of over £1,649.16 per year. I've not seen evidence that Mrs R's system produced this, even after the issues that were affecting performance were rectified in 2018. So, these statements were not true.

Considering Mrs R's account about what she was told, and the documentation I've seen from the time of the sale, I think N likely gave Mrs R a false and misleading impression of the self-funding nature of the solar panel system.

I consider N's misleading presentation went to an important aspect of the transaction for the system, namely the benefits which Mrs R was expected to receive by agreeing to installation of the system. I consider that N'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 Mrs R went into the transaction. Either way, N's assurances were seriously misleading and false, undermining the purpose of the transaction from Mrs R's point of view.

Would the relationship likely be found unfair under s.140A?

Where Ikano is to be treated as responsible for N's negotiations with Mrs R in respect of its misleading and false assurances as to the self-funding nature of the solar panel system, I'm persuaded that the relationship between Mrs R and Ikano would most likely be found 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 Ikano has benefitted from the interest paid on a loan she would otherwise have not taken out.

Therefore, I am persuaded that Ikano has not treated Mrs R 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.

In all the circumstances I consider that fair compensation should aim to remedy the unfairness of Mrs R and Ikano's relationship arising out of N's misleading and false

assurances as to the self-funding nature of the solar panel system. I require Ikano to repay Mrs R a sum that corresponds to the outcome she could reasonably have expected as a result of N's assurances. That is, that Mrs R's loan repayments should amount to no more that the financial benefits she receives for the duration of the loan agreement.

Therefore, to resolve the complaint, Ikano should recalculate the agreement based on the known and assumed savings and income Mrs R 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 Mrs R received by way of FIT payments as well as through energy savings.

If Mrs R is unable to supply this information to Ikano covering the whole period since the solar panels were installed, (such as where the energy provider has gone out of business or where it no longer holds that information), Ikano should use the information that is available to compete the calculation using reasonably assumed benefits for the periods where information is not available.

Mrs R made some other points relating to commission and irresponsible lending in her letter before claim. She hasn't elaborated on these points since referring her complaint to this service. However, given I've upheld her complaint for the reasons I've set out, and given the redress I am directing in the circumstances, I don't think I need to make findings on those points.

My final decision

For the reasons I have explained I uphold Mrs R's complaint. To put things right Ikano Bank AB (publ) must:

- Calculate the total payments (the deposit and monthly repayments) Mrs R has made towards the solar panel system up until the date of settlement – A

- Use Mrs R's bills and FIT statements, to work out the known and reasonably assumed benefits she received up until the date of settlement – B*

- Calculate the difference between what Mrs R actually paid (A), and what she should have paid (B) over that period – C

- If the calculation in C means that Mrs R has overpaid, repay any overpaid amount to Mrs R plus 8% simple interest per year from the date of each overpayment until the date of settlement

- Use Mrs R's bills and FIT statements, to work out the known and reasonably assumed benefits she will receive for the period between the settlement of her complaint and the end of the original loan term – D

- Rework the loan so that the amount left to pay is D and so that the remaining monthly repayments of that amount are spread equally over the remaining term of the loan.

* If Ikano Bank AB (publ) considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mrs R how much it's taken off. It should also give Mrs R a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs R to accept or

reject my decision before 14 June 2024.

Michael Ball
Ombudsman