

The complaint

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

What happened

In February 2014, Mr L bought a solar panel system ('the system') from a company I'll call "G" using a ten-year fixed sum loan from Creation.

In November 2021, Mr L complained to Creation through a claims management company. He said that he was told by G that the income and savings from the system would cover the monthly loan repayments, so he would not be any worse off each month. However, that hasn't happened, and he's suffered a financial loss as a result. Mr L also believed that what happened at the time of the sale created an unfair relationship between him and Creation.

Creation responded to the complaint in its final response. It dismissed Mr L's complaint as being made too late under the Financial Conduct Authority's Dispute Resolution (DISP) Rules.

Unhappy with Creation's response, Mr L referred his complaint to the Financial Ombudsman Service.

When writing to us, Creation also said that Mr L's claim under s.75 was out of time due to the provisions of the Limitation Act ("LA") and that Creation had no liability for any misrepresentation or breach of contract by G at the time of sale.

Our Investigator considered Mr L's complaint and ultimately thought that:

- Given the s.75 claim was 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 Mr L and Creation.

Our Investigator recommended that Mr L keep the system and Creation ensure that Mr L pays no more for it than the benefits the system will provide over the original ten-year loan term.

Mr L accepted the investigator's view. Creation reiterated that it thought the complaint was outside of our jurisdiction. And said that if it wasn't, and the complaint was upheld, the redress should follow the approach taken by the courts in a case known as "Hodgson".

I've been asked to make a decision on the complaint, which is the final stage in our complaint handling 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.

My findings on jurisdiction

I'm satisfied I have jurisdiction to consider Mr L's complaint, both in respect of the refusal by Creation to accept and pay his s.75 claim and the allegations of an unfair relationship under s.140A. Creation is aware of this from previous decisions.

The s.75 complaint

The event complained of here is Creation's alleged wrongful rejection of Mr L's s.75 claim on 27 November 2021. This relates to a regulated activity under our compulsory jurisdiction. Mr L brought his complaint about this to the ombudsman service on 3 January 2022. So, his 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 Mr L. Here the relationship was ongoing at the time it was referred to the ombudsman service, 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 10 February 2014. Mr L brought his s.75 claim to Creation on 22 November 2021. That is more than six years after he entered into an agreement with it. 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 part of the complaint.

The unfair relationship under s.140A complaint

When considering whether representations and contractual promises by G 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 G 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 G for which Creation were responsible under s.56 when considering whether it is likely Creation had acted fairly and reasonably towards Mr 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 s.140A.

What happened

Mr L has said that he was told by G's representative that the income and savings from the system would cover the monthly loan repayments, so he would not be any worse off each month.

I've looked at the documents available to see if there was anything contained within them that made it clear that the solar panel system wouldn't be self-funding in this way. This documentation is limited to the credit agreement, which shows what Mr L had agreed to pay for the system, including interest. This was £10,858.96 over 120 monthly repayments of £90.49.

Other than Mr L's recollection of what he was told, there is nothing showing the estimated benefits of the system, and nothing to contradict what he has said.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £1,085 per year. Mr L says the benefits of the system have not been this high. In most cases I've seen, the benefits of a domestic solar panel system do not cover the monthly loan repayments from the start. So, Mr L's recollection is, in my opinion, plausible and persuasive. I'm satisfied that he was told the system's benefits would cover the monthly loan repayments, and that this hasn't happened.

What G told Mr L was misleading and went to an important aspect of the transaction for the system, namely the benefits and savings which Mr L was expected to receive by agreeing to its installation. I consider that G's assurances in this regard likely amounted to a contractual promise that the solar panel system would have the capacity to cover the monthly loan repayments. But, even if they did not have that effect, they nonetheless represented the basis upon which Mr L went into the transaction. Either way, I think G's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr L's point of view.

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

Where Creation is to be treated as responsible for G's negotiations with Mr 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 Mr L and Creation was unfair.

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 that Mr L would not otherwise have taken out.

Putting things right

In all the circumstances I consider that fair compensation should aim to remedy the unfairness of Mr L and Creation's relationship arising out of G's misleading and false assurances as to the self-funding nature of the solar panel system.

To do this Creation should repay Mr L a sum that corresponds to the outcome he could reasonably have expected as a result of G's assurances. That is, that Mr L's loan repayments should amount to no more than the financial benefits he has and is likely to receive over the original loan term.

Creation told us that it considers our approach to redress should be in accordance with the Court's decision in *Hodgson v Creation Consumer Finance Limited [2021] EWHC 2167 (Comm)* ('Hodgson').

I have considered the Hodgson judgment, but this doesn't persuade me I should adopt a different approach to fair compensation. Hodgson concerned a legal claim for damages for misrepresentation, whereas I'm considering fair redress for a complaint where I consider it likely the supplier made a contractual promise regarding the self-funding nature of the solar panel system. And even if I am wrong about that, I am satisfied the assurances were such that fair compensation should be based on Mr L's expectation of what he would receive. I consider Mr L has lost out and has suffered unfairness in his relationship with Creation, to the extent that his loan repayments to Creation exceed the benefits from the solar panels. On that basis, I believe my determination results in fair compensation for Mr L.

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 Financial Ombudsman Service scheme, which is intended to be fair, quick, and informal.

Therefore, to resolve the complaint, Creation should recalculate the agreement based on the known and assumed savings and income Mr L received from the system over the ten-year term of the loan, so Mr L pays no more than that. To do that, I think it's important to consider the benefit Mr L received by way of FIT payments as well as through energy savings.

Mr L will need to supply up to date details, where available, of all FIT income received and electricity bills to Creation. If he cannot provide this he will at least need to provide a meter reading so Creation can see how much electricity the system has generated. For periods where no FIT statements and/or electricity bills are not available, Creation can use reasonable assumptions in its calculation.

Finally, I think that Creation's failure to consider the fairness of its relationship with Mr L when responding to him caused Mr L some degree of trouble and upset. In recognition of this, Creation should also pay Mr L compensation for trouble and upset as set out below.

What Mr L must do

Mr L must provide Creation with at least a meter reading or Feed-In Tariff statement. Without this I see no way for Creation to calculate what redress is payable – since it will have insufficient information about the system. So, if Mr L fails to provide this information, Creation will only have to pay him the compensation for trouble and upset as set out below.

My final decision

For the reasons I have explained I uphold Mr L's complaint.

Creation must pay Mr L £100 for the trouble and upset caused.

Then, once Mr L has provided a meter reading or FIT statements to evidence the electricity generated by the system, Creation Consumer Finance Ltd must:

- Calculate the total payments (the deposit and monthly repayments) Mr L has made towards the solar panel system up until the date of settlement – A
- Use Mr L's bills and FIT statements, to work out the benefits he received up until the loan term* – B
- Use B to recalculate what Mr L should have paid each month towards the loan over that period and calculate the difference, between what he actually paid (A), and what he should have paid, adding 8% simple interest per year to any overpayment from the date of overpayment until the date of settlement** – C
- Reimburse C to Mr L

*Where Mr L has not been able to provide all the details of his electricity bills and/or FIT benefits, Creation Consumer Finance Ltd can 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 Mr L how much it's taken off. It should also give Mr L a tax deduction certificate if she asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 24 July 2024.

Phillip Lai-Fang
Ombudsman