

The complaint

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

What happened

In September 2014 Mr G entered into a fixed sum loan agreement with Creation to pay for a £9,670 solar panel system (“the system”) from a supplier I’ll call “R”. The total amount payable under the agreement was £15,000.87 and it was due to be paid back with 120 monthly repayments of £125.

In December 2021 Mr G sent a letter of claim to Creation explaining he thought the system was mis-sold. He said R 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 within the loan term. He said R told him he’d receive a guaranteed income for 20 years and that he’d earn up to 10% per year tax free. He said R told him the system would be maintenance free with a 25-year life expectancy; his energy bills would go down; and his property value would increase.

Mr G 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 December 2021 to say it was dismissing the complaint without consideration because it had been brought out of time.

Unhappy with Creation’s response, Mr G decided to refer his complaint to the Financial Ombudsman in February 2022.

One of our investigators looked into things and thought R had likely told Mr G 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 R had misrepresented it. They thought a court would likely find the relationship between Mr G 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 G 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 G agreed, 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 G's allegations of an unfair relationship don't relate to any events post-dating the sale of the system in around September 2014.
- 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 G had not brought a complaint about Creation's handling 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 setting out why the complaint was within our jurisdiction to consider. Neither party has objected to that, so I'm not going to set it out again. As far as the merits of the complaint, my provisional decision said:

The unfair relationship under s.140A complaint

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

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 G says he was verbally misled that the system would effectively pay for itself. I've taken account of what Mr G 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 G to be able to understand what was required to be repaid towards the agreement. But it doesn't set out what savings Mr G could expect to make from the system.

None of the documents we've been supplied show any estimates of the savings Mr G would make. I've not seen there was an easy way for Mr G to compare his total costs against the financial benefits he was allegedly being promised.

I've not seen anything to indicate Mr G had an interest in purchasing a solar panel system before R contacted him. Mr G has said he only agreed to the purchase because R told him the system would be self-funding. Mr G said the financial benefits were discussed despite the paperwork I've seen not including information about them. He said at the time he had two dependents and had an income of around £11,000 and was receiving weekly tax credits. I'm mindful that it would be difficult to understand why, in this particular case, Mr G would have agreed to the installation if his monthly outgoings would increase significantly.

I think Mr G would have looked to R's representative to help him understand how much the panels would cost, what they would bring in and how much he would benefit from the system.

Mr G hasn't been able to supply a copy of his MCS certificate. But he's supplied a copy of his FIT statements that have allowed me to calculate the average yield for the system. For the solar panels to be self-funding, they'd need to produce a combined savings and FIT income of around £1,500 per year. But I've also not seen anything to suggest Mr G's system achieved anywhere near the benefits required to make the system self-funding within the term of the agreement. I therefore find the representations that were likely made weren't true. I think the salesperson ought to have known this and made it clear the system wouldn't have produced enough benefits to cover the overall cost of the fixed sum loan agreement during its term.

Considering Mr G's account about what he was told, the documentation; and that Creation hasn't disputed these facts, I think it likely R gave Mr G 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 G's account of what he was told by R 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 R not given the reassurances he said he received.

I consider R's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Mr G expected to receive by agreeing to the installation of the system. I consider that R'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 G went into the transaction. Either way, I think R's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr G'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 R's negotiations with Mr G 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 G 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 G and Creation's relationship arising out of R's misleading and false assurances as to the self-funding nature of the solar panel system. Creation should repay Mr G a sum that corresponds to the outcome he could reasonably have expected as a result of R's assurances. That is, that Mr G'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 G received (or will receive) 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 G received by way of FIT payments as well as through energy savings. Mr G 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 G 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 G also mentioned claiming damages through section 75 ("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 G's s.75 complaint. Furthermore, this doesn't stop me from reaching a fair outcome in the circumstances.

Mr G accepted the provisional 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 submitted 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 something further about why I've decided redress 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 G's expectation of what he would receive. I consider Mr G 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 G.

My final decision

For the reasons I have explained I uphold Mr G's complaint and direct Creation Consumer Finance Ltd to:

- Calculate the total payments (the deposit and monthly repayments) Mr G has made towards the solar panel system up until the date of settlement of his complaint – A
- Use Mr G's bills and FIT statements to work out the benefits he received up until the date of settlement of his complaint* – B
- Use B to recalculate what Mr G 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 G
- If required, use Mr G's bills and FIT statements to work out the benefits he will receive for the period between the settlement of his 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 or allow Mr G to continue with his current payment so the loan finishes early.
- Pay Mr G an additional £100 compensation

*Where Mr G 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 G how much it's taken off. It should also give Mr G 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 G to accept or reject my decision before 28 August 2024.

Simon Wingfield

Ombudsman