DRN-4820969

The complaint

Miss L 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 into account Section 140A ('s.140A') of the CCA.

What happened

In November 2014, Miss L bought a solar panel system ('the system'), from a company I'll call "M", using a 10-year fixed sum loan from Creation.

Miss L made a claim to Creation through a claims management company ("CMC") on 1 October 2021. The CMC said that Miss L was told by M that the financial benefits through savings on her electricity bills and income from the Feed-In Tariff ("FIT") would cover the loan repayments so her outgoings would reduce. However, that hasn't happened, so she's suffered a financial loss. She also believed that what happened at the time of the sale created an unfair relationship between herself and Creation.

Creation responded to the complaint in its final response. It dismissed the complaint without looking into what had happened, since it said the complaint was made outside of the time limits set out in the Financial Conduct Authority's Dispute Resolution (DISP) Rules.

Unhappy with Creation's response, Miss L made a complaint about this and referred it to our service.

Creation then told us that in addition to what it wrote in its final response, it thought the claim was made outside the time limits set out in the Limitation Act, so any claim under s.75 was made too late and Creation had no liability. Creation confirmed that the credit agreement is still running.

An investigator considered Miss L's complaint. The investigator thought that:

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

She recommended that Miss L keep the system and Creation make sure that Miss L pays no more for the system than the benefit she will receive over the loan term, making the system self-funding within that time.

Creation did not respond. So, the case was progressed to the next stage of our process, an Ombudsman's decision. I issued a provisional decision explaining my reasons for upholding

the complaint. Creation did not respond to this by the deadline I gave. Miss L responded to say she had nothing further to add. As such, this final decision is the same as my provisional one.

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 Miss L'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 Miss L's s.75 claim on 14 December 2021. This relates to a regulated activity under our compulsory jurisdiction. Miss L brought her complaint about this to the ombudsman service on 9 February 2022. 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 Miss L. Here the relationship was ongoing at the time it was referred to the ombudsman service on 9 February 2022, so the complaint has been brought in time for the purposes of our jurisdiction.

My findings on the merits of the complaint

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 5 November 2014. Miss L brought her s.75 claim to Creation on 1 December 2021. That is more than six years after she entered into the agreement with Creation. Given this, I think it was fair and reasonable for Creation to not have accepted the s.75 claim. So, I do not uphold this part 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 Miss L. 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

Miss L has said that she was told by M's representative that Miss L was told by M that the financial benefits through savings on her electricity bills and income from the Feed-In Tariff ("FIT") would cover the loan repayments so her outgoings would reduce. Miss L said that prior to this she had no interest in getting solar panels.

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

The credit agreement was signed on 5 November 2014. This included the following information:

- Cash price of the system £9,795.00
- Deposit £0.00
- Amount of credit £9,7950.00
- Interest charge £5,473.20
- Arrangement fee £35.00
- Total amount payable £15,403.20
- 120 monthly repayments of £128.36 per month

As such the loan repayments amounted to £1,540.32 per year.

I've considered the contract signed by Miss L and M on 5 November 2014. The likely financial benefits of the system aren't included on this document. So, it appears that there was no written information provided to Miss L showing the estimated financial benefits of the system at the time she agreed to the purchase. This means that, when making the decision to purchase the system using the loan, she would've been entirely reliant on the information given to her verbally by M's representative.

Miss L did, however, sign a satisfaction note on 27 November 2014, following installation of the system. This provided the following information about the "Year 1 system performance expectations" – based on the system generating 3,589 kWh per year:

A. Generation tariff income (14.38p per kWh) £516.10

B. Export tariff income (4.77p per kWh) £171.20

C. Electricity savings (16p per kWh) £287.12

Estimated first-year benefit (A+B+C) £974.42

Comparing the first-year benefit to the annual loan repayment (£1,540.32), it is clear there will be a shortfall in the first year. However, this information was only provided to Miss L after

installation of the system. There is no evidence that she was given this information prior to signing the contract or the credit agreement.

I also note an error in the calculation shown on the satisfaction note, in that the export tariff income is twice what it should be. M has calculated this based as 4.77p per kWh multiplied by 3,589 kWh – being the full amount of electricity generated. But the calculation should be 4.77p per kWh multiplied by 1,794.5 kWh – resulting in an income of £85.60. This is because the industry standard calculations (which M claimed to use here), and the FIT scheme, worked in such a way that 50% of the electricity generated was assumed to be used in the home (electricity savings), leaving 50% of the electricity to be exported to the grid, for which the customer is paid the export tariff.

I asked Miss L about this document, and the fact it shows a first-year benefit that was less than the annual loan repayments. She said that upon signing this document she was told not to worry as any shortfall would be recouped within a few months.

Miss L says that she was unhappy with the benefits she was getting from the system and tried to complain about this to M – but that her complaints were ignored. The CMC told her that M had changed its name shortly after Miss L purchased the system. But I have checked Companies House records and can see that M did not change its name. However, it went into liquidation in May 2015, which may be why it did not respond to Miss L's complaints. The CMC appears to have been referring to a separate and unrelated company that had a similar name, which it changed.

Miss L has told us that she had no interest in solar panels prior to M contacting her, and she wouldn't have purchased the system if she'd been aware it would not pay for itself within the 10-year loan period.

Overall, considering all the evidence, I find what Miss L's said to be sufficiently plausible and persuasive. There is nothing to indicate that Miss L was shown any breakdown of estimated benefits before she agreed to the purchase, so she relied on what she was told verbally. The estimate she was given after the installation was completed was overstated, and although it still showed a shortfall compared to her annual loan repayments, her concerns were alleviated by what she was told at the time.

I've concluded that when Miss L entered into the contract on 5 November 2014, she did so on the understanding that the system would pay for itself within the loan term. This was based on what she had been told by M before signing the contract. That would mean the income and savings from the system would need to at least match her total loan repayments of £15,403.20 within the ten-year loan term.

Creation hasn't provided a response to our investigator's assessment, so I don't know its reasons for disputing the outcome that was reached.

Using the generation figures, FIT and electricity unit rates shown on the satisfaction note, I've calculated what at that time would've been a reasonable estimate of how much benefit Miss L was likely to receive over the ten-year loan term. I've made reasonable assumptions about inflation rates based on what was known at that time (historical RPI and electricity price inflation data from the ONS). This shows that Miss L was unlikely to recoup her loan repayments until around 14 years after installation. This is much longer than she was told. As such, I think M ought to have been aware that the system would not pay for itself within ten years, and that what it had told her was not true.

Considering all of this, I think it likely that M gave Miss L a false and misleading impression of the self-funding nature of the solar panel system.

I think M's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Miss L was expected to receive by agreeing to purchase the system. I think 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 such that Miss L would not be out of pocket. But, even if they did not have that effect, they nonetheless represented the basis upon which Miss L went into the transaction. Either way, I think M's assurances were seriously misleading and false, undermining the purpose of the transaction from Miss L'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 Miss L 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 Miss L and Creation was unfair.

Because of this shortfall between her costs and the actual benefits, over the loan term she has had to pay more than she expected to cover the difference between the benefits received from the system and the cost of the loan. So, clearly Creation has benefitted from the interest paid on a loan Miss L would otherwise not have taken out.

Putting things right

In all the circumstances, I consider that fair compensation should aim to remedy the unfairness of Miss L and Creation's relationship arising out of M's misleading and false assurances as to the self-funding nature of the solar panel system. Creation should repay Miss L a sum that corresponds to the outcome she could reasonably have expected as a result of M's assurances. That is, that Miss L's loan repayments should amount to no more than the financial benefits she received 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 Miss L received and will receive from the 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 miss L received by way of FIT payments as well as through energy savings. If Creation requires it, Miss L should supply up to date details, where available, of all FIT benefits received, electricity bills and current meter readings to Creation. Where Miss L is unable to provide this information, Creation can make reasonable assumptions when calculating the settlement.

Creation 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, subject to any responses received by the deadline set out above, I have provisionally decided to uphold Miss L's complaint. To put things right I am planning to telling Creation Consumer Finance Ltd to:

- Calculate the total payments (including arrangement fee) Miss L has made towards the solar panel system up until the date of settlement – A

- Use Miss L's bills and FIT statements (where available), to work out the benefits she received up until the date of settlement* – B
- Use B to recalculate what Miss L should have paid each month towards the loan over that period and calculate the difference between what she actually paid (A) and what she should have paid, applying 8% simple interest to any overpayment from the date of payment until the date of settlement** – C
- Reimburse C to Miss L
- Use Miss L's bills and FIT statements to work out the 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 remaining balance is D and recalculate the remaining monthly payments equally over the remaining term of the loan.
- Pay Miss L an additional £100 in recognition of the distress and inconvenience cause by Creation rejecting Miss L's entire claim as having been made too late when it ought to have been evident to Creation that part of it was not.

*Where Miss L is not able to provide all the details of her meter readings, electricity bills and/or FIT benefits, Creation Consumer Finance Ltd should use known and reasonably assumed benefits.

** If Creation Consumer Finance Ltd considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Miss L how much it's taken off. It should also give Miss L 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 L to accept or reject my decision before 9 July 2024.

Phillip Lai-Fang
Ombudsman