DRN-4987588

The complaint

Mrs I has complained about the way Creation Consumer Finance Ltd ("Creation") responded to claims she'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").

Mrs I has been represented in bringing her complaint but, to keep things simple, I'll refer to Mrs I throughout.

What happened

In November 2013, Mrs I entered into a fixed sum loan agreement with Creation to pay for a £10,694 solar panel system ("the system") from a supplier I'll call "Z". The deposit of £100 and a similar contribution from Z, meant that the credit requested was £10,494. The total amount payable under the agreement was £16,588.55 and it was due to be paid back with 120 monthly repayments of £137.40.

In August 2021, Mrs I sent a letter of claim to Creation explaining she thought the system was mis-sold. She said Z told her she'd be paid for the electricity the system generated through the government's Feed in Tariff (FIT) payments and from that and from savings on her electricity bills, the system would be self-funding.

Mrs I said the system was misrepresented and believed the statements and several other actions at the time of the sale created an unfair relationship between herself and Creation. Creation sent a final response letter in October 2021 to say it was dismissing the complaint without consideration because it had been brought out of time.

Unhappy with Creation's response, Mrs I decided to refer her complaint to the Financial Ombudsman in March 2022.

One of our investigators looked into things and thought Z had likely told Mrs I 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 Z had misrepresented it. They thought a court would likely find the relationship between Mrs I and Creation was unfair and that she'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 Mrs I pays no more than that, and she keeps the system. They also recommended £100 compensation for the impact of Creation not investigating the s.140A claim.

Mrs I accepted the view, but Creation didn't make a response. As things weren't resolved, the complaint has been passed to me to decide.

I issued my provisional decision in respect of this complaint on 9 August 2024, a section of which is included below, and forms part of, this decision. In my provisional decision, I set out the reasons why it was my intention to uphold Mrs I's complaint. I set out an extract below:

"I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint

My findings on jurisdiction

Jurisdiction to look at 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 were 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 I's claim into a letter that both explained why it would not be paying the claim and treated Mrs I 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 4 October 2021, in which it told Mrs I she could refer her complaint to our service within 6 months.

In those circumstances, because Creation's letter dated 4 October 2021 rejected Mrs I's claim under s.75 (which Mrs I 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 I to refer that complaint to our service if she was dissatisfied with the outcome. Creation could have separated those stages, waited for Mrs I 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 I to refer the matter directly to the ombudsman service, by way of treating it as a complaint.

If Creation argued that Mrs I 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, that would ignore 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 I's complaint were whether it was fair and reasonable for Creation to reject Mrs I's s.75 claim, as they remain to this day.

Creation may have chosen to refer 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 I a final response letter on 4 October 2021. After the complaint was referred by Mrs I to the ombudsman

service in March 2022, we wrote to Creation providing details of the complaint as submitted to the ombudsman service including details of Mrs I'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 I'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 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 I's complaint about its rejection of the s.75 claim.

Jurisdiction to look at the complaint about an unfair relationship under s.140A

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 I 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 its responsibility to correct unfairness in the relationship.

In Mrs I's case the relationship was ongoing when she referred her complaint to the Financial Ombudsman. At the time, Creation was responsible for the matters which made its relationship with Mrs I 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 I therefore complained about an event that was ongoing at the time she referred her 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 Mrs I'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 Z 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 Z 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 Z for which Creation was responsible under s.56 when considering whether it is likely Creation had acted fairly and reasonably towards Mrs I.

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 I says she was verbally misled that the system would effectively pay for itself. Mrs I has said that she was told by Z's representative that the cost of the system would be fully

paid for by the FIT payments and electricity savings she would receive. Mrs I has said the system has not generated savings anywhere near that. I've taken account of what Mrs I says she 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 Mrs I to be able to understand what was required to be repaid towards the agreement. But the loan agreement does not mention the income or savings that may be generated. So, there was no way from that document for Mrs I to compare her total costs against the financial benefits she was allegedly being promised from that document. So, Mrs I would have looked to Z's representative to help her understand how much the panels would cost, what they would bring in and how much she would benefit from the system in order for her to make a decision.

Mrs I said she had no interest in purchasing a solar panel system before Z contacted her. Mrs I told us, 'I was told money will be paid to me for 25yrs from national grid and that the monthly finance payments would be covered in full by these payments and the savings made on electricity bills.'

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

Mrs I has said she only agreed to the purchase because Z told her the system would pay for itself. I'm mindful that it would be difficult to understand why, in this particular case, Mrs I would have agreed to pay for the system if her monthly outgoings would increase significantly. On balance I find Mrs I'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 £1,648 per year. I've not seen anything to suggest she'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 Z's representative must reasonably have been aware that Mrs I'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 Z's representative would have known that Mrs I's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to her.

Considering Mrs I's account about what she was told; the documentation; and that Creation hasn't disputed what's been said, I think it likely Z gave Mrs I a false and misleading impression of the self-funding nature of the system. Given her lack of prior interest and the financial burden she took on, I find Mrs I's account of what she was told by Z credible and persuasive. The loan is a costly long-term commitment, and I can't see why she would have seen this purchase appealing had Z not given the reassurances she said she received.

I consider Z's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Mrs I expected to receive by agreeing to the installation of the system. I consider that Z'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 Mrs I went into the transaction. Either way, I think Z's assurances were seriously misleading and false, undermining the purpose of the transaction from Mrs I'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 Z's negotiations with Mrs I 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 I 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 otherwise have not taken out.

Fair compensation

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

Creation may consider 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 Mrs I's expectation of what she would receive. I consider Mrs I has lost out, and has suffered unfairness in her relationship with Creation, to the extent that her loan repayments to it exceed the benefits from the solar panels. On that basis, I believe my determination results in fair compensation for Mrs I.

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 I received from the system over the 10-year term of the loan, so she pays no more than that. To do that, I think it's important to consider the benefit Mrs I received by way of FIT payments as well as through energy savings. Mrs I will need to supply up to date details of all FIT benefits received, electricity bills and current meter readings to Creation.

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

Finally, I note Mrs I 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 Mrs I's s.75 complaint. Furthermore, this doesn't stop me from reaching a fair outcome in the circumstances.

For the reasons I have explained I'm intending to uphold Mrs I's complaint and direct Creation Consumer Finance Ltd to:

- *Calculate the total payments (the deposit and monthly repayments) Mrs I has made towards the solar panel system up until the end of the loan term – A*
- *Use Mrs I's bills and FIT statements to work out the benefits she received up until the end of the loan term* – B*
- *Use B to recalculate what Mrs I should have paid each month towards the loan over that period and calculate the difference, between what she actually paid (A), and what she 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 Mrs I*
- *Pay Mrs I an additional £100 compensation*

**Where Mrs I has not been able to provide all the details of her meter readings, electricity bills and/or FIT benefits, I am satisfied she has provided sufficient information in order for Creation to complete the calculation I have directed it 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 Mrs I how much it's taken off. It should also give Mrs I a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate."*

I asked the parties to the complaint to let me have any further representations that they wished me to consider by 23 August 2024. Mrs I has accepted my provisional findings. Creation has not acknowledged the provisional decision, made a further submission or asked for an extension to do so.

I think that both parties have had time sufficient to have made a further submission had they wished to. So, I am proceeding to my final decision.

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.

So, as neither party has provided any new information or argument for me to consider following my provisional decision, I have no reason to depart from those findings. And as I've already set out my full reasons (above) for upholding Mrs I's complaint, I have nothing further to add.

So, having looked again at all the submissions made in this complaint, I am upholding Mrs I's complaint and require Creation to calculate and pay the fair compensation detailed above.

Putting things right

I require Creation Consumer Finance Ltd to calculate and pay the fair compensation as detailed above.

My final decision

For the reasons set out, I'm upholding Mrs I's complaint about Creation Consumer Finance Ltd. I require Creation Consumer Finance Ltd to calculate and pay the fair compensation as detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs I to accept or reject my decision before 25 September 2024.

Douglas Sayers
Ombudsman