DRN-4941636

The complaint

Mrs L 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 January 2014, Mrs L bought a solar panel system ('the system'), from a company I'll call "R", using a ten-year fixed sum loan from Creation.

In January 2022, Mrs L complained to Creation. She said that she was told by R that the reduction in energy bills and funds generated through the Feed-In Tariff ("FIT") would be sufficient to fund the cost of the loan, so financially she would be no worse off each month. However, that hasn't happened, and she's suffered a financial loss as a result. She also believed that what happened at the time of the sale created an unfair relationship between her and Creation.

Creation responded to the complaint in its final response, it dismissed the claim saying it had been brought too late under the Dispute Resolution (DISP) rules, which set out how financial businesses must handle complaints.

Unhappy with Creation's response, Mrs L referred her complaint to our service.

When sending us its file, Creation said that the complaint was not within our jurisdiction, since it was made more than six years after the events complained about and more than three years after Mrs L ought reasonably to have known she had cause to complain. It also said her s.75 claim was out of time due to the provisions of the Limitation Act.

Our investigator considered Mrs L's complaint and 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 Mrs L and Creation.

Our Investigator recommended that Mrs L keep the system and Creation take into account what Mrs L had paid so far, along with the benefits she received, making sure the system was effectively self-funding within the original loan term.

Mrs L accepted the investigator's view. Creation asked for more time but didn't reply within the agreed deadline. So, the case was progressed to the next stage of our process, an Ombudsman's decision.

Creation later provided further comments and in summary, 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 Service.
- Mrs L's allegations of an unfair relationship don't relate to any events post-dating the sale of the system in January 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.
- Mrs L had not brought a complaint about Creation's handing of her 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). Creation 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 Creation 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 explaining that I was planning to uphold the complaint, which responded to Creation's further comments. Mrs L said she accepted my provisional decision, but Creation did not respond. 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've decided to uphold this complaint.

My findings on jurisdiction

I'm satisfied I have jurisdiction to consider Mrs L'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

Where Creation exercises its right and duties as a creditor under a credit agreement it is carrying out a regulated activity within scope of our compulsory jurisdiction under Article 60B(2) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the "RAO"). In undertaking that activity, the creditor must honour liabilities to the debtor. So, if a debtor advances a valid s.75 claim in respect of the credit agreement, the creditor has to honour that liability and failing or refusing to do so comes under our compulsory jurisdiction.

Creation argues that the event complained of when the matter is brought to our service occurred as and when the supplier caused the alleged s.75 liability to arise in the first place. I disagree: the lender's s.75 liability in damages doesn't arise as a result of any act or omission of the lender in performing a regulated activity – it is simply a claim given by statute to the borrower against the lender. And it arises from the acts or omissions of a third party, the supplier. Only when and if that claim is presented by the borrower to the lender must the

lender do anything about it, which is to honour its statutory liability by paying the claim if it is a valid one. Until then, the lender's acts and omissions are simply to have lent money to the borrower at the borrower's request, and that is not the matter complained about.

So, when a borrower brings a complaint to our service alleging that they are due money under s.75 which the lender has refused to pay, the "event complained of" in such circumstances isn't the supplier's conduct; it is the lender's refusal to honour its alleged statutory liability when the borrower made the claim.

In this case, Creation rolled up its consideration of Mrs L's claim into a letter that both explained why it would not be paying the claim and treated Mrs L as having brought a complaint which she was entitled to refer to our service. So, its refusal to accept and pay the s.75 claim was contained in a final response letter of 21 January 2022, in which it told Mrs L she could refer her complaint to our service within 6 months.

In those circumstances, because Creation's letter dated 21 January 2022 rejected Mrs L's claim under s.75 (which Mrs L says is valid) it constituted "the event complained of". It also set out Creation's response to any complaint that flowed from this and invited Mrs L to refer that complaint to our service if she was dissatisfied with the outcome. Creation could have separated those stages, waited for Mrs L to complain that the s.75 claim had not been accepted and honoured, and only then issued its final response letter. Instead, it followed the same practice that many other lenders adopt by allowing Mrs L to refer the matter directly to the ombudsman service, by way of treating it as a complaint.

Creation argues that Mrs L didn't complain to it about the manner in which it dealt with her s.75 claim, and that it has never responded to such a complaint. But that ignores the fact that it was Creation's choice to roll the answer to the s.75 claim into a final response letter in the way that I've described. That was a reasonable and pragmatic way of proceeding because the issues between the parties on this part of Mrs L's complaint were whether it was fair and reasonable for Creation to reject Mrs L's s.75 claim, as they remain to this day.

Creation also refers to DISP 2.8.1R(1) which broadly provides a complaint can only be considered if the respondent has sent the complainant its final response (or summary resolution communication). However, Creation did send Mrs L a final response letter on 21 January 2022. After the complaint was referred by Mrs L to the ombudsman service in 27 January 2022, we wrote to Creation providing details of the complaint as submitted to the ombudsman service including details of Mrs L's complaint about the s.75 claim.

If Creation's position had been that it denied it received any such complaint, it could have raised this with the ombudsman service at the time, but it did not. Instead, it provided information concerning its position on the complaint. It was apparent from this correspondence that, in relation to s.75, Mrs L's complaint was that Creation had a liability to her which it was declining to pay.

So, even if no final response had been issued in respect of the complaint about s.75, in accordance with DISP 2.8.1R(2) Creation has had well over eight weeks to respond to the complaint and our service is entitled to deal with it.

There has been no conflation with the six-month time limit under DISP 2.8.2R(1) in this regard. That Creation refused to accept the s.75 claim within a final response letter does not give rise to any difficulties calculating when time begins to run under DISP 2.8.2R(2)(a).

Creation also argued the complaint was out of our jurisdiction taking into account the Limitation Act 1980 ("the LA"), but our service has its own rules under DISP 2.8.2R saying when a complaint is brought too late. The LA does not limit our jurisdiction. However, I do

consider that the LA is relevant law for the purposes of the merits of Mrs L's complaint about its rejection of the s.75 claim.

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.

Mrs L is able to make a complaint about an unfair relationship between herself 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 her. 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 still on foot, 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 is responsibility to correct unfairness in the relationship.

In Mrs L's case the relationship was ongoing when she referred her complaint to the Financial Ombudsman Service. At the time, Creation was responsible for the matters which made its relationship with Mrs L 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 her complaint on the unfairness of the credit relationship between herself and Creation, Mrs L therefore complained about an event that was ongoing at the time she referred her complaint to the Financial Ombudsman Service.

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 Mrs L's complaint has been brought in time for the purposes of the alternative three-year rule under DISP 2.8.2R(2)(b).

My findings on the merits of the complaint

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 Mrs L.

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

Mrs L has said that she was told by R's representative that the reduction in energy bills and funds generated through the Feed-In Tariff ("FIT") would be sufficient to fund the cost of the loan, so financially she would be no worse off each month.

Mrs L says she had some interest in solar panels but would not have entered into the contract if she had not been assured that the benefits of the system would cover the loan repayments as well as reducing her electricity bills.

The only documentation available from the time of sale is the credit agreement. This set out what Mrs L agreed to pay for the system but understandably has no details about its benefits in terms of income and savings.

Mrs L no longer has any sales documents because the sale took place so long ago. But she is certain that it did not provide any information about the benefits of the system. So, she relied on what she was told about this.

Creation hasn't provided evidence to dispute what Mrs L's said happened. Yet Mrs L left the meeting having agreed to an interest-bearing loan, with a monthly repayment of around £90, payable for ten years. Given the financial burden she took and the reasons she gave for doing so, I find Mrs L's account of what she was told by R is credible and persuasive. The loan is a costly long-term commitment, and it's hard to see why she would have seen this purchase appealing had she not been given the assurances she's said she received from R.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £1,085 per year. I have not seen anything to indicate Mrs L's system was not performing as expected, but the system has not produced this level of benefit. So, these statements were not true.

I think the R's representative must reasonably have been aware that Mrs L's system would not have produced benefits at this level. Whilst there are elements of the calculations that had to be estimated and assumptions that must be made, given the capacity of the system to generate electricity, and using industry-standard calculations and reasonable assumptions from the time of sale, I can't see how R could reasonably expect the system to generate the stated benefits.

Considering Mrs L's account about what she was told, the documentation available from the time of the sale, and that Creation hasn't disputed her recollection, I think it likely R gave Mrs L a false and misleading impression of the self-funding nature of the solar panel system.

R's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Mrs L was expected to receive by agreeing to the installation of the system. I think that R'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 Mrs L went into the transaction. Either way, I think R's assurances were seriously misleading and false, undermining the purpose of the transaction from Mrs L'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 R's negotiations with Mrs L 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 Mrs L 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 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 Mrs L's s.75 complaint and the other points made in her letter of claim. This would not alter my findings and doesn't stop me from reaching a fair outcome.

Fair compensation

In all the circumstances I think that fair compensation should aim to remedy the unfairness of Mrs L 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 Mrs L a sum that corresponds to the outcome she could reasonably have expected as a result of R's assurances. That is, that Mrs L's loan repayments should amount to no more than the financial benefits she 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 Mrs L's expectation of what she would receive. I consider Mrs L has lost out and has suffered unfairness in her relationship with Creation, to the extent that her loan repayments to Creation exceed the benefits from the solar panels. On that basis, I believe my determination results in fair compensation for Mrs L.

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

Mrs L 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 unreasonable dismissal of Mrs L's claim and complaint caused her some degree of trouble and upset. In recognition of this Creation should also pay Mrs L additional compensation as set out below.

My final decision

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

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

- Use Mrs L's bills and FIT statements (where available) to work out the benefits she received up until the end of the original loan term* – B

- Calculate the difference between what Mrs L actually paid (A), and what she 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 Mrs L

- Pay Mrs L £100 additional compensation

*Where Mrs L has not been able to provide all the details of her 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 Mrs L how much it's deducted. It should also give Mrs L 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 Mrs L to accept or reject my decision before 9 September 2024.

Phillip Lai-Fang
Ombudsman