DRN-5045787

The complaint

Mr P has complained about the way Creation Consumer Finance Ltd ("Creation") responded to claims he'd made in relation to misrepresentation, breach of contract, and an alleged unfair relationship taking into account section 140A ("s.140A") of the Consumer Credit Act 1974 (the "CCA").

Mr P has been represented in bringing his complaint but, to keep things simple, I'll refer to Mr P throughout.

What happened

In May 2015 Mr P entered into a fixed sum loan agreement with Creation to pay for a £7,995 solar panel system ("the system") from a supplier I'll call "E". The total amount payable under the agreement was £12,610.80 and it was due to be paid back with 120 monthly repayments of £105.09. The most recent update from Mr P was in December 2022 where he confirmed he still had a balance to pay.

In August 2021 Mr P sent a letter of claim to Creation explaining the system had been mis-sold to him due to misrepresentation by E.

Mr P said E told him he'd be paid for the electricity the system generated through the government's Feed in Tariff (FIT) payments and that the system would be self-funding and his energy bills and household overheads would go down.

Finally, Mr P said the system was misrepresented to him and believed the statements and several other actions at the time of the sale created an unfair relationship between himself and Creation.

Creation sent a final response letter in October 2021 to say it wasn't considering the complaint because it had been brought out of time. Unhappy with Creation's response, Mr P decided to refer his complaint to the Financial Ombudsman in January 2022.

One of our investigators looked into things. Firstly, they considered that the Financial Ombudsman had jurisdiction to consider the complaint and they concluded s.140A created an unfair relationship that was still ongoing when the complaint was made and so the complaint was made within the relevant time limits. They then went on to consider the merits.

The investigator concluded Mr P was likely told the system was self-funding over the course of the loan term, and so they thought E had misrepresented it. They thought a court would likely find the relationship between Mr P and Creation was unfair and that he'd suffered a loss through entering into the agreement.

In order to put things right, they thought Creation should recalculate the loan based on known and assumed savings and income over the course of the loan so that Mr P 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.

Mr P accepted the view, but Creation didn't. In summary, Creation said:

- The complaint was brought more than six years after the events complained about, so outside the time limits which apply to the jurisdiction of the Financial Ombudsman.
- Mr P's allegations of an unfair relationship don't relate to any events post-dating the sale of the system in May 2015.
- 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.
- Without prejudice to its position on jurisdiction it considers 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 things weren't resolved, the complaint has been passed to me to decide. I then proceeded to issue a provisional decision explaining the reasons why I was intending to uphold the complaint.

Both parties were asked for further submissions as soon as possible, but in any event no later than 26 September 2024.

Mr P confirmed he accepted the provisional decision, and we didn't hear from Creation. A copy of the provisional findings follows this in smaller font and form 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.

My findings on jurisdiction

I'm satisfied I have jurisdiction to consider Mr P'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

Where Creation exercises its right and duties as a creditor under a credit agreement it is carrying out a regulated activity within scope of our compulsory jurisdiction under Article 60B(2) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the "RAO"). In undertaking that activity, the creditor must honour liabilities to the debtor. So, if a debtor advances a valid s.75 claim in respect of the credit agreement, the creditor has to honour that liability and failing or refusing to do so comes under our compulsory jurisdiction. Creation argues that the event complained of when the matter is brought to our service occurred as and when the supplier caused the alleged s.75 liability to arise in the first place.

I disagree: the lender's s.75 liability in damages doesn't arise as a result of any act or omission of the lender in performing a regulated activity – it is simply a claim given by statute to the borrower against the lender. And it arises from the acts or omissions of a third party, the supplier. Only when and if that claim is presented by the borrower to the lender must the lender do anything about it, which is to honour its statutory liability by paying the claim if it is a valid one. Until then, the lender's acts and omissions are simply to have lent money to the borrower at the borrower's request, and that is not the matter complained about.

So, when a borrower brings a complaint to the Financial Ombudsman Service alleging that

they were due money under s.75 which the lender has refused to pay, the "event complained of" in such circumstances isn't the supplier's conduct; it is the lender's refusal to honour its alleged statutory liability when the borrower made the claim.

In this case, Creation rolled up its consideration of Mr P's claim into a letter that treated Mr P as having brought a complaint which he was entitled to refer to us. So, its refusal to accept and pay the s.75 claim was contained in a final response letter in October 2021, in which it told Mr P he could refer his complaint to the Financial Ombudsman within 6 months.

In those circumstances, because Creation's letter dated October 2021 didn't agree and therefore rejected Mr P's claim under s.75 (which Mr P says is valid) it constituted "the event complained of". It also set out Creation's response to any complaint that flowed from this and invited Mr P to refer that complaint to the Financial Ombudsman if he was dissatisfied with the outcome. Creation could have separated those stages, waited for Mr P to complain that the s.75 claim had not been accepted and honoured, and only then issued its final response letter. Instead, it followed the same practice that many other lenders adopt by allowing Mr P to refer the matter directly to the Financial Ombudsman Service, by way of treating it as a complaint.

Creation may argue that Mr P didn't complain to it about the manner in which it dealt with his s.75 claim, and that it has never responded to such a complaint. But that ignores the fact that it was Creation's choice to roll the answer to the s.75 claim into a final response letter in the way that I've described. That was a reasonable and pragmatic way of proceeding, because the issues between the parties on this part of Mr P's complaint were whether it was fair and reasonable for Creation to reject Mr P's s.75 claim, as they remain to this day.

The unfair relationship under s.140A complaint

I have also considered Creation's arguments in its response on our jurisdiction over the complaint about an unfair relationship under s.140A. I am satisfied this aspect of the complaint was brought in time so that the Financial Ombudsman has jurisdiction.
Mr P is able to make a complaint about an unfair relationship between himself and Creation under 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 alleged 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 ongoing, 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 is responsibility to correct unfairness in the relationship.

In Mr P's case the relationship was ongoing when he referred his complaint to the Financial Ombudsman. At the time, Creation was responsible for the matters which made its relationship with Mr P unfair and for taking steps to remove the source of that unfairness or mitigate its consequences so that the relationship was no longer unfair. By relying in his complaint on the unfairness of the credit relationship between himself and Creation, therefore Mr P complained about an event that was ongoing at the time he referred his complaint to the Financial Ombudsman.

Therefore, taking into account DISP 2.8.2R(2)(a), I am satisfied it has been brought in time. I am otherwise satisfied the complaint is within the Financial Ombudsman Service's jurisdiction to consider and it's not necessary to consider whether Mr P's complaint has been brought in time for the purposes of the alternative three-year rule under DISP 2.8.2R(2)(b).
Merits

The unfair relationship under s.140A complaint

When considering whether representations and contractual promises by E 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 E 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 E for which Creation was 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

Mr P says he was verbally misled that the system would effectively pay for itself within five years because he was told the system would cover the cost of the loan and then he would be able to sell the excess power to his electricity supplier. I've taken account of what Mr P says he was told, and I've reviewed all the documentation I've been supplied with.
The fixed sum loan agreement which has been provided sets out the amount being borrowed; the interest charged; the total amount payable; the term; and the contractual monthly loan repayments. I think this was set out clearly enough for Mr P to be able to understand what was required to be repaid towards the agreement.

Indeed, we asked if there was other documentation from the point of sale, and Mr P was able to supply what appear to be handwritten notes – but it isn't clear whether these are notes made by Mr P or notes given to Mr P by E's agent. I have also been supplied with a

copy of the contract between Mr P and E.

This contract doesn't set out any potential financial benefit Mr P could achieve, so I can't see there was a way for Mr P to compare his total costs against the financial benefits he was allegedly being promised.

The handwritten note calculations provided do support what Mr P has said about the system being paid for itself. Based on the figures in the notes it suggests that Mr P's current outgoings would be matched by the payments that he could expect to receive as well as the reduced amount of electricity that he would have to use. Overall, the notes are further evidence of what Mr P says – E's agent explained that the system would be cost neutral. Indeed, given the outcome of the Renewable Energy Consumer Code's (RECC) investigations – which I come on to below, I think on balance, Mr P was told the system would be self-funding.

Mr P has said he only agreed to the purchase because E told him the system would pay for Itself and which I think is supported by the documentation. Given Mr P's testimony, I'm mindful that it would be difficult to understand why, in this particular case, he would have agreed to pay for the system if his monthly outgoings would increase significantly. And I think this is supported by the additional information I've seen about E's sale practices and what its website showed at the time.

When thinking about the above I'm mindful of the actions taken by the 'RECC' against E. My understanding is that the RECC administers the renewable energy consumer Code and ensures that its members comply with the Code.

The RECC investigated E's conduct in September 2014 – so less than a year before Mr P agreed to the system. The RECC determined that E was in breach of a number of sections of the code including, but not limited to, sections 5.2 and 5.4. These two sections relate to requiring members not to provide false or misleading information to consumers and providing clear and accurate information about the cost and benefits of the product sold. Whilst I accept that the above are findings on different cases the RECC was looking at, the findings suggest that there were conduct concerns in the same areas that Mr P has complained about, at a similar time to when he was sold the system.

Apart from the credit agreement and contract, there isn't any substantial information about the benefits or the usage Mr P may have benefited from, so I can't be sure of the financial benefits that Mr P may have been provided or received.

So, I find what Mr P has explained happened to be believable, and the RECC investigation and limited paperwork do seem to support that the potential benefits were discussed. I'm 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.

I think Mr P would have looked to E'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. And as I've said I think the information I have seen supports Mr P's testimony that he was told by E's representative the system would be self-funding.

On balance I find Mr P's account to be plausible and convincing.

For the solar panels to be self-funding, they'd need to produce a combined savings of around £1,261.08 per year – this is based off the total year payment Mr P would need to pay in order to service the credit agreement.

I've not seen anything to suggest he's achieved anywhere near this benefit. I therefore find the statements that were likely made as to the self-funding nature of the system weren't true. I think E's representative must reasonably have been aware that Mr P's system would not likely have produced benefits at the level required to be self-funding. While there are elements of the calculations that had to be estimated, the amount of sunlight as an example,

I think E's representative would have known that Mr P's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to him.

Overall, I've not quite seen enough in the limited documentation I do have to be persuaded that Mr P was given enough information to make an informed decision about the savings he'd likely make.

Considering Mr P's account about what he was told; the documentation; the RECC findings; and that Creation hasn't disputed what's been said, I think it likely E gave Mr P a false and misleading impression of the self-funding nature of the system at the point the credit agreement was entered into.

Given the financial burden he took on I find Mr P's account of what he was told by E credible and persuasive. The loan is a costly long-term commitment, and I can't see why he would have seen this purchase appealing had E not given the reassurances he said he received.

I consider E's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Mr P expected to receive by agreeing to the installation of the system. I consider that E's assurances in this regard likely amounted to a contractual promise that the 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 P went into the transaction. Either way, I think E's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr P'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 E's negotiations with Mr P 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 P and Creation was unfair.

Because of this apparent 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.

Finally, I note Mr P also mentioned claiming damages through s.75. 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 P's s.75 complaint. Furthermore, this doesn't stop me from reaching a fair outcome in the circumstances.

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 E's misleading and false assurances as to the self-funding nature of the solar panel system. Creation should repay Mr P a sum that corresponds to the outcome he could reasonably have expected as a result of E's assurances. That is, that Mr P'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. I have considered this 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 P's expectation of what he would receive. I consider Mr P has lost

out, and has suffered unfairness in his relationship with Creation, to the extent that his loan repayments to it exceed the benefits from the solar panels. On that basis, I believe my determination results in fair compensation for Mr P.

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's 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 P 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 P received by way of FIT payments as well as through energy savings. Mr P will need to supply up to date details of all FIT benefits received, electricity bills and current meter readings to Creation.

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

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 had anything further to add, I see no reason to depart from the findings I made in the provisional decision and which can be found above. I am therefore upholding Mr P's complaint for the reasons I've set out above.

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

Putting things right

For the reasons I have explained, I uphold Mr P's complaint in part and direct Creation Consumer Finance Ltd to:

- Calculate the total payments (the deposit and monthly repayments) Mr P has made towards the solar panel system up until the end of the loan term – A
- Use Mr P's bills and FIT statements to work out the benefits he received up until the end of the loan term* – B
- Use B to recalculate what Mr P 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 each payment until the date of settlement** – C
- Reimburse C to Mr P
- Pay Mr P an additional £100 compensation

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

My final decision

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

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 31 October 2024.

Robert Walker
Ombudsman