

The complaint

Miss R has complained about Creation Consumer Finance Ltd ('Creation')'s 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 August 2014, Miss R bought a solar panel system ('the system'), from a company I'll call "A", using a ten-year fixed sum loan from Creation.

In June 2021, Miss R complained to Creation via a claims management company ("CMC"). She said that she was told by A that the reductions in energy bills and funds generated through Feed-In Tariff ("FIT") would cover the cost of credit so she would be financially no worse off each month. But Miss R says that hasn't happened and she's suffered a financial loss because her loan repayments have exceeded the benefits of the system. Miss R's CMC also said that what happened created an unfair relationship between Miss R and Creation.

Creation responded to the complaint in its final response. It treated the claim as a complaint and dismissed it because the complaint was made too late under the Dispute Resolution (DISP) Rules, which set out how financial businesses should handle complaints.

Unhappy with Creation's response, Miss R referred her complaint to our service.

When sending us its file, Creation said the claim was outside of our jurisdiction due to the time limits under DISP, and that Miss R had made the claim too late for Creation to have any liability.

Our Investigator considered Miss R's complaint, they ultimately thought that:

- Given the s.75 claim was likely to be time barred under the Limitation Act, 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 Miss R and Creation.

Our Investigator recommended that Miss R keep the system and Creation take into account what Miss R had paid so far, along with the benefits she received, making sure the system was effectively self-funding.

Miss R accepted the investigator's view.

Creation didn't respond. So, I've been asked to make a decision on this complaint. I issued a provisional decision explaining that I was planning to uphold the complaint. Miss R accepted the provisional decision, but Creation has not responded. As such, 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've decided to uphold this complaint.

My findings on jurisdiction

I'm satisfied I have jurisdiction to consider Miss R'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 R's s.75 claim on 2 June 2021, this relates to a regulated activity under our compulsory jurisdiction. Miss R brought her complaint about this to the ombudsman service on 2 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 R. Here the relationship was ongoing at the time it was referred to the ombudsman service on 2 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 unfair relationship under s.140A complaint

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

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

Miss R has said that she was told by A's representative that the reductions in energy bills and funds generated through Feed-In Tariff ("FIT") would cover the cost of credit so she would be financially no worse off each month.

The only document available from the time of sale is the credit agreement. This sets out how much Miss R agreed to pay for the system. She says she was coming into some money and offered to pay for the system outright but was persuaded to take the loan given the system benefits would cover the loan repayments.

The credit agreement understandably does not set out the expected benefits of the system. Miss R confirms that the sales documents she was given have been lost. But that they did not contain any written estimates of the benefits. So, she had to rely on what she was told by the sales representative.

Creation hasn't provided evidence to dispute what Miss R's said happened. Yet with no prior interest Miss R left the meeting having agreed to an interest-bearing loan, with a monthly repayment of around £98, payable for ten years. I find Miss R's account of what she was told by A is credible and persuasive. The loan is a costly long-term commitment, and she says she would not have found this purchase appealing had she not been given the assurances of the system paying for itself.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £1,190 per year. From the evidence provided it is clear that the system has not generated benefits at that level. And looking at how much electricity the system has generated (around 2,642 kWh in the first year) I think the salesperson ought to have known that the system was not capable of producing such annual benefits within the first ten years.

Considering all the available evidence, and that Creation hasn't disputed Miss R's recollection of events, I think it likely A gave Miss R a false and misleading impression of the self-funding nature of the solar panel system.

I consider A's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Miss R was expected to receive by agreeing to the installation of the system. I consider that A'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 Miss R went into the transaction. Either way, I think A's assurances were seriously misleading and false, undermining the purpose of the transaction from Miss R'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 A's negotiations with Miss R 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 R and Creation was 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 Creation has benefitted from the interest paid on a loan she would not otherwise have taken out.

The s.75 complaint and other complaint points

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 Miss R's s.75 complaint and the other complaint points made. This doesn't stop me from reaching a fair outcome in the circumstances.

Fair compensation

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

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 Miss R received from the system over the ten-year term of the loan, so Miss R pays no more than that. To do that, I think it's important to consider the benefit Miss R received by way of FIT payments as well as through energy savings.

Miss R will need to provide Creation with up-to-date details of her 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 think that Creation's failure to consider the fairness of its relationship with Miss R when responding to her caused her some degree of trouble and upset. In recognition of this Creation should also pay Miss R additional compensation as set out below.

My final decision

For the reasons I've explained, I uphold Miss R's complaint. Creation Consumer Finance Ltd should put things right by doing the following:

- Calculate the total payments Miss R has made towards the solar panel system up until the date of settlement – A
- Use Miss R's bills and FIT statements to work out the benefits she received up until the original loan term* – B
- Calculate the difference between what Miss R actually paid (A), and what he should have paid (B), applying 8% simple interest per year to any overpayment from the date of overpayment until the date of settlement of the complaint** – C
- Pay C to Miss R
- Use Miss R'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 R £100 additional compensation

*Where Miss R has not been able to provide all the details of her meter readings, 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 considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Miss R how much it's taken off. It should also give Miss 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 Miss R to accept or reject my decision before 9 September 2024.

Phillip Lai-Fang
Ombudsman