

The complaint

Mr O has complained about Creation Consumer Finance Ltd's ('Creation') response to a claim he made under Section 75 ('s.75') of the Consumer Credit Act 1974 (the 'CCA') and in relation to allegations of an unfair relationship taking in to account Section 140.A ('s.140A') of the CCA.

What happened

On 29 July 2013, Mr O signed a loan agreement to buy a solar panel system ('the system') from a company I'll call "Z" using a 10-year fixed sum loan from Creation.

Mr O complained to Creation, he said that he was told by Z that the 'feed in tariff' ('FIT') payments would cover the cost of the loan repayments. However, that hasn't happened, and he's suffered a financial loss. Mr O also believed that what happened at the time of the sale created an unfair relationship between himself and Creation.

Creation told us they received a complaint from Mr O on 17 April 2020. Creation issued a final response letter dated 5 November 2020. Creation considered Mr O had brought his claim more than six years after the cause of action occurred under the FCA's rules on dispute resolution and the complaint was too late under the Limitation Act ('LA'). Mr O brought his complaint to this service on 17 November 2020 as he was unhappy with Creation's response and Mr O asked us to review his complaint.

One of our investigators looked into things and thought Z had likely told Mr O 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 Mr O 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 O 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.

Creation responded on 4 May 2023, in summary it said:

- Our service didn't have jurisdiction to look at the s.75 or s.140A complaint because, in regard to both, the event being complained of was more than 6 years ago.
- Mr O hadn't complained about the handling of his s.75 claim, however even if he had and Creation issued a response, the Financial Ombudsman Service wouldn't have jurisdiction under DISP 2.8.1R(1) to consider it.
- Events can give rise to an unfair relationship, but an unfair relationship is not an event in itself – the end of the relationship may be the starting point for limitation purposes in civil litigation but is not the starting point for the Ombudsman's jurisdiction under DISP 2.8.2R. The event being considered should be the event that gave rise to the unfair relationship.

- Our service should be adopting the High Court’s approach in *Hodgson v Creation Consumer Finance Limited* [2021] EWHC 2167 (Comm) (‘Hodgson’) as an appropriate mechanism for calculating redress

As there was no agreement the case was forwarded to the next stage of our process, an ombudsman’s decision.

I issued my first provisional decision in respect of this complaint on 2 September 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 Mr O’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

I’m satisfied I have jurisdiction to consider Mr O’s complaint, both in respect of the refusal by Creation to accept and pay his s.75 claim and the allegations of an unfair relationship under s.140A.

The s.75 complaint

The event complained of here is Creation’s alleged wrongful rejection of Mr O’s s.75 claim on 5 November 2020, this relates to a regulated activity under our compulsory jurisdiction. Mr O brought his complaint about this to the ombudsman service on 17 November 2020. So, his complaint in relation to the s.75 claim was brought in time for the purposes of our jurisdiction.

The Unfair relationship under s.140A complaint

The event complained of here is Creation’s participation, for so long as the credit relationship continues, in an alleged unfair relationship with Mr O. Here the relationship ended only when Mr O repaid the loan with a lump sum on 2 April 2019. The complaint was raised on 17 April 2020. So, the complaint has been brought in time for the purposes of our jurisdiction.

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 were responsible under s.56 when considering whether it is likely Creation had acted fairly and reasonably towards Mr O.

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 s140A.

What happened?

Mr O has said that he was told by Z's representative that the cost of the system would be fully paid for by the FIT payments he would receive and the savings he would make. I haven't seen any evidence Mr O had any prior interest in purchasing Solar Panels before being approached by a representative of Z.

I've looked at the documents from the time of the lending provided by Mr O 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, signed by Mr O on 29 July 2013, sets out Mr O's responsibilities for repaying the loan amount and the monthly cost of that. I'm satisfied the loan agreement clearly sets out, amongst other things, the amount being borrowed, the interest to be charged, total amount payable, the term of the loan and the contractual monthly loan repayments. So, I'm satisfied the loan was taken in Mr O's name to solely purchase the system sold by Z.

But the loan agreement contains no mention of the income or savings that may be generated. So, there was no way for Mr O to compare his total costs against the financial benefits he was allegedly being promised from that document. Given this, Mr O would have looked to Z'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 in order for him to make a decision.

We've asked if there was other documentation from the point of sale, but neither Creation nor Mr O have provided any.

However, Mr O has said the financial benefits were discussed. When thinking about the above I'm mindful of the actions taken by the Renewable Energy Consumer Code ('RECC') against Z. My understanding is that the RECC administers the renewable energy consumer Code and ensures that its members comply with the Code.

I have considered that Z were found to be in breach of the Renewable Energy Consumer Code in September 2014. And one of the breaches was found to be that consumers may have been misled about the costs of the loan being met fully by income generated from the solar panels.

The panel found that, "In relation to the loan agreements, and the costs being covered by the Feed-in Tariff, the Member's actions amounted to an acceptance that consumers may have been misled, and therefore the Panel finds the facts proved."

So, the Panel decided Z was in breach of Section 5.2 of the code (amongst others including section 5.4 and section 4). Section 5.2 of the code required members not to provide false or misleading information to consumers.

Whilst I accept that the above represents findings based on different cases the RECC were looking at, the findings do suggest that there were conduct concerns in the areas that relate to Mr O's complaint around the time that he was sold his system.

So, this seems to support what Mr O told us; that he was persuaded to go ahead with the solar panels paid for by a loan because he was told the cost of the solar panels would be fully met from the income and savings they could generate. Furthermore, I'm of the opinion that all of the above information strongly supports Mr O's testimony.

Creation hasn't provided evidence to dispute what Mr O said happened. Yet with no prior interest, Mr O left the meeting having agreed to an interest-bearing loan, with a monthly repayment of around £125 payable for ten years. Given his lack of prior interest and the financial burden he took on, I find Mr O's account of what he was told by Z to be credible and persuasive. The loan is a costly long-term commitment, and I can't see why he would have seen this purchase as appealing had he not been given the reassurances he's said he received from Z.

I have noted that our investigator thought that Mr O's testimony seemed persuasive and explained why they thought that in their assessment. I have noted that Creation has not responded to that part of the assessment.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £1,500 per year. I have not seen anything to indicate Mr O's system was not performing as expected but Mr O's system did not produce sufficiently to meet the loan repayments.

So, the statements made by Z were not true. I think the salesman from Z must reasonably have been aware that Mr O's system would not have produced benefits at this level. Whilst there are elements of the calculations that had to be estimated, the amount of sunlight as an example, I think the salesman would have known that Mr O's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to Mr O.

Considering Mr O's account about what he was told, and the documentation he was shown at the time of the sale, RECC's findings, Creation's actions and the fact it hasn't disputed these facts, and in the absence of any other evidence from Creation to the contrary, I think it likely Z gave Mr O a false and misleading impression of the self-funding nature of the solar panel system. On balance, I find Mr O's account to be plausible and convincing.

I consider Z's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Mr O was 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 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 Mr O went into the transaction. Either way, I think Z's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr O'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 Mr O 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 O 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.

The s.75 complaint and additional s.140A complaint 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 Mr O's s.75 complaint and his other s.140A complaint points. Furthermore, this doesn't stop me from reaching a fair outcome in the circumstances.

Fair compensation

In all the circumstances I consider that the fair compensation should aim to remedy the unfairness of Mr O and Creation's relationship arising out of Z's misleading and false assurances as to the self-funding nature of the solar panel system. I require Creation to repay Mr O a sum that corresponds to the outcome he could reasonably have expected as a result of Z's assurances. That is, that Mr O's loan repayments should amount to no more than the financial benefits he receives 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 O received from the solar panel 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 O received by way of FIT payments as well as through energy savings.

Mr O may need to supply up to date details to help Creation make that calculation. But Creation can and should use assumptions when information is not available. Mr O repaid the loan on 2 April 2019, so, to put things right Creation Consumer Finance Ltd must:

- *Calculate the total repayments Mr O made towards the loan up until he repaid it – A*
- *Use Mr O's electricity bills, FIT statements and meter readings to work out the known and assumed benefits he received up until he repaid the loan – B*
- *Use B to recalculate what Mr O should have repaid each month towards the loan over that period and reimburse him the difference between what he actually repaid (A) and what he should have repaid, adding 8% simple annual interest* to any overpayment, from the date of repayment until the date of settlement – C*
- *Use his electricity bills, FIT statements and meter readings to work out the known and assumed benefits he received between the loan being paid off and the end of the original loan term – D*
- *Deduct D from the amount Mr O paid off the loan – E*
- *Add 8% simple annual interest* to E from the date Mr O paid off the loan until the date of settlement – F*
- *Creation should pay Mr O C + F*

I agree Creation's refusal to consider the claim under s140A has also caused Mr O some further inconvenience. And I think the £100 compensation recommended by our investigator is broadly a fair way to recognise that.

** If Creation considers that it's required by HM Revenue & Customs to deduct income*

tax from that interest, it should tell Mr O how much tax it's taken off. It should also give Mr O a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate."

Creation Consumer Finance Ltd 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 asked the parties to the complaint to let me have any further representations that they wished me to consider by 16 August 2024. Neither party has 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 do so. 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 Mr O's complaint, I have nothing further to add.

So, having looked again at all the submissions made in this complaint, I am upholding Mr O'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 Mr O'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 Mr O to accept or reject my decision before 15 October 2024.

Douglas Sayers
Ombudsman