

The complaint and what happened

Mr W has complained about Creation Consumer Finance Ltd's ('Creation') 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 in to account Section 140A ('s.140A') of the CCA.

I've included relevant sections of my provisional decision from July 2024, which form part of this final decision. In my provisional decision I set out the reasons why I was planning to uphold this complaint. In brief that was because I thought that Mr W was induced into buying the solar panel system at the heart of this dispute by misrepresentations, which resulted in there being an unfair relationship between him and Creation.

I asked both parties to let me have any more information they wanted me to consider. Neither has responded.

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.

Having done so, I'm upholding it, and I'll reiterate why, but first I've included here the relevant sections of my provisional decision:

"What happened

In August 2013, Mr W bought a solar panel system ('the system') from a company I'll call "M" using a 10-year fixed sum loan from Creation.

Mr W complained to Creation, he said that he was told by M that the 'feed in tariff' ('FIT') payments and electricity savings he would make would cover the cost of the loan repayments, however that hasn't happened, and he's suffered a financial loss. He also believed that what happened at the time of the sale created an unfair relationship between himself and Creation.

Creation responded to the complaint in its final response, it considered Mr W had brought his claim more than six years after the cause of action occurred under the Limitation Act ('LA').

Unhappy with Creation's response, Mr W referred his complaint to our service.

An adjudicator considered Mr W's complaint, he ultimately thought that –

- *Given the s.75 claim was more 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 W and Creation.*

He recommended that Mr W keep the system and Creation take into account what Mr W had paid so far, along with the benefits he received, making sure the system was effectively self-funding. He also recommended an award of £100 distress and inconvenience as a result of the poor and protracted way in which Creation had dealt with this matter.

Mr W accepted the adjudicator's view. Creation did not, highlighting again that the event complained of occurred in August 2013, and had therefore been brought too late for this service to consider it. Several months later it reiterated that objection, and went on to disagree with the adjudicator's findings around how things should be put right for Mr W. So, the case was progressed to the next stage of our process, an Ombudsman's decision.

What I've provisionally 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 provisional findings on jurisdiction

I'm satisfied I have jurisdiction to consider Mr W'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 W's s.75 claim on 1 November 2021, this relates to a regulated activity under our compulsory jurisdiction. Mr W brought his complaint about this to the ombudsman service on 6 December 2021. 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

I have also considered Creation's arguments in its response on our jurisdiction over the complaint about an unfair relationship under s.140A. I am satisfied this aspect of the complaint was brought in time so that the Financial Ombudsman has jurisdiction.

Mr W is able to make a complaint about an unfair relationship between himself and Creation per s.140A. The event complained of for the purposes of DISP 2.8.2R(2)(a) is Creation's participation, for so long as the credit relationship continued, in an allegedly unfair relationship with him. This accords with the court's approach to assessing unfair relationships – the assessment is performed as at the date when the credit relationship ended: *Smith v Royal Bank of Scotland plc* [2023] UKSC 34.

S.140A doesn't impose a liability to pay a sum of money in the same way as s.75. Rather, it sets out the basis for treating relationships between creditors and debtors as unfair. Under s.140A a court can find a debtor-creditor relationship is unfair, because of the terms of the credit agreement and any related agreement, how the creditor exercised or enforced their rights under these agreements, and anything done or not done by the supplier on the creditor's behalf before or after the making of a credit agreement or any related agreement. A court must make its determination under s.140A with regard to all matters it thinks relevant, including matters relating to the creditor and matters relating to the debtor.

The High Court's judgment in *Patel v Patel* [2009] EWHC 3264 QB established that determining whether the relationship complained of was unfair has to be made "having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination". The time for making determination in the case of an existing relationship is the date of trial, if the credit relationship is still alive at trial, or otherwise the date when the credit relationship ended. This judgment has recently been approved by the Supreme Court in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('Smith').

Throughout the period of the credit agreement, a creditor should conduct its relationship with the borrower fairly, including by taking corrective measures. In particular, the creditor should take the steps which it would be reasonable to expect it to take in the interest of fairness to reverse the consequences of unfairness, so that the relationship can no longer be regarded as unfair: see Smith at [27]-[29] and [66]. Whether that has, or has not, been done by the creditor is a consideration in whether such an unfair relationship was in existence for the purposes of s.140A when the relationship ended.

In other words, determining whether there is or was an unfair credit relationship isn't just a question of deciding whether a credit relationship was unfair when it started. The question is whether it was still unfair when it ended; or, if the relationship is ongoing, whether it is still unfair at the time of considering its fairness. That requires paying regard to the whole relationship and matters relevant to it right up to that point, including the extent to which the creditor has fulfilled its responsibility to correct unfairness in the relationship.

In Mr W's case the relationship was ongoing when he referred his complaint to the Financial Ombudsman. At the time, Creation was responsible for the matters which made its relationship with Mr W unfair and for taking steps to remove the source of that unfairness or mitigate its consequences so that the relationship was no longer unfair. By relying in his complaint on the unfairness of the credit relationship between himself and Creation, Mr W therefore complained about an event that was ongoing at the time he referred his complaint to the Financial Ombudsman.

Therefore, taking into account DISP 2.8.2R(2)(a), I am satisfied it has been brought in time. I am otherwise satisfied the complaint is within the ombudsman service's jurisdiction to consider and it's not necessary to consider whether Mr W's complaint has been brought in time for the purposes of the alternative three-year rule under DISP 2.8.2R(2)(b).

Merits

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 Mr W.

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 W has said that he was told by M's representative that the cost of the system would be fully paid for by the FIT payments he would receive and the savings he would make on his electricity charges. It isn't clear whether M cold called Mr W or not, but in any event, I haven't seen any evidence he had any prior interest in purchasing solar panels.

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

I have a copy of the loan agreement, which shows that both the total amount payable, and the monthly cost of the loan were clear to Mr W. However, there is no mention on the agreement of the potential benefits of the panels.

Unfortunately, neither party has any documentation created by M to show what, if any, figures it provided on the likely performance and financial benefits of the panels. But I have been able to access some archived content from M's website from the time of the sale, which I think is relevant when considering the likely content and tone of the information it would have given Mr W – both verbally and in writing. I have included a screenshot of one relevant section here, which talks about the "profit" of the system:

11. Financial predictions.

The financial predictions we create use a bespoke system design for your property to predict how much electricity you will generate .

Using this figure alongside the Feed-in Tariff payment we can estimate your first year earnings. By estimating how much electricity you will use on site we can also predict how much you will save once we know how much you pay for a unit of electricity.

For a 20 year forecast we take into account the degeneration of the panels (as they do reduce in efficiency over time), the expected inflation rate (RPI- retail price index) and also the rate we expect electricity prices to increase by. This detailed analysis can tell us what return on investment you should be able to expect, and also the total amount of profit the system could earn you.

Along with the above, potential benefits of a solar panel system purchased from M are mentioned several times on the website. There are references to how income and savings, "...can cover the cost of the loan", and how some customers prefer to finance rather than paying up front as, "...the cost of the loan is fully funded by the system". I acknowledge that the content I have cited was not personalised to Mr W, and it is possible that M might have clarified to Mr W that those benefits would not extend to him. But I think it follows that if the website heavily emphasises the benefits of a solar panel system and the profit and return on the investment (as mentioned above), it's likely this would have been a central part of M's conversation when selling the product to Mr W.

I find what Mr W has said to be believable. Given the credit agreement doesn't contain information about the benefits, Mr W would have looked to M's representative to help him understand what the panels would bring in and how much he would benefit from the system. As mentioned, I've seen no evidence of any motivation other than a financial one on Mr W's part to agree to the panel installation. I'm of the opinion that money would be a key reason to purchase the system and his savings on his electricity bills and income from the FIT scheme would have been a central part of the conversation with a salesperson. On balance, I think it is more likely than not that Mr W would not have agreed to the installation of the panels if M had made it clear that it would leave him out of pocket.

When thinking about the above I'm mindful of the actions taken by the Renewable Energy Consumer Code ('RECC') against M. My understanding is that the RECC administers the renewable energy consumer Code and ensures that its members comply with the Code.

The RECC investigated M's conduct. In September 2014, and later in November 2015, it determined that M was in breach of a number of sections of the code including, but not limited to, sections 5.2 and 5.4. These two sections relate to requiring members not to provide false or misleading information to consumers and providing clear and accurate information about the cost and benefits of the product sold.

I'm also aware that Citizens Advice Bureau ('CAB') carried out analysis on 292 cases where consumers had contacted it for advice about M. It then provided a statement to RECC about M in September 2015. This statement raised a number of issues with M's conduct, including but not limited to, misleading marketing claims where consumers were told that the solar panels were 'free' and that the FIT payments 'would comfortably cover the loan repayments on their finance deals'.

Whilst I accept that the above comes from findings on different cases the RECC and CAB were looking at, the findings do suggest that there were conduct concerns in the areas that relate to Mr W's complaint around the time that he was sold his system.

Creation hasn't provided evidence to dispute what Mr W's said happened. Yet with no prior interest Mr W left the meeting having agreed to an interest-bearing loan, with a monthly repayment of around £120, payable for 10 years. Given his lack of prior interest and the financial burden he took on I find Mr W's account of what he was told by M 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 about saving money he's said he received from M.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £1,400 per year. I have not seen anything to indicate Mr W's system was not performing as expected, but his system has not produced this. So, these statements were not true. I think the M's representative must reasonably have been aware that Mr W's system would not have produced benefits at this level. Whilst there are elements of the calculations that had to be estimated, the amount of sunlight as an example, I think M's representative would have known that Mr W's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to Mr W.

Considering Mr W'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 these facts, I think it likely M gave Mr W a false and misleading impression of the self-funding nature of the solar panel system.

I consider M's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Mr W was expected to receive by agreeing to the installation of the system. I consider 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. But, even if they did not have that effect, they nonetheless represented the basis upon which Mr W went into the transaction. Either way, I think M's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr W'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 M's negotiations with Mr W 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 W 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.

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 W's s.75 complaint. Furthermore, 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 Mr W 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 Mr W a sum that corresponds to the outcome he could reasonably have expected as a result of M's assurances. That is, that Mr W'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, I plan to direct Creation to recalculate the agreement based on the known and assumed savings and income Mr W 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 W received by way of FIT payments as well as through energy savings. Mr W will need to supply up to date details, where available, of all FIT benefits received, electricity bills and current meter readings to Creation.

I have considered the Hodgson judgment, cited by Creation in its rejection of the adjudicator's view. 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 W's expectation of what he would receive. I consider Mr W 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 W. 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.

Finally, I consider that Creation's failure to fully deal with Mr W's complaint in a reasonable timeframe, with minimal communication, caused Mr W some degree of trouble and upset. In recognition of this, and in addition to what I have already set out above, Creation should also pay Mr W £100."

As mentioned above, neither Mr W nor Creation has replied to my provisional decision. Therefore I have seen nothing which alters my findings as set out therein. And so it follows that I uphold this complaint.

Putting things right

In order to put things right for Mr W, Creation Consumer Finance Ltd must now:

- Calculate the total payments (the deposit and monthly repayments) Mr W has made towards the solar panel system up until the date of settlement – A
- Use Mr W's bills and FIT statements, to work out the benefits he received up until the loan term* – B
- Use B to recalculate what Mr W 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 payment until the date of settlement** – C
- Reimburse C to Mr W

*If Mr W is not 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 W how much it's taken off. It should also give Mr W a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

I also think the way Creation handled Mr W's complaint has caused him trouble and upset, and an award of £100 is appropriate – which I therefore also direct.

My final decision

For the reasons I've explained, I uphold this complaint and Creation Consumer Finance Ltd must put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 23 August 2024.

Siobhan McBride
Ombudsman