DRN-4920692

The complaint

Mr C has complained about Creation Consumer Finance Ltd ('Creation')'s response to a claim he 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 July 2013, Mr C bought a solar panel system ('the system'), from a company I'll call "G", using a ten-year fixed sum loan from Creation.

In September 2021, Mr C complained to Creation. He said that he was told by G that the income and savings from the system would cover the loan repayments, so he would be no worse off each month. However, he says that hasn't happened, and he's suffered a financial loss as a result. Mr C also said 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 the complaint because it said it had been made too late under the Dispute Resolution (DISP) Rules, which set out how financial businesses should deal with complaints.

Unhappy with Creation's response, Mr C referred his complaint to our service. He said that under Section 32 of the Limitation Act his claim was made in time.

When Creation sent us its file, it also said that Mr C's claim was out of time under the relevant legislation.

Our Investigator considered Mr C's complaint, they ultimately thought that:

- Given the s.75 claim was likely to be time barred under the Limitation Act, it seemed fair for Creation to not uphold this aspect of the complaint.
- 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 C and Creation.

Our Investigator recommended that Mr C keep the system and Creation take into account what Mr C had paid so far, along with the benefits he received, making sure the system was effectively self-funding over the ten-year loan term.

Mr C accepted the investigator's view.

Creation reiterated that it thought the complaint was outside of our jurisdiction due to the

time limits that apply. And that if we disagreed and upheld the complaint, the redress should follow the approach taken by the courts in a case known as “Hodgson”.

I issued a provisional decision explaining my reasons for upholding this complaint, which differed slightly to our Investigator’s. Neither Mr C nor Creation responded by the deadline they were given. So my final decision is in line with 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.

I’m satisfied I have jurisdiction to consider Mr C’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.

The s.75 complaint

The event complained of here is Creation’s alleged wrongful rejection of Mr C’s s.75 claim on 9 November 2021, this relates to a regulated activity under our compulsory jurisdiction.

Mr C brought his complaint about this to the ombudsman service on 6 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 C. Here the relationship was ongoing at the time it was referred to the ombudsman service on 6 January 2022, so the complaint has been brought in time for the purposes of our jurisdiction.

My findings on the merits of the complaint

I’ve decided to uphold this 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 C. 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 C has said that he was told by G's representative that the income and savings from the system would cover the loan repayments, so he would be no worse off each month. I've looked at the documents provided by Mr C to see if there was anything contained within them that made it clear that the solar panel system wouldn't be self-funding. There was not.

The credit agreement made clear what Mr C had agreed to pay for the system, but I have not seen anything from the time of sale to indicate the estimated income and savings of the system would be less than the monthly loan repayments. So, I think that Mr C would've relied on what he was told by G's representative.

I'm mindful that a 2015 consent order of the Renewable Energy Consumer Code ("RECC") said that G had breached the RECC in 2013, including section 5.2, which deals with the behaviour of sales representatives, including that they should not provide false or misleading information to consumers. This suggests that around the time of sale G had some issues with what it was telling consumers about solar panel system, and that by 2015 RECC was not completely satisfied that those issues had been resolved.

Creation hasn't provided evidence to dispute what Mr C's said happened. Yet Mr C left the meeting having agreed to an interest-bearing loan, with a monthly repayment of around £83, payable for ten years. Given the financial burden he took on I find Mr C's account of what he was told by G to be credible and persuasive. The loan is a costly long-term commitment, and I can't see why he would have seen this purchase appealing had he not been given the reassurances he's said he received from G.

For the system, to pay for itself, they would need to produce combined savings and FIT income of around £1,120 per year. I have not seen anything to indicate Mr C says his system has not produced this, not least because he has not received FIT payments. So, these statements were not true. I think G's representative must reasonably have been aware that Mr C's system would not have produced benefits at this level – and that the system would not pay for itself in the way Mr C was told.

Considering Mr C's account about what he was told, the documentation he was shown at the time of the sale, and the fact Creation hasn't disputed Mr C's recollection of what happened, I think it likely G gave Mr C a false and misleading impression of the self-funding nature of the solar panel system.

I consider G's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Mr C was expected to receive by agreeing to the installation of the system. 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 fund the loan repayments. But, even if they did not have that effect, they nonetheless represented the basis upon which Mr C went into the transaction. Either way, I think G's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr C'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 C 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 C 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 he would not otherwise have taken out.

The s.75 complaint

Given my above conclusions and bearing in mind the purpose of my decision is to provide a fair outcome quickly with minimal formality, I don't think I need to provide a detailed analysis of Mr C's s.75 complaint. Furthermore, this doesn't stop me from reaching a fair and reasonable decision

Fair compensation

In all the circumstances I consider that fair compensation should aim to remedy the unfairness of Mr C and Creation's relationship arising out of G's misleading and false assurances as to the self-funding nature of the solar panel system. Creation should repay Mr C a sum that corresponds to the outcome he could reasonably have expected as a result of G's assurances. That is, that Mr C's loan repayments should amount to no more than the financial benefits he received for the duration of the loan agreement.

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 C's expectation of what he would receive. I consider Mr C 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 C.

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.

Therefore, to resolve the complaint, Creation should recalculate the agreement based on the known and assumed savings and income Mr C received from the system over the ten-year term of the loan, so Mr C pays no more than that. To do that, I think it's important to consider the benefit Mr C received by way of FIT payments as well as through energy savings. Where Mr C has not received FIT payments and cannot do so in future, such payments should not be included in the calculation.

Mr C will need to provide Creation with up-to-date details of his electricity generation meter

reading and, where available, all relevant FIT statements and electricity bills. But Creation can use reasonable assumptions for periods where evidence of the actual benefits is not available.

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

My final decision

For the reasons I have explained, I uphold Mr C's complaint. To put things right, Creation Consumer Finance Ltd must:

- Calculate the total payments Mr C has made towards the solar panel system up until the date of settlement – A

- Use Mr C's meter reading, bills, and FIT statements, to work out the benefits he received, up until the date of settlement* – B

- Use B to recalculate what Mr C 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, applying 8% simple interest per year to any overpayment from the date of payment until the date of settlement** – C

- Reimburse C to Mr C.

- Pay Mr C an additional amount of £100 compensation.

* Where Mr C has not been able to provide all the details of his electricity bills and/or FIT benefits, Creation Consumer Finance Ltd should complete the calculation using known and reasonably assumed benefits.

** If Creation Consumer Finance Ltd is required by HM Revenue & Customs to deduct income tax from the interest, it should tell Mr C how much it's taken off. It should also give Mr C 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 C to accept or reject my decision before 18 August 2024.

Phillip Lai-Fang
Ombudsman