

The complaint

Mr P 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") relating to a solar panel system which he says was mis-sold to him.

What happened

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

In February 2022, Mr P contacted Creation to make a claim under s.75. He said that the system had been mis-sold because he was told by A that the panels would be entirely "self-funded" via a government scheme that would reduce his energy bills and cover the monthly loan repayments. That hasn't happened, and he's suffered a loss as a result.

Creation didn't respond within a reasonable time so in April 2022 Mr P asked the Financial Ombudsman Service for help. We contacted Creation to let it know Mr P had made a complaint.

Creation responded to the claim and complaint in its final response dated 12 May 2022. Creation said Mr P had brought his s.75 claim too late given the provisions of the Limitation Act. This meant Creation had no liability, so it did not investigate further.

After we passed a copy of Creation's final response onto Mr P, on 25 July 2022 he asked the Financial Ombudsman Service to proceed with investigating his complaint.

Our investigator asked Mr P for some more information about what he was told at the time of sale – given the following was shown on the contract about the benefits of the system:

INCOME AND SAVINGS			
Feed In Tariff	3,579.00 kWh	x 14.90 p	= £ 533.27
Export Tariff	1,789.50 kWh	x 4.64 p	= £ 83.03
Energy Used	2,684.25 kWh	x 15.32 p	= £ 411.23
Total Annual Savings			£ 1,027.53
Cost			£ 9,850.00
Return on Investment (%)			10.43
Pay Back Year			6
20 years benefits			£ 72,096.00

Mr P confirmed he didn't recall these figures being discussed and he didn't have a clear recollection of the sale. But he said that he had accepted the salesperson's assurance of a six-year payback. Mr P says he saw the solar panel system as a financial investment but is only receiving about 50% of the promised benefits.

Our Investigator concluded that:

- Given the s.75 claim was likely to be time barred under the Limitation Act, Creation's answer seemed fair.
- Mr P's complaint overall was about the unfairness of his relationship with Creation due to the system being mis-sold, so he thought about this in relation to Section 140A ("s.140A) of the CCA as well. S.140A deals with unfair relationships between creditors and debtors. Our Investigator said that s complaint about the fairness of Mr P's relationship with Creation was one we could look at under our rules and 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 P and Creation.

Our Investigator recommended that Mr P keep the system and Creation ensure he paid no more for it than the benefits he received over the original five-year loan term.

Mr P accepted the investigator's view.

Creation didn't respond to this directly but has told us in similar cases that it disputes our jurisdiction to consider the matter.

As the complaint has not been resolved, I've been asked to make a decision on the complaint, which is the final stage in our complaint handling process.

I issued a provisional decision explaining why I thought we had jurisdiction to consider the complaint and why I was planning to uphold it.

Neither Mr P nor Creation responded by the deadline I gave. So, I issued a jurisdiction confirming that we could look at the complaint.

This is my final decision on the merits of the complaint. It is in line with the provisional decision I issued.

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 21 February 2014. Mr P brought his s.75 claim to Creation on 25 February 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 P.

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

When Mr P first contacted Creation about this matter he said in his letter that the system had been mis-sold because he was told by A that the panels would be entirely "self-funded" via a government scheme that would reduce his energy bills and cover the monthly loan repayments.

He later told our Investigator that he didn't have a clear recollection of the sale but accepted the salesperson's assurance of a six-year payback and that he saw the solar panel system as a financial investment. That was after our investigator asked him about the benefits shown in the contract (see above).

Considering the inconsistency in what Mr P has said, and that he admits to not having a clear recollection of what was discussed at the point of sale, it would not be reasonable for me to simply accept what he has said as being a reliable indication of what he was told, and what he was thinking, at the time of sale. It was over ten years ago now, so it is understandable if his memory of what happened is not clear. But I will accept that it is likely that Mr P viewed the purchase as a good investment, and this is a key reason why he went ahead with the purchase.

With this in mind, I have looked at the documents from the time of sale to help me decide if A did anything that might make Mr P's relationship with Creation unfair.

As mentioned above, the contract did give some information about the benefits of the system. The "total annual savings" (which included FIT payments and electricity savings) were said to be £1,027.53. Against a cost of £9,850.00, this was a return on investment of 10.43% per year. The payback year was stated as year six, and over 20 years Mr P would benefit by £72,096.00.

I think it is likely that the figures shown on the contract informed the discussion between Mr P and A's representative. Bearing in mind that Mr P signed the credit agreement in the same meeting, I think that he knew that he was agreeing to pay a total amount for the system of £12,549.62 if the loan ran to its full five-year term. And that his monthly loan repayments throughout that time would be £207.49.

So, comparing the monthly loan repayment of £207.49 and the first-year benefits of £1,027.53, I think it ought to have been clear to Mr P that the benefits would not cover the monthly loan repayments. It doesn't seem very likely that A would've told Mr P the system would be self-funding in that way while giving him information on the contract that showed that would not happen.

I think the contract is clear that the payback time of six years and return on investment of 10.43% is based on the cost of £9,850.00 shown on the contract. The calculation is the "total annual savings" divided by the cost:

- $£1,027.53 / £9,850.00 = 10.43\%$

However, I do think the payback time and the "20-year benefits" of £72,096.00 were seriously misleading. I say this because annual inflation over the previous ten years, based on figures released by the Office for National Statistics ("ONS") had averaged:

- RPI 3.4%
- Electricity 8.4%

Extrapolating the first-year benefits shown on the contract using these inflation figures (FIT payments increasing annually with RPI and savings by electricity inflation), by my calculation the likely benefits of the system would be:

- £7,074 at six years
- £36,924 at 20 years

This compares to what is shown on the contract of benefits of at least £9,850 at six years (the contracted purchase price) and £72,096 at 20 years. The contract is silent on how those benefits were calculated. But it seems unlikely to me that reasonable assumptions were used – given historical inflation figures and the large discrepancy with my own calculations.

In addition to this, Mr P has provided evidence of how much electricity the system has generated – which is shown on his FIT statements. I've compared this to the figure shown on the contract and the MCS certificate, which is 3,579 kWh per year.

In the first year the system generated around 2,386 kWh, and by April 2021 it had generated on average 2,319 kWh per year. This is only about 65% of the amount of electricity that was promised by A. Given the system has never generated anywhere near the promised amount, it seems the system provided is not capable of generating the amount of electricity that Mr P was told it would. Had a more realistic generation figure been used along with reasonable inflation assumptions, then a more reasonable estimate of the benefits the system would provide would've been:

- £4,700 at six years
- £24,600 at 20 years

A reasonable estimated payback time then would've been 11 years for the purchase price of £9,850 and 13 years for the total amount payable under the loan agreement. This is significantly different to what Mr P was told.

Given the above, I think it likely that A gave Mr P a false and misleading impression of the benefits of the system – both in terms of its ability to generate electricity and the income and savings that would flow from that.

I consider A's misleading presentation went to an important aspect of the transaction for the system, namely the benefits which Mr P 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 have the capacity to generate the stated amount of electricity and provide a significant return on investment.

But, even if they did not have that effect, they nonetheless represented the basis upon which Mr P went into the transaction. Either way, I think A's assurances were seriously misleading and/or false, undermining the purpose of the transaction from Mr P'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 A's negotiations with Mr P in respect of its misleading and false assurances as to the benefits of the solar panel system, I'm persuaded a court would likely conclude that because of this the relationship between Mr P and Creation was unfair.

Because of this shortfall between Mr P's actual benefits and what he was promised, Mr P has been out of pocket by significantly more than he would've expected. And Creation has benefitted from the interest paid on a loan that Mr P 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 P and Creation's relationship arising out of A's misleading and false assurances as to the benefits of the solar panel system.

Creation should repay Mr P a sum that corresponds to the outcome that I consider to be fair and reasonable in the circumstances, which is that what Mr P paid for the system should amount to no more than the financial benefits he received in the first ten years after installation.

My reasoning for this is that I think it strikes a fair balance between Mr P paying a fair price for the system and him receiving a reasonable return on his investment. The expected lifespan of a solar panel system is 25 years. And Mr P will continue to receive FIT payments for up to 20 years after installation, as well as electricity savings (from using some of the electricity generated) for as long as the system continues to function. Limiting what he pays for the system to the benefits received over just five years (the term of the loan) seems to me to be too generous in this instance.

Creation should 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. While I have thought about what a court might award or has awarded in cases relating to the misrepresentation of solar panel systems under s.75, the redress I have decided upon is what I think is fair and reasonable in all the circumstances specific to this complaint to remedy the unfairness in Mr P's relationship with Creation.

Therefore, to resolve the complaint, Creation should recalculate the agreement based on the income and savings Mr P received from the system over the first ten years after installation and ensure that Mr P has paid no more than that.

Mr P will need to provide Creation with an up-to-date electricity generation meter reading and, where available, all relevant FIT statements and electricity bills (where available).

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 P when responding to him caused him some degree of trouble and upset. In recognition of this Creation should also pay Mr P additional compensation as set out below.

My final decision

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

- Calculate the total payments Mr P has made to purchase the solar panel system (including deposit/advance payment, fees and loan repayments) – A
- Use Mr P's meter readings, bills and FIT statements, to work out the benefits he received up until ten years after installation* – B
- Calculate the difference between what Mr P actually paid (A), and the benefits over ten years (B), adding 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 P
- Pay Mr P £100 additional compensation

*Where Mr P has not been able to provide electricity bills and/or FIT statements, 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 P how much it's deducted. It should also give Mr P 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 P to accept or reject my decision before 4 October 2024.

Phillip Lai-Fang
Ombudsman