DRN-5003069

The complaint

Mr B has complained about Creation Consumer Finance Ltd ('Creation')'s response to a claim he made under Section 75 ('s.75') of the Consumer Credit Act 1974 (the 'CCA')

What happened

In January 2014, Mr B bought a solar panel system ('the system'), from a company I'll call "A", using a ten-year fixed sum loan from Creation.

In March 2022, Mr B complained to Creation. He said that he thought the system was mis-sold to him.

Creation issued a final response letter that said Mr B had brought his claim more than six years after the date of sale, so it had no liability for the claim given the provisions in the Limitation Act.

Mr B then contacted the Financial Ombudsman Service. He said that the system was mis-sold because he was told by A that the Feed-In Tariff ("FIT") payments would cover the loan repayments, but that this hadn't happened. He felt what had happened was unfair – given he has suffered a loss that was ongoing at the time he made the claim and complaint.

Our Investigator considered Mr B's complaint and said that:

- Given the s.75 claim was likely to be time barred under the Limitation Act, Creation's answer in that regard seemed fair.
- But we could also consider the fairness of Mr B's relationship with Creation under Section 140A ("s.140A") of the CCA (which deals with unfair relationships between creditors and debtors), and that because Mr B's complaint was that he thought what had happened was unfair and the relationship was ongoing, we had jurisdiction to look at this.
- Misrepresentations could be considered under s.140A.
- A court would likely find an unfair relationship had been created between Mr B and Creation.

Our Investigator recommended that Mr B keep the system and Creation adjust the loan to take into account what Mr B had paid and the benefits he received, making sure the system was self-funding within the loan term.

Creation didn't respond directly but separately provided comments about our jurisdiction and what redress we should award in cases such as this. 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.
- The suggestion of an unfair relationship doesn'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.

- Mr B had not brought a complaint about Creation's handing 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 said that 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 said the approach to redress should be in accordance with the Court decision in Hodgson v Creation Consumer Finance Limited [2021] EWHC 2167 (Comm) ("Hodgson").

As the complaint was not resolved, I was asked to make a decision on the complaint.

I issued a provisional decision explaining why I thought the complaint was within the jurisdiction of the Financial Ombudsman Service, and that I was planning to uphold it. Neither Mr B nor Creation responded by the deadline I gave.

I then issued a jurisdiction decision confirming that I have jurisdiction to consider the merits of this complaint. And this is my final decision on the merits of this complaint, which matches my provisional 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.

I've decided to uphold this complaint.

The s.75 complaint

The law imposes a six-year limitation period on claims for misrepresentation and breach of contract, after which they become time barred.

In this case the alleged misrepresentation and alleged breach cause of action arose when an agreement was entered into on 7 January 2014. Mr B brought his s.75 claim to Creation on 9 March 2022. That is more than six years after he entered into an agreement with it. Given this, I think it was fair and reasonable for Creation to have not accepted the s.75 claim. So, I do not uphold this aspect 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 Mr B.

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.

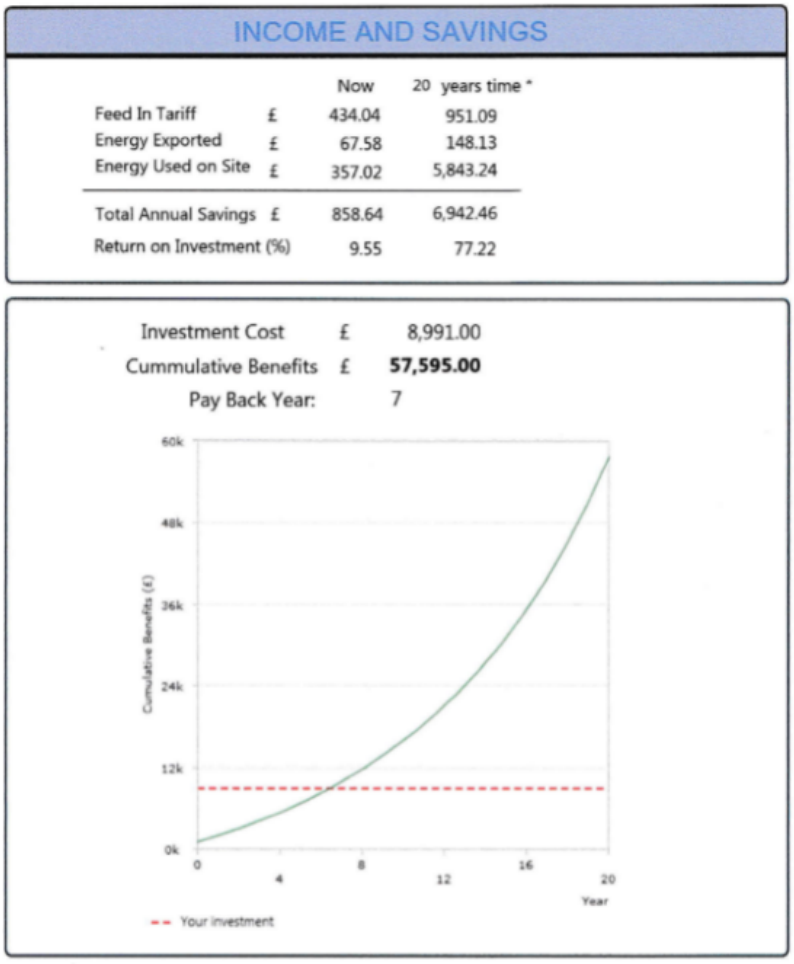
What happened

Mr B has said that he was told by A's representative that the system was "self-funding" because the FIT payments would cover the loan repayments.

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

The loan agreement made clear what Mr B was agreeing to pay - £117.97 per month for 120 months, a total of £14,156.98.

The sales documents showed the income and savings from the system as follows:



INCOME AND SAVINGS

		Now	20 years time *
Feed In Tariff	£	434.04	951.09
Energy Exported	£	67.58	148.13
Energy Used on Site	£	357.02	5,843.24
Total Annual Savings	£	858.64	6,942.46
Return on Investment (%)		9.55	77.22

Investment Cost	£	8,991.00
Cummulative Benefits	£	**57,595.00**
Pay Back Year:		7

This shows total benefits in the first year of £868.64. This is less than the annual loan repayments, which equate to about £1,415. So, I think that Mr B ought to have been aware that the system would not be self-funding from the start or on a monthly basis.

However, the sales documents indicate the system will pay for itself after seven years, with a

total benefit over 20 years of almost £60,000 – around four times what Mr B had agreed to pay. These figures are reinforced by the graph. The seven-year payback figure is in relation to the purchase price of the system, as opposed to the total payable under the loan.

I asked Mr B for more information about his understanding of how the system would be self-funding. He said that he understood that the FIT payments would exceed the total loan repayments after seven years.

Looking at the sales documents, I do not think I can reasonably conclude that the sales representative is unlikely to have presented the system in the way that Mr B recalls. If he was told the system would be self-funding within seven years, then looking at the sales documents would tend to reinforce what Mr B was told – in that it shows the system paying for itself within seven years and a total benefit after 20 years equivalent to four times the total loan repayments.

Even if Mr B had noticed the payback figure of seven years in the sales documents was in relation to the purchase price, the graph is likely to still have reassured him that the benefits would meet the cost of the loan within the ten-year loan term.

On balance, I find Mr B's account of what he was told by A is credible and persuasive. I'm mindful that Mr B did not pursue the matter until more than seven years after the sale took place. By that time, it would've become clear to him that the FIT income received had not exceeded the total loan repayments within the timescale he was told. I also note that the A went into liquidation in 2016, so he could not have pursued the matter with A as he wasn't sure there was a problem until some years later.

I've looked at the FIT statements provided, and it appears that the income Mr B has received has not covered the loan repayments in the way he was led to believe they would.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £1,415 per year. It appears they have not done so. So, these statements were not true. I think that A's representative ought reasonably to have been aware that Mr B's system would not have produced benefits at this level.

In its calculations, A assumed annual inflation rates of 4.00% for RPI and 15% for electricity unit prices. I think these figures were unreasonably high given average inflation rates in the prior ten years (which were 3.4% and 8.4% respectively based on Office for National Statistics figures). Using those more realistic assumptions, the total benefit after seven years would be around £7,000, and after 20 years it would be around £29,000. FIT payments over 20 years would be just £13,000 – which is less than the total loan repayments.

Considering Mr B's account about what he was told and the documentation he was shown at the time of the sale, I think it likely that A gave Mr B 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 Mr B 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 pay for itself within the loan term.

But, even if they did not have that effect, they nonetheless represented the basis upon which Mr B went into the transaction. Either way, I think A's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr B's point of view.

<u>Would a court be likely to make a finding of unfairness under s.140A?</u>

Where Creation is to be treated as responsible for A's negotiations with Mr B 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 B and Creation was unfair.

Because of this shortfall between Mr B's costs and the actual benefits, he has had to pay more than he expected to cover the difference between his solar benefits and the cost of the loan. And Creation has benefitted from the interest paid on a loan Mr B would not otherwise have taken out.

Fair compensation

In all the circumstances I consider that fair compensation should aim to remedy the unfairness of Mr B 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 Mr B a sum that corresponds to the outcome he could reasonably have expected as a result of A's assurances. That is, that Mr B's loan repayments should amount to no more than the financial benefits he 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 Mr B's expectation of what he would receive. I consider Mr B 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 B.

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

Mr B will need to provide Creation with up-to-date details of his electricity generation meter reading and, where available, 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 consider that Creation's failure to consider the fairness of its relationship with Mr B when responding to him caused him some degree of trouble and upset. In recognition of this, Creation should also pay Mr B additional compensation as set out below.

My final decision

For the reasons I have explained, my decision is that I uphold Mr B's complaint.

To put things right, Creation Consumer Finance Ltd must:

- Calculate the total payments (including any advance payment/deposit and admin fees) Mr B has made towards the solar panel system up until the date of settlement – A
- Use Mr B's bills and FIT statements (where available), to work out the benefits he received up until the end of the original loan term* – B
- Calculate the difference between what Mr B 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 Mr B
- Pay Mr B £100 additional compensation

*Where Mr B has not been able to provide all of his 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 the interest, it should tell Mr B how much it's deducted. It should also give Mr B 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 B to accept or reject my decision before 4 October 2024.

Phillip Lai-Fang
Ombudsman