

## **The complaint**

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

## **What happened**

In October 2015 Mr D entered into a fixed sum loan agreement with Creation to pay for a solar panel system (“the system”) from a supplier I’ll call “E”. Mr D’s loan amount was £8,850 with £4,878 worth of interest. The total amount payable under the agreement was £13,728 and it was due to be paid back with 120 monthly repayments of £114.40. As of March 2022, Mr D still had an outstanding balance to pay. The system was installed at the end of October 2015.

In January 2022, Mr D sent a letter of claim to Creation explaining he thought the system was mis-sold. He said E told him he’d receive a guaranteed income for 20 years for electricity generated through the government’s Feed in Tariff (FIT) payments and that the system would be self-funding. He said E told him the system would be maintenance free with a 25-year life expectancy and his energy bills would go down.

Mr D said the system was misrepresented 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 January 2022 to say it was “...dismissing...” the complaint without consideration because it had been brought out of time. Unhappy with Creation’s response, Mr D decided to refer his complaint to the Financial Ombudsman in February 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.140 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 D 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 D 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 D 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. The investigator also concluded

the claim under s.75 was within the Financial Ombudsman's jurisdiction but didn't go into any more detail because they had concluded the claim ought to be upheld.

Mr D 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 D's allegations of an unfair relationship don't relate to any events post-dating the sale of the system in October 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 issued by provisional decision outlining why I thought Mr D's complaint should be upheld. Both parties were asked to provide any further submissions as soon as possible, but in any event, no later than 3 October 2024.

Mr D accepted the findings I made in the provisional decision, and we didn't hear from Creation. A copy of the provisional findings follows this in smaller font 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.*

#### ***My findings on jurisdiction***

##### **Jurisdiction to look at the s.75 complaint**

*I accept that Creation, hasn't commented on or specifically disagreed with this point because the issue of the s.75 claim was only briefly mentioned in the investigator's assessment but for completeness, I thought about and have addressed it below.*

*The event complained of here is Creation's alleged wrongful rejection of Mr D's s.75 claim in January 2022, this relates to a regulated activity under our compulsory jurisdiction. Mr K brought his complaint about this to the ombudsman service in January 2022. So, his complaint in relation to the s.75 claim was brought in time for the purposes of our jurisdiction.*

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

*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 D 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 D'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 D 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, Mr D 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.*

## **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 D. 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 D says E attended his property in relation to purchase the system and he says he was told that he would receive a financial incentive for purchasing the system through E. As part of the sales pitch Mr D says he was told the system would pay for itself, in effect it would be self-funding within the loan term. I've taken account of what Mr D says he was told, and I've reviewed the limited documentation that I've been supplied.*

*To start with 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 Mr D to be able to understand what was required to be repaid towards the agreement.*

*We've asked if there was other documentation from the point of sale, and Mr D has been able to provide a copy of credit agreement, the sales contract as well as the MCS installation certificate. Although, I fully accept the MCS was given to Mr D after he had entered into the credit agreement.*

*Mr D was also able to provide an order form for the system, as well as a document entitled "Guarantee and System Performance Estimate". This document is dated 30 September 2015 so seems to have been completed and given to Mr D at the point E's agent attended his property.*

*This document set out that Mr D's proposed system would generate around 2973 kWh – and the potential benefit to Mr D would be £797 per year – but this figure was made up of a number of different calculations within the document – it wasn't presented as one amount. This is important because this would be significantly less than the savings and income from the FIT that Mr D would need to make for the system pay for itself.*

*It also worth saying here that the 20-year benefits Mr D could receive, as outlined in the same document, would be roughly the amount to cover the cost for the system – but of course Mr D says E told him the system was due to be repaid over 10 years. So, there is an argument to say that Mr D, at the point he agreed to have the system installed may have been on notice that the system wouldn't be self-funding.*

*I therefore made further enquires with Mr D to see what he understood by this document and what if any other reassurance he was provided by E's agent in order to take out the system. Mr D has told me E's agent reassured him that the estimate for how many kWh would be produced by the system would be sufficient to cover the cost of the loan over the course of the year.*

*Given, Mr D has said he only agreed to the purchase because E told him the system would pay for itself. I'm mindful that it would be difficult to understand why, in this particular case, Mr D would have agreed to pay for the system if his monthly outgoings would increase. On balance I find Mr D's account to be plausible and convincing.*

*For the solar panels to be self-funding, they'd need to produce a combined savings (through saved electricity but also through selling back to the grid) of around £1,372.80. This has been calculated on the cost of the agreement that Mr D paid, and so for the system to be cost neutral Mr D would need to see combined savings of more than that.*

*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 D'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 E's representative would have known that Mr D's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to him as well as what is present in the paperwork that I've mentioned above.*

*Considering Mr D's account about what he was told; the documentation; and that Creation hasn't disputed what's been said, I think it likely E gave Mr D a false and misleading impression of the self-funding nature of the system. Given his lack of prior interest and the financial burden he took on I find Mr D's account of what he was told by E credible and persuasive. The loan is a 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.*

*In addition, I've been able to view what E's website was showing in May 2015, so around the time of Mr D's agreement. And I do think, the website supports what Mr D said he was told, which said the system would be self-funding.*

*There is a section called "Solar Panels" and it's clear from the information under this heading that the panels "...are a great way to generate free electricity for your home." The website also emphasis Mr D could "...generate an income from the Feed-in-Tariff."*

*Moving further into E's website it says;*

*Installing Solar Panels on your roof will generate free electricity for your home and, thanks to the UK Government's Feed-in Tariff scheme, will earn you a guaranteed tax free income for 20 years. With energy prices at an all time high, solar panels are the perfect way to lower your household energy bills and generate you own clean energy*

*I think it follows that if the website emphasises the benefits of a solar panel system, and how they would pay for the products being offered by E would not only save Mr D money but also generate a guaranteed income for him. Which has led me to conclude I think these benefits would've likely formed a central part of E's conversation.*

*So, I find what Mr D has explained happened to be believable, I think E's website supports his testimony 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 D 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 website supports Mr D's testimony that he was told by E's representative the system would be self-funding and he would receive some benefit of it. I consider E's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Mr D expected to receive by agreeing to the installation of the system.*

*I am therefore intending to conclude that Mr D's complaint should be upheld.*

#### **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 D 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 D and Creation was unfair.*

*Because of this shortfall between his costs and the actual benefits, each month he has had to pay more than he expected to cover the difference between his solar benefits and the cost*

of the loan. So, clearly Creation has benefitted from the interest paid on a loan he would otherwise have not taken out.

### **The s.75 complaint**

*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 D'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 D 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 D a sum that corresponds to the outcome he could reasonably have expected as a result of E's assurances. That is, that Mr D'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 D's expectation of what he would receive. I consider Mr D 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 D.*

*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 Mr D 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 D received by way of FIT payments as well as through energy savings. Mr D 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 D 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 hasn't provided any new submissions, I see no reasons to depart from the findings I made in the provisional decision and which can be found above. I've outlined below what Creation needs to do in order to put things right for Mr D.

## **Putting things right**

For the reasons I have explained I'm upholding Mr D's complaint and direct Creation Consumer Finance Ltd to:

- Calculate the total payments (the deposit and monthly repayments) Mr D has made towards the solar panel system up until the date of settlement – A
- Use Mr D's bills and FIT statements, to work out the benefits he received up until the loan term\* – B
- Use B to recalculate what Mr D 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 interest to any overpayment from the date of payment until the date of settlement\*\* – C
- Reimburse C to Mr D
- Pay Mr D £100 for trouble and upset caused

\*Where Mr D 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 D how much it's taken off. It should also give Mr D 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 D's complaint.

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 6 November 2024.

Robert Walker  
**Ombudsman**