DRN-4928076

The complaint

Mr H has complained about the way Creation Consumer Finance Ltd ("Creation") responded to claims he'd made in relation to misrepresentation, breach of contract, and an alleged unfair relationship taking into account section 140A ("s.140A") of the Consumer Credit Act 1974 (the "CCA").

Mr H has been represented in bringing his complaint but, to keep things simple, I'll refer to Mr H throughout.

What happened

In October 2013 Mr H entered into a fixed sum loan agreement with Creation to pay for a £10,110 solar panel system ("the system") from a supplier I'll call "E". The total amount payable under the agreement was £15,892.80 and it was due to be paid back with 120 monthly repayments of £132.44.

In September 2021 Mr H sent a letter of claim to Creation explaining he thought the system was mis-sold. He said E told him he'd be paid for the electricity the system generated through the government's Feed in Tariff (FIT) payments and that the system would be self-funding. He said E told him the system would be maintenance free with a 40-year life expectancy and his energy bills would go down.

Mr H said the system was misrepresented and believed the statements and several other actions at the time of the sale created an unfair relationship between himself and Creation.

Creation sent a final response letter in November 2021 to say it was dismissing the complaint without consideration because it had been brought out of time.

Unhappy with Creation's response, Mr H decided to refer his complaint to the Financial Ombudsman in January 2022.

One of our investigators looked into things and thought E had likely told Mr H the system would be self-funding and that the documentation didn't clearly set out it wasn't. They didn't think the system was self-funding over the course of the loan term, and so they thought E had misrepresented it. They thought a court would likely find the relationship between Mr H and Creation was unfair and that he'd suffered a loss through entering into the agreement. They thought Creation should recalculate the loan based on known and assumed savings and income over the course of the loan so that Mr H pays no more than that, and he keeps the system. They also recommended £100 compensation for the impact of Creation not investigating the s.140A claim.

Mr H accepted the view, but Creation didn't. In summary, Creation said:

- The complaint was brought more than six years after the events complained of, so outside the time limits which apply to the jurisdiction of the Financial Ombudsman.
- Mr H's allegations of an unfair relationship don't relate to any events post-dating the sale of the system in around October 2013.

- The end of a credit relationship may be the starting point for limitation purposes in civil litigation, but it isn't the starting point for the six-year period under DISP 2.8.2R(2)(a), where the unfair relationship itself would not constitute an event. It is the event(s) giving rise to an unfair relationship which are the "events complained of" for the purposes of that rule.
- Mr H had not brought a complaint about Creation's handing of his section 75 ("s.75") claim and it did not issue a final response letter in relation to one.
- The investigator conflates the jurisdiction rules on the Financial Ombudsman's time limits for bringing complaints under DISP 2.8.2R(2)(a) and DISP 2.8.2R(1). It considers the approach allows any complainant to bring an otherwise time-barred claim in time by complaining about the decision not to uphold the complaint.
- Without prejudice to its position on jurisdiction it considers the approach to redress should be in accordance with the Court decision in Hodgson v Creation Consumer Finance Limited [2021] EWHC 2167 (Comm) ("Hodgson*").*

I issued a provisional decision on the complaint. I set out my findings on jurisdiction saying why Mr H had brought his s.75 and s.140A claims in time. Neither party has disputed what I said, so I'm not going to set it out again. With regards to the merits of the complaint, in my provisional decision I said:

<u>The unfair relationship under s.140A complaint</u>

When considering whether representations and contractual promises by E 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 E 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 E for which Creation was responsible under s.56 when considering whether it is likely Creation had acted fairly and reasonably towards Mr H.

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.

<u>What happened?</u>

Mr H says he was verbally misled that the system would effectively pay for itself. I've taken account of what Mr H says he was told, and I've reviewed the documentation that I've been supplied.

The fixed sum loan agreement sets out the amount being borrowed; the interest charged; the total amount payable; the term; and the contractual monthly loan repayments. I think this was set out clearly enough for Mr H to be able to understand what was required to be repaid towards the agreement.

We've asked if there was other documentation from the point of sale, but Mr H said he's supplied everything he had. I've not seen enough to demonstrate Mr H had documentation from the point of sale that would've given him enough information about the savings he'd likely make from the system.

Mr H said he had no interest in purchasing a solar panel system before E contacted him. He said he was motivated by the fact E told him he'd be making his own electricity and that it would be better for the environment. He said E told him through generating electricity he wouldn't have to pay for bills. He said E showed him a graph showing the benefits of the system. And he was reassured by E because he had a south facing garden. He said E told him it would be a good investment and that he'd receive three decent FIT payments a year, but he was disappointed to find he received three less than expected payments per year and he still needed to pay for electricity.

Mr H has said he only agreed to the purchase because E told him the system would pay for itself. I'm mindful that it would be difficult to understand why, in this particular case, Mr H would have agreed to pay for the system if his monthly outgoings would increase significantly.

On balance I find Mr H's account to be plausible and convincing.

For the solar panels to be self-funding, they'd need to produce a combined savings of around £1,600 per year. I've not seen anything to suggest he's achieved anywhere near this benefit. I therefore find the statements that were likely made as to the self-funding nature of the system weren't true.

I think E's representative must reasonably have been aware that Mr H's system would not have produced benefits at the level required to be self-funding. While there are elements of the calculations that had to be estimated, the amount of sunlight as an example, I think E's representative would have known that Mr H's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to him.

Considering Mr H's account about what he was told; the documentation; and that Creation hasn't disputed what's been said, I think it likely E gave Mr H a false and misleading impression of the self-funding nature of the system. Given his lack of prior interest and the financial burden he took on I find Mr H's account of what he was told by E 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 E not given the reassurances he said he received.

I consider E's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Mr H expected to receive by agreeing to the installation of the system. I consider that E's assurances in this regard likely amounted to a contractual promise that the 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 H went into the transaction. Either way, I think E's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr H'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 E's negotiations with Mr H 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 H 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 otherwise have not taken out.

Fair compensation

In all the circumstances I consider that fair compensation should aim to remedy the unfairness of Mr H and Creation's relationship arising out of E's misleading and false assurances as to the self-funding nature of the solar panel system. Creation should repay Mr H a sum that corresponds to the outcome he could reasonably have expected as a result of E's assurances. That is, that Mr H's loan repayments should amount to no more than the financial benefits he 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 Mr H received from the system over the 10-year term of the loan, so he pays no more than that. To do that, I think it's important to consider the benefit Mr H received by way of FIT payments as well as through energy savings. Mr H will need to supply up to date details of all FIT benefits received, electricity bills and current meter readings to Creation.

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.

I also find Creation's refusal to consider the claim has also caused Mr H some further inconvenience. And I think the £100 compensation recommended by our investigator is broadly a fair way to recognise that.

Finally, I note Mr H also mentioned claiming damages through s.75. 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 H's s.75 complaint. Furthermore, this doesn't stop me from reaching a fair outcome in the circumstances.

Mr H accepted the decision. I can't see we received a response from Creation.

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.

Seeing as though neither party has supplied anything new for me to consider, I see no reason to depart from the conclusions I reached in my provisional decision. But I did want to explain some further reasoning for why I've decided the complaint in this way.

Creation told us that it considers our approach to redress should be in accordance with the court's decision in Hodgson. I have considered this 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 H's expectation of what he would receive. I consider Mr H has lost out, and has suffered unfairness in his relationship with Creation, to the extent that his loan repayments to it exceed the benefits from the solar panels. On that basis, I believe my determination results in fair compensation for Mr H.

My final decision

My final decision is that I uphold Mr H's complaint and direct Creation Consumer Finance Ltd to:

- Calculate the total payments (the deposit and monthly repayments) Mr H has made towards the solar panel system up until the end of the loan term – A
- Use Mr H's bills and FIT statements to work out the benefits he received up until the end of the loan term* – B
- Use B to recalculate what Mr H 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 annual interest to any overpayment from the date of each payment until the date of settlement** – C
- Reimburse C to Mr H
- Pay Mr H an additional £100 compensation

*Where Mr H has not been able to provide all the details of his meter readings, electricity bills and/or FIT benefits, I am satisfied he has provided sufficient information in order for Creation to complete the calculation I have directed it to follow in the circumstances using 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 H how much it's taken off. It should also give Mr H a tax deduction certificate if he 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 H to accept or reject my decision before 21 August 2024.

Simon Wingfield
Ombudsman