

The complaint

Dr N has complained about Creation Consumer Finance Ltd (“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.

Dr N has been represented in bringing his complaint but, to keep things simple, I’ll refer to Dr N throughout.

What happened

On 30 September 2015, Dr N signed a loan agreement for a fixed sum loan agreement with Creation to pay for two solar panel systems for two separate properties from a supplier I’ll call “Z”. The loan amount was for £15,132 and the total amount payable under the agreement was £24,683.38 and it was due to be paid back with 120 monthly repayments of £197.36.

Creation told us that they received Dr N’s letter of complaint on 22 September 2021. In the complaint Dr N explained that he considered he had a valid claim due to misrepresentation and breach of contract by Z. Dr N said he’d been told he could be entitled to the solar panel systems at no cost to him. He says he was told the system would be fully self-funding. But the income and savings have not been sufficient to cover the cost of the borrowing. On the basis of the above Dr N said he had a like claim against Creation for breach of contract and misrepresentation under s75. To resolve the claim and complaint, Dr N requested that Creation should make a payment to settle the matter.

Creation issued their final response letter on 11 November 2021 to say it was dismissing the complaint without consideration because it had been brought out of time. As Dr N remained unhappy with Creation after the final response, he asked us to review the complaint.

On 3 May 2023, one of our investigators looked into things and thought Z had likely told Dr N 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 Dr N 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 Dr N 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.

As we have not received a response to that assessment from Creation, the case was passed forward for the next stage in our process, an Ombudsman’s decision.

I issued my provisional decision in respect of this complaint on 13 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 Dr N'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.

Jurisdiction to look at the s.75 complaint

The loan agreement was signed by Dr N on 30 September 2015. Dr N raised his complaint on 22 September 2021. So, Dr N raised his complaint within six years of the event complained about. As such, based on the rules I must have regard for, Dr N has raised his complaint within the time limits that apply. But I go on to talk about that in regard to s.75 and s.140 A below.

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.

On other cases, 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 our 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 Dr N's claim into a letter that treated Dr N as having brought a complaint which he was entitled to refer to our service. So, its refusal to accept and pay the s.75 claim was inferred from a final response letter of 11 November 2021, in which it told Dr N he could refer his complaint to our service within 6 months.

In those circumstances, because Creation's letter dated 11 November 2021 rejected Dr N's claim under s.75 by saying the complaint had been made too late, (a claim which Dr N 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 Dr N to refer that complaint to our service if he was dissatisfied with the outcome. Creation could have separated those stages, waited for Dr N 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 Dr N to refer the matter directly to the ombudsman service, by way of treating it as a complaint.

Creation has argued in other cases that if a consumer 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 Dr N's complaint were whether it was fair and reasonable for Creation to reject Dr N's s.75 claim, as they remain to this day.

Creation also refers to DISP 2.8.1R(1) which broadly provides a complaint can only be considered if the respondent has sent the complainant its final response (or summary resolution communication). However, Creation did send Dr N a final response letter on 5 November 2021. And in this case, I note that after the complaint was referred by Dr N to the ombudsman service on 3 June 2021, we wrote to Creation providing details of the complaint as submitted to the ombudsman service including details of Dr N's complaint about the s.75 claim.

If Creation's position had been that it denied it received any such complaint, it could have raised this with the ombudsman service at the time, but it did not. Instead, it provided information concerning its position on the complaint. It was apparent from this correspondence that, in relation to s.75, Dr N's complaint was that Creation had a liability to him which it was declining to pay.

So, even if no final response had been issued in respect of the complaint about s.75, in accordance with DISP 2.8.1R(2) Creation has had well over eight weeks to respond to the complaint and our service is entitled to deal with it.

There has been no conflation with the six-month time limit under DISP 2.8.2R(1) in this regard. That Creation refused to accept the s.75 claim within a final response letter does not give rise to any difficulties calculating when time begins to run under DISP 2.8.2R(2)(a).

Creation also argued on other cases that the complaint was out of our jurisdiction taking into account the Limitation Act 1980 ("the LA"), but our service has its own rules under DISP 2.8.2R saying when a complaint is brought too late. The LA does not limit our jurisdiction. However, I do consider that the LA is relevant law for the purposes of the merits of Dr N's complaint about its rejection of the s.75 claim.

Jurisdiction to look at the complaint about an unfair relationship under s.140A

I have also considered Creation's arguments on other cases about 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.

Dr N 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 foot, 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 Dr N'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 Dr N 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, Dr N therefore 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 ombudsman service's jurisdiction to consider and it's not necessary to consider whether Dr N'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 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 was responsible under s.56 when considering whether it is likely Creation had acted fairly and reasonably towards Dr N.

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?

Dr N says he was verbally misled that the system would effectively pay for itself. I've taken account of what Dr N says he was told, and I've reviewed the documentation that I've been supplied.

The fixed sum loan agreement 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 Dr N to be able to understand what was required to be repaid towards the agreement.

But the loan agreement contains no mention of the income or savings that may be generated. So, there was no way for Dr N to compare his total costs against the financial benefits he was allegedly being promised from that document. Given the contract doesn't contain information about the benefits, Dr N 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.

And in this case, I've noted a document from the time of sale, a benefits calculation statement. Amongst some data it says,

'Pay Back Year 8'

This documentary evidence does not undermine Dr N's testimony that he entered into the finance agreement on the basis that the solar panel benefits would more than cover the cost of the monthly finance repayment. And that the panels would be self-funding within the lifetime of the loan.

I'm mindful that it would be difficult to understand why, in this particular case, Dr N would have agreed to pay for the system if his monthly outgoings would increase significantly. On balance I find Dr N'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 £2,368 per year. 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 Z's representative must reasonably have been aware that Dr N's system would not 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 Z's representative would have known that Dr N's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to him.

Considering Dr N's account about what he was told; the documentation; and that Creation hasn't disputed what's been said, I think it likely Z gave Dr N a false and misleading impression of the self-funding nature of the system. Given his lack of meaningful prior

interest and the financial burden he took on, I find Dr N's account of what he was told by Z 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 Z not given the reassurances he said he received.

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

Fair compensation

In all the circumstances I consider that fair compensation should aim to remedy the unfairness of Dr N and Creation's relationship arising out of Z's misleading and false assurances as to the self-funding nature of the solar panel system. Creation should repay Dr N a sum that corresponds to the outcome he could reasonably have expected as a result of Z's assurances. That is, that Dr N's loan repayments should amount to no more than the financial benefits he received for the duration of the loan agreement.

Creation told us in other cases 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 Dr N's expectation of what he would receive. I consider Dr N 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 Dr N.

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.

Therefore, to resolve the complaint, Creation should recalculate the agreement based on the known and assumed savings and income Dr N received from the systems 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 Dr N received by way of FIT payments as well as through energy savings. Dr N

will need to supply up to date details of all FIT benefits received, electricity bills and current meter readings to Creation.

Dr N told us that the loan was repaid early on 18 May 2020.

For the reasons I have explained I'm intending to uphold Dr N's complaint and to direct Creation Consumer Finance Ltd to:

- Calculate the total repayments Dr N made towards the loan up until he repaid it – A*
- Use Dr N'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 Dr N 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 her electricity bills, FIT statements and meter readings to work out the known and assumed benefits Dr N received between the loan being paid off and the end of the original loan term – D*
- Deduct D from the amount Dr N paid off the loan – E*
- Add 8% simple annual interest* to E from the date Dr N paid off the loan until the date of settlement – F*
- Creation should pay Dr N C + F*

**Where Dr N 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 Dr N how much it's taken off. It should also give Dr N a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.*

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

Finally, I note Dr N 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 Dr N's s.75 complaint. Furthermore, this doesn't stop me from reaching a fair outcome in the circumstances."

I asked the parties to the complaint to let me have any further representations that they wished me to consider by 27 September 2024. Dr N has accepted my provisional findings. Creation has not 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 Dr N's complaint, I have nothing further to add.

So, having looked again at all the submissions made in this complaint, I am upholding Dr N'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 Dr N'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 X to accept or reject my decision before 28 October 2024.

Douglas Sayers
Ombudsman