DRN-5026935

Financial Ombudsman Service

The complaint

Mr M complains about a credit agreement he took out with Creation Consumer Finance Ltd in relation to some home energy improvements. More specifically, that Creation did not accept his claims under s.75 and s.140A of the Consumer Credit Act.

What happened

In July 2014 Mr M entered into a Green Deal arrangement with a company I shall refer to as H. It was agreed that Mr M would receive a new boiler and solar panels. The total price for all of these new items was £9,000 and this was to be funded through a Green Deal loan and a loan with Creation.

Mr M is represented in his complaint but for ease I have referred to all submissions from Mr M and his representative as if made by Mr M. Mr M has said that he was told the Gren Deal arrangement would be fully self-funded and the new items would therefore not actually cost him anything. Mr M believes the arrangement was misrepresented to him as it has actually cost him money and the arrangement has not been self-funding as he was told.

Mr M believes he has valid claims under s.75 and s.140A of the Consumer Credit Act and is unhappy that Creation has not upheld his claims.

Creation did not consider that Mr M had submitted his claims in time and it believes this complaint is outside the time limits permitted in the FCA's DISP Rules. The complaint was referred to our service, where it was considered by an investigator. In summary, the investigator found that when considering s.75 and the Limitations Act, Mr M's s.75 claim is likely to be time barred as it was made to late. This was because Mr M had submitted his claim more than 6 years from the date he had entered into the loan agreement and suffered a loss.

The investigator set out how the limitation period in relation to a s.140A claim starts from when the relationship between the parties ended and as the relationship is ongoing, Mr M's claim under s.140A has been made in time.

The investigator found that Mr M's complaint about misrepresentation can be considered under s.140A, through s.56 Consumer Credit Act as H was acting as Creation's agent when negotiating the provisions of the loan and the sale of energy efficient measures. When considering the evidence presented in this case, which included the requirements of the 'Golden Rule' under the Green Deal scheme, there had been a misrepresentation to Mr M. And that Mr M had relied on that misrepresentation when deciding to enter into the contract with H, and he had suffered a financial loss as a result of this.

The investigator upheld Mr M's complaint and set out what Creation should now do to put things right.

Mr M accepted what the investigator had set out and proposed clarified that the loan with Creation was repaid in 2017. We did not receive a response to the investigator's view from Creation on this specific complaint. As the complaint could not be resolved informally, it was

referred to me for consideration as the last stage in our process.

I issued a provisional decision setting out what I was minded to conclude and then invited any further final comments from the parties. In that provisional decision, I set out the following:

The Green Deal

Before I set out my findings in this case I think it will be helpful to include some further details of the Green Deal scheme and in particular the 'Golden Rule'.

The energy efficient measures that Mr M entered into with H were through the government Green Deal initiative. It will be helpful therefore to set out some detail around this initiative and in particular the requirements of the 'Golden Rule' under the Green Deal scheme.

The Green Deal scheme was a government backed initiative intended to remove the upfront cost to consumers of installing energy efficiency measures into their homes. It did this by allowing Green Deal Providers ("Provider") to enter finance agreements with consumers to pay for the measures, which were then repaid via the consumer's electricity bill. The finance agreement was part of what was known as the Green Deal Plan ("Plan").

The Green Deal Provider Guidance issued by the Department of Energy & Climate Change (now part of the Department for Business, Energy & Industrial Strategy) set out the general structure of a Green Deal arrangement and the duties and responsibilities of various parties. Typically, this worked as follows:

- *If a consumer was interested in the Green Deal arrangement, an accredited Green Deal Assessor ("Assessor") would visit their home and assess possible improvements the consumer could introduce to make the home more energy efficient. This assessment should have taken place at least 24 hours after any initial introduction to the Green Deal scheme, unless the consumer opted to waive their right to this in writing.*

- *The Assessor produced an Energy Performance Certificate ("EPC") which showed the energy use of a typical household of the relevant type. And a Green Deal Advice Report ("GDAR"), which included an Occupancy Assessment certificate ("OA").*

- *The OA formed part of the qualifying assessment. And would have set out the actual use of energy by the customer's household at the time the assessment was carried out. It then detailed the potential measures which could improve energy efficiency for the property and what savings these measures would likely lead to.*

- *Once a GDAR was registered in a centralised register, it could be taken to any Provider, or several, to obtain quotes for a Plan. The Provider should have ensured that the quote covered all payments that were to be recovered from the consumer for supply and installation of the improvements and the provision of credit.*

- *It was the Provider who was ultimately responsible for designing the specification of works and the implementation of the Plan. This would include ensuring that the improvement measures were properly integrated into the overarching design of the package of improvements agreed upon.*

- *The Provider would arrange for a Green Deal Installer ("Installer") to install the measures under the plan. The Provider had to provide the Installer with a clear*

design and specification for all works to be carried out, including how the various products should be integrated into the overarching design for the package of improvements.

- *Once the installation was complete, the Green Deal payments were collected by electricity suppliers alongside the collection of energy payments. In doing so, the supplier would be acting on behalf of the Provider.*

- *The Plan was a contract between the Provider and the consumer. It was a contract for energy efficiency improvements to be made to a property and for finance to pay for those improvements.*

- *The Provider had to establish the Plan in line with requirements set out in the Energy Act 2011, the Green Deal Framework (Disclosure, Acknowledgement, Redress etc.) Regulations 2012 ("the Framework") and the Green Deal Code of Practice.*

The Golden Rule

A significant key principle of the Green Deal scheme was that the amount of finance that could be provided for the improvement measures was limited to the estimated financial benefit to the customer that was likely to be made by those measures. This limitation was partly constructed through a comparison of the estimated saving from having the benefits with the repayments made, in the first year of the agreement.

This principle is known as the "Golden Rule" and it forms part of the legislative provisions governing Plans. Regulation 30 of the Framework stated: "The first year instalments must not exceed the estimated first year savings…"

As the Plan remained with the property, and so was not dependent on the usage of energy by the specific occupant at the time of the assessment, the total amount of finance that could be provided was based on the benefits that could be achieved for a typical property of the type the consumer had.

Before entering into a Plan, the Provider had to estimate the overall savings which were likely to be made if the improvements were carried out. It was also the responsibility of the Provider to ensure that the "Golden Rule" was satisfied and that it was properly explained to the consumer.

What I've provisionally 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.

When considering what is fair and reasonable, I am required to take into account relevant law and regulations; regulator's rules, guidance and standards, and codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

Where the evidence is incomplete, inconclusive or contradictory (as some of it is here), I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in light of the available evidence and the wider circumstances.

S.140A Consumer Credit Act

As the investigator has already set out in some detail, Mr M has complained about the misrepresentations made by H have created an unfair relationship, as set out in s.140A

Consumer Credit Act. Mr M is able to make a complaint about an unfair relationship between himself 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 him. 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 going, 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 Mr M's case the relationship was not ongoing when he referred his complaint to the Financial Ombudsman as the Creation credit agreement had I understand been settled by this time. But as the Creation loan was I understand settled in 2017, effectively ending the relationship at that time, this was still within six years of Mr M bringing his complaint.

Therefore, taking into account DISP 2.8.2R(2)(a), I am satisfied Mr M's complaint 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 Mr M's complaint has been brought in time for the purposes of the alternative three-year rule under DISP 2.8.2R(2)(b).

The unfair relationship under s.140A complaint

When considering whether representations and contractual promises by H 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 H 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 H for which Creation was responsible under s.56 when considering whether it is likely Creation had acted fairly and reasonably towards Mr M.

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.

Mr M's case

Mr M says he was misled that the new measures would effectively pay for themselves. I've taken account of what Mr M says he was told, and I've reviewed the documentation that I've been supplied with.

The cost of the solar panels and replacement boiler was £9,000. This was to be funded by a green deal loan of £5,362.10 and a £3,802 loan with Creation. Mr M's Green Deal credit agreement refers to the total estimated first year savings that he can expect to make on his energy bills based on the improvements being made for a typical property. It is noted that these are not guaranteed savings but Mr M's estimated first year savings are noted as being £557.92.

I think it's important to note the Green Deal credit agreement also states, "Under the Green Deal the total estimated first year savings must be equal to, or greater than, your repayments in the first year of this agreement. This is called the "Golden Rule"."

H was responsible for ensuring that the whole package of instalments was taken into account when producing the Plan. The Green Deal Provider Guidance states:

> *"The Green Deal Provider has responsibility for designing the specification of works to be carried out for the property in question. In practice this means working with the customer to select products and ensuring that they are properly integrated into the overarching design of the package of improvements agreed upon. This is important in development of the quote stage because costing will depend on, amongst other things, the price of the products and any requirements for integration. It is the Green Deal Provider's responsibility to ensure that they take any necessary steps to satisfy themselves and their customers that the specification of works is comprehensive, ensures the proper integration of measures and meets all the necessary requirements."*

And:

> *"The Green Deal Provider should ensure that the quote issued to the customer covers all payments that are to be recovered from the Improver and bill payer for supply and installation of the improvements and the provision of credit."*

So, I think it reasonable that H should have known that not all of the cost was being funded

by the Plan.

The annual repayments required under the Green Deal credit agreement are approximately £554.80, which is less than the estimated savings of £557.92. Considering this in isolation, it would appear that the Golden Rule was met here, as the savings are likely to exceed the cost of the measures.

But the cost of the energy efficient measures Mr M was acquiring far exceeded the amount being borrowed under the Green Deal loan and Mr M was therefore required to make repayments to Creation for the £3,802 loan, in addition to the repayments to the Green Deal loan. When including the required repayments for the Creation loan, the Golden Rule was not even close to be being met.

Mr M has been consistent and clear about his intentions of taking out the energy efficient measures here and that it was because he was told they would be self-funding and therefore essentially cost him nothing. Had Mr M been made aware that the installation of the measures would come at a net cost to him, I don't think he would have agreed to the Plan. I don't think he would have agreed to have the new boiler and solar panels installed or have entered the finance agreement with Creation.

Mr M complains about the arrangement being misrepresented to him and a misrepresentation is generally considered to be a false statement of fact that has the result of inducing the other party to enter a contract. For the reasons set out here, I am satisfied that there was a false statement of fact around the actual cost of the measures as these were not self-funding as Mr M was led to believe. Mr M has said that it was that the measures would be self-funding and therefore not cost him anything that was behind his decision to enter into the agreement. This is to me entirely plausible, and I'm satisfied the false statement about the measures being self-funding is what induced Mr M into entering into the arrangement.

Would the court be likely to make a finding of unfairness under s.140A?

The relationship between Mr M and Creation was built on the misrepresentation made by H, Creation's agent and having considered the submissions in this case, I consider it more likely than not that Mr M would not have agreed to take out the energy efficiency measures had he been correctly informed about the true costs of the arrangements.

Because of this shortfall between his costs and the actual benefits, each month Mr M has had to pay more than he expected to cover the difference between his energy efficient benefits and the cost of the loans. So, clearly Creation has benefitted from the interest paid on a loan he would otherwise have not taken out.

In my view, the original misrepresentations and the resulting collection of the loan repayments gave rise to the level of unfairness required to trigger a likely finding by a Court under s.140A. As the investigator has set out, the whole relationship is tainted by the untrue statements made by Creation's agent.

It follows that I think a court would likely find the relationship in question unfair. Given that, I've also concluded that Mr M has suffered a loss through entering the agreement. And I find that he's been treated unfairly and unreasonably and as a result his complaint should be upheld.

Putting things right

As I am persuaded a court would find the relationship between Creation and Mr M to have

been unfair I will now set out what I consider to be fair and reasonable redress.

The aim of any award will be to try and put Mr M in the position he would have been in had an unfair relationship not been created and H had not misrepresented the benefits of the solar panel system and boiler. But to achieve this Creation would need to arrange for the removal of the solar panels and boiler. This is likely to be expensive to Creation, who would need to employ other parties to carry out the work. And this would create significant disruption Mr M. I'm also mindful of these items working in line with the way they should and would likely be scrapped if now removed. It would therefore be more reasonable in my view for the solar panels and boiler to stay in place.

The cost of the solar panels and replacement boiler was £7,000 and £2,000 respectively. The repayment period for each of the measures under the Green Deal finance is 23 and 12 years respectively. The first year estimated savings was £557.92.

It's not been possible to determine the individual estimated savings for each of the two measures. In the absence of the individual measure's savings, I consider it reasonable to apportion the first year estimated savings of £557.92 proportionately across each of the two measures, under the total cost price of £9,000.

Measure	*Cost price*	*% of overall cost*	*% of total first year savings*
Solar Panels	*£7,000*	*78%*	*£435.18*
Boiler	*£2,000*	*22%*	*£122.74*

As the Green Deal credit agreement says the repayment period for the panels and boiler is 23 years and 12 years, I think it's reasonable that Mr M should pay no more than £11,482.02 for these measures. This is an amount equivalent to the estimated savings across the solar panels and boiler respective repayment periods. Creation should therefore take steps to ensure Mr M isn't paying more than £11,482.02 across both the Green Deal loan and what Mr M had paid towards the Creation loan.

In my view, the easiest way to do this would be to leave the Green Deal loan in place and calculate how much Mr M has paid in total towards the Creation loan. But Creation should recalculate the loan as if it's original total cost was £4,649.85, instead of the £5,896.80. If Mr M has paid more than this, the amount of any overpayment should be refunded to him, with interest.

Interest should be calculated at 8% simple per year from the date of any payment made until the date of settlement.

My provisional decision

My provisional decision is that I uphold Mr M's complaint against Creation Consumer Finance Ltd and direct it to settle the complaint in accordance with what I have set out above in the putting things right section.

Our service did not receive a response from either party to the 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 have received no response from either party to my provisional decision and in the absence of any new or alternative arguments, I’ve come to the same overall conclusions as set out in my provisional decision. I’m satisfied, for the same reasons previously explained above, that Mr M’s complaint should be upheld.

My final decision

My final decision is that I uphold Mr M’s complaint against Creation Consumer Finance Ltd and direct it to settle the complaint in accordance with what I have set out above in the *Putting things right* section of this decision.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr M to accept or reject my decision before 16 October 2024.

Mark Hollands
Ombudsman