

The complaint

Mr B 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').

What happened

In December 2012, Mr B bought a solar panel system ('the system') from a company I'll call "R" using a 10-year fixed sum loan from Creation. The agreement sets out the total cost of the system was £8,150. However, Mr B paid a £4,000 deposit and so only £4,150 was financed with £1,552.40 of interest added to this. Mr B was due to make 120 monthly payments of £47.52. The amount payable was £9,702.40. Creation has confirmed the loan has been repaid.

Mr B complained to Creation on 5 January 2021, he said that he felt pressured by R into purchasing the system. That R told him the 'feed in tariff' ('FIT') payments would cover the full cost of what he paid towards the panels including his loan repayments and his electricity bills, however, that hasn't happened, and he's suffered a financial loss.

He also said that R had dissolved, therefore he no longer had a warranty on the system, so if something happened to it, he would have to cover things out of his own pocket.

Creation wrote to Mr B on 29 March 2021 and said it was unable to provide a response to his s.75 claim. In the letter it said as it was taking longer than expected to resolve things, he could refer his complaint to our service, but hoped he would allow it extra time to complete its investigation. As Mr B hadn't heard further from Creation, he referred his complaint to the Financial Ombudsman Service on 3 November 2021.

Whilst we were asking Mr B for further information regarding his complaint Creation responded on 5 November 2021 in its final response. It considered Mr B had brought his complaint outside of the time limits we follow. In the letter Creation explained that Mr B could refer his complaint to the Financial Ombudsman.

On 17 November 2021 Mr B told us he remained unhappy, so an investigator considered his complaint, she thought that –

- Given the s.75 claim was more likely to be time barred under the LA, Creation's answer seemed fair.
- She could use the Financial Ombudsman's inquisitorial remit to consider whether the alleged misrepresentations could have created an unfair relationship between Mr B and Creation under Section 140A ('s.140A') of the CCA.
- She found that a complaint about an unfair relationship was one we could look at under our rules and that 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 B and Creation.

She recommended that Mr B keep the system and Creation take into account what Mr B had

paid so far, along with the benefits he received, making sure the system was effectively self-funding over the loan term.

I can't see Mr B or Creation responded, so, the case was progressed to the next stage of our process, an Ombudsman's decision.

Our investigator spoke to Mr B, and he clarified further, what happened and what was said at the point of sale. Mr B told us he was approached by R who initially proposed he purchased 16 panels for his system.

However, later R told him they could only fit 12 panels on his roof. This was due to frames that were required for the panels to be mounted on a flat roof. Because of this the cash price of the panels reduced from around £9,900 to £8,150.

Mr B has told us that R's representative originally said that the full cost of the system, including his £4,000 deposit would be paid for by the benefits he would receive from the 16 panels. Mr B said he was reassured by R's representative that he didn't need to worry about the monthly payments of the loan, as the benefits would cover this, and by the time he repaid the loan he would be thousands of pounds in profit, so the full amount paid would be covered.

We asked Mr B what he understood about his benefits given the 16 panels were changed to 12. He said R did not specifically mention there would be a significant change in his benefits than what had previously been explained. At this time R told him he would still make his money back, so he proceeded with the purchase.

Mr B has said he retired at 59, around 5 years before he purchased the system. He's said at the point of retiring his income got a lot tighter, he didn't have very much money coming in. The complaint was then considered by an ombudsman colleague, who gave reasons why the complaint ought to be upheld. Mr B agreed with the findings reached by my colleague and we didn't hear from Creation.

However, my colleague isn't here at the moment to be able to finalise her decision. So, the complaint was passed to me for review and I issued a provisional decision outlining why I agreed the complaint should be upheld.

Both parties were asked to respond as soon as possible, but in any event, no later than 19 September 2024. Neither Creation or Mr B responded to or provided any further submissions. As the deadline for a response has now passed, I've arranged to finalise the complaint and issue a final decision.

A copy of the provisional findings follows this and forms part of this final decision.

What I said in my provisional decision:

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

Jurisdiction

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

The s.75 complaint

The event complained of here is Creation's alleged wrongful rejection of Mr B's s.75 claim on 5 November 2021, in which it gave referral rights to our service. This relates to a regulated activity under our compulsory jurisdiction. Whilst Mr B initially brought his complaint to the ombudsman service on 3 November 2021, he reconfirmed he wanted the financial ombudsman to look at it on 17 November 2021, 12 days after Creation issued its final response. 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

It seems to me that Mr B's complaint is, at its heart, both about Creation's response to his s.75 claim and also about the consequences of R's alleged misleading representations/contractual promises (which for reasons I'll explain later Creation was responsible for). In part that seems to me to amount to a complaint about the unfairness of the overall lending relationship he has had with Creation, bearing in mind the failings that Mr B has alleged and the detriment that he says he experienced as a result. In my view therefore, his concerns extend to and include a complaint about Creation's participation in and perpetuation of an unfair relationship.

So, given one of the events complained of here is Creation's participation, for so long as the credit relationship continues, in an alleged unfair relationship with Mr B. And given the relationship was ongoing at the time it was referred to the Financial Ombudsman Service on 3 November 2021, that particular complaint has been brought in time for the purposes of our jurisdiction.

Merits

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 cause of action arose when an agreement was entered into on 17 December 2012. Mr B brought his s.75 claim to Creation on 5 January 2021 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 R 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 R 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 R 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?

As I've already set out Mr B told us he was approached by R who initially proposed he purchased 16 panels for his system. Mr B has provided a contract for 16 panels at a cash price of £9,900, on the contract there is a box titled 'special conditions', the copy we have, in parts, is illegible however Mr B has explained that in this box the representative noted he had a flat roof, and the panels would need a frame.

Mr B has explained that R later told him they could only fit 12 panels on the roof, because of the frames. R did not provide a new contract however the cash price reduced to £8,150 – which is the amount set out in the credit agreement. Mr B has said that when the 16 panels were changed to 12, R did not specifically mention there would be a significant change in his benefits than what had previously been explained. Mr B has said at this time R told him he would still make his money back, so he proceeded with the purchase.

I haven't seen any evidence Mr B had any prior interest in purchasing solar panels before R sold him the system.

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.

I've considered Mr B's loan agreement. I'm satisfied it 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.

I've also considered the contract Mr B has provided; I'm mindful this was for 16 panels and Mr B ended up purchasing 12, however the likely financial benefits of the system aren't included on this document. There is a box entitled "Calculating a SAP Calculation" but it only includes the likely electrical output of the system.

Mr B has also said he didn't receive a second contract for the 12 panels. Given all of this, I can't see there was a way for Mr B to compare his total costs against the financial benefits he was allegedly being promised.

Mr B has said the financial benefits were discussed; despite the paperwork I've seen not including information about them. I've looked at a copy of R's website from January 2013, on the Solar PV installations page, it said the following:

Why Install Solar PV

- Get a return on your investment better than most banks through the guaranteed government back FIT scheme, index linked every year for 20 years
- FREE electricity
- Isolate yourself from rising energy costs
- Reduce your carbon footprint.

Further down the page it says – 'see how much money you could earn and how you can reduce your carbon footprint with our solar calculator'.

I think it follows that if the website emphasises the benefits of a solar panel system and the return on the investment (as mentioned above), it's likely this would have been a central part of R's conversation when selling the product.

So, I find what Mr B has said believable, I think R's website supports his testimony that the potential benefits were discussed. I'm also of the opinion that they would be a key reason to purchase the system and his savings on his electrical bills and income from the FIT scheme would have been a central part of the conversation.

Given the original contract doesn't contain information about the benefits, and he didn't receive a contract for the reduced panels, Mr B would have looked to R'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.

However, with no prior interest in solar panels Mr B, who was retired at the time with a tight income, left the meetings with R having agreed to spend a substantial amount of his savings and to an interest-bearing loan, with a monthly repayment of £45.72, payable for 10 years. Given his lack of prior interest and the financial burden he took on, I find Mr B's account of what he was told by R, credible and persuasive. Furthermore, I'm persuaded he felt reassured by R that the reduction in panels and cost price wouldn't make a difference to making his money back over the term of the loan.

The loan is a long-term commitment, when as I said he was retired and had a tight income, I can't see why he would have seen this purchase appealing had he not been given the reassurances he's said he received from R. Also, Creation hasn't provided evidence to dispute what Mr B's said happened.

For the solar panels to pay for themselves, including the £4,000 deposit, by the time the loan was repaid, they would need to produce combined savings and FIT income of around £970.24 per year.

I have not seen anything to indicate Mr B's system was not performing as expected, but his system has not produced this. So, these statements were not true. I think R's representative must reasonably have been aware that Mr B'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 R's representative would have known that Mr B's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to Mr B.

Considering Mr B's account about what he was told, the documentation he was shown at the time of the sale, and the fact Creation hasn't disputed these facts, I think it's likely R gave Mr B a false and misleading impression of the self-funding nature of the solar panel system.

I consider R'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 R'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 B went into the transaction. Either way, I think R's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr B'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 R'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 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.

Mr B's warranty

As mentioned previously it appears Mr B's system is performing as expected, and I can't see a claim has been made about it not working that's not been fulfilled. Therefore, I don't plan to make a finding on this in my decision.

It seems to me that Mr B is worried about something going wrong with the system in the future, and if this happened who would help him. If this does happen, he may want to contact Creation to see if it would be able to help, and if he's unhappy with its response he may be

able to bring a complaint to our service.

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 R'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 R'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.

Therefore, I agree with the investigator's findings on how to resolve the complaint. Given Mr B has now repaid his loan, Creation should recalculate the agreement based on the known and assumed savings and income Mr B received from the 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 B received by way of FIT payments as well as through energy savings. Mr B will need to supply up to date details, where available, of all FIT benefits received, electricity bills and current meter readings to Creation.

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.

Finally, I consider that Creation's failure to fully deal with Mr B's complaint in a reasonable timeframe, with minimal communication, caused Mr B some degree of trouble and upset. I agree with the investigator that in recognition of this, and in addition to what I have already set out above, Creation should also pay Mr B £100.

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.

As neither party has provided any further comments or submission, I see no reason to depart from the findings that I made in the provisional decision. I still think for the reasons set out in the provisional decision and which are repeated above that Creation should pay compensation to Mr B.

I've set out below what Creation needs to do in order to put things right for Mr B.

Putting things right

For the reasons I have explained I intend to uphold Mr B's complaint, and tell Creation Consumer Finance Ltd to do the following to put things right –

- Calculate the total payments (the deposit and monthly repayments) Mr B has made towards the solar panel system up until the date of settlement of his complaint – A
- Use Mr B's bills and FIT statements, to work out the benefits he received up until the loan term* – B
- Use B to recalculate what Mr B should have paid each month towards the loan over that period and calculate the difference, between what he actually paid (A), and what he should have paid, applying 8% simple annual interest to any overpayment from the date of payment until the date of settlement of his complaint** – C
- Reimburse C to Mr B
- Pay Mr B £100 for trouble and upset caused.

*Where Mr B is not able to provide all the details of his meter readings, electricity bills and/or FIT benefits, I am satisfied he has already 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 Mr B how much it's taken off. 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.

My final decision

For the reasons I've explained above and in the provisional decision, I'm upholding Mr B's complaint.

Creation Consumer Finance Ltd should put things right for Mr B as directed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 18 October 2024.

Robert Walker
Ombudsman