DRN-5080642

The complaint and what happened

Ms C has complained about Creation Consumer Finance Ltd's ('Creation') response to a claim she 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 140A ('s.140A') of the CCA.

I've included relevant sections of my provisional decision from September 2024, which form part of this final decision. In my provisional decision I set out the reasons why I was planning to uphold this complaint. In brief that was because I thought that Ms C was induced into buying the solar panel system at the heart of this dispute by misrepresentations, which resulted in there being an unfair relationship between her and Creation.

I asked both parties to let me have any more information they wanted me to consider. Neither has responded.

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.

Having done so, I'm upholding it, and I'll reiterate why, but first I've included here the relevant sections of my provisional decision:

> ***"What happened***
>
> *In October 2013, Ms C bought a solar panel system ('the system') from a company I'll call "I" using a 10-year fixed sum loan from Creation.*
>
> *Ms C complained to Creation, she said that she was told by I that the 'feed in tariff' ('FIT') payments and electricity savings she would make would cover the cost of the loan repayments, however that hasn't happened, and she's suffered a financial loss. She also believed that what happened at the time of the sale created an unfair relationship between herself and Creation.*
>
> *Creation responded to the complaint in its final response, it considered Ms C had brought her claim more than six years after the cause of action occurred under the Limitation Act ('LA').*
>
> *Unhappy with Creation's response, Ms C referred her complaint to our service.*
>
> *An adjudicator considered Ms C's complaint, he ultimately thought that –*
>
> - *Given the s.75 claim was more likely to be time barred under the LA, Creation's answer seemed fair.*
> - *The s.140A complaint 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 Ms C and Creation.*

He recommended that Ms C keep the system and Creation take into account what Ms C had paid so far, along with the benefits she received, making sure the system was effectively self-funding. He also recommended an award of £100 distress and inconvenience as a result of the poor and protracted way in which Creation had dealt with this matter.

Ms C accepted the adjudicator's view. Creation has never responded. So, the case was progressed to the next stage of our process, an Ombudsman's decision.

What I've provisionally decided – and why

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

Having done so, I'm planning to uphold it, and I'll explain why.

My provisional findings on jurisdiction

I'm satisfied I have jurisdiction to consider Ms C's complaint, both in respect of the refusal by Creation to accept and pay her s.75 claim and the allegations of an unfair relationship under s.140A.

The s.75 complaint

The event complained of here is Creation's alleged wrongful rejection of Ms C's s.75 claim on 22 December 2021, this relates to a regulated activity under our compulsory jurisdiction. Ms C brought her complaint about this to the ombudsman service on 2 May 2022. So, her 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

I am also satisfied this aspect of the complaint was brought in time so that the Financial Ombudsman has jurisdiction.

Ms C is able to make a complaint about an unfair relationship between herself 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 her. 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 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 Ms C's case the relationship was ongoing when she referred her complaint to the Financial Ombudsman. At the time, Creation was responsible for the matters which made its relationship with Ms C 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 her complaint on the unfairness of the credit relationship between herself and Creation, Ms C therefore complained about an event that was ongoing at the time she referred her 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 Ms C's complaint has been brought in time for the purposes of the alternative three-year rule under DISP 2.8.2R(2)(b).

Merits

<u>The unfair relationship under s.140A complaint</u>

When considering whether representations and contractual promises by I 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 I 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 I for which Creation were responsible under s.56 when considering whether it is likely Creation had acted fairly and reasonably towards Ms C.

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.

<u>What happened?</u>

Ms C has said that she was told by I's representative that the cost of the system would be fully paid for by the FIT payments she would receive and the savings she would make on her electricity charges. Ms C says she saw an advert on the internet and then spoke to at least one sales representative from I, and I haven't seen any evidence she had any prior interest in purchasing solar panels.

I've looked at the documents provided by Ms C to see if there was anything contained within them that made it clear that the solar panel system wouldn't be self-funding.

I have a copy of the loan agreement, which shows that both the total amount payable, and the monthly cost of the loan were clear to Ms C. However, there is no mention on the agreement of the potential benefits of the panels.

Ms C has kindly provided as much documentation as she can, including some which is from the time of sale and created by I, such as warranty documents and a certificate confirming the panels complied with building regulations. There is one page headed, "Predicted System Performance", which mentions an annual cost saving of just under £400. But there are also several documents from I setting out the "total cost" of the system without the interest payable on the loan that I arranged for Ms C. So I cannot conclude that the documentation provided set out clearly and accessibly the monthly or annual cost of the system (including interest) versus the potential financial benefits via energy bill savings and FIT payments.

Unfortunately, I haven't been able to access any archived content from I's website from the time of the sale, but I have found some from 2014. Whilst I am unable to place any significant weight on it, given the timeline, I also don't think it's entirely irrelevant when considering the likely content and tone of the information I would have given Ms C – both verbally and in writing. In the 'FAQs' section, I explains that, "Nearly all systems become self funding, meaning that the financial rewards far out way [sic] the cost of your system."

This lends further weight to Ms C's testimony, which I find to be believable. Given the credit agreement and other documents about the cost of the system, don't contain information about the benefits, Ms C would have looked to I's representatives to help her understand what the panels would bring in and how much she would benefit from the system. As mentioned, I've seen no evidence of any motivation other than a financial one on Ms C's part to agree to the panel installation. I'm of the opinion that money would be a key reason to purchase the system and her savings on her electricity bills and income from the FIT scheme would have been a central part of the conversation with the salespeople. That is particularly pertinent given what Ms C has told us about her income and financial commitments at the time, which do not suggest large amounts of disposable income. On balance, I think it is more likely than not that Ms C would not have agreed to the installation of the panels if I had made it clear that it would leave her out of pocket.

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

The RECC investigated I's conduct and informed I of its concerns in 2014. Significantly, RECC had concerns about I using false or misleading information and that pressured sales were taking place.

The RECC Panel heard the case and decided the following were proved -

- *allegations consumers had been given misleading information about payment and payback*
- *allegations consumers were not given certain technical information before signing the contract*

So, the Panel decided I was in breach of Section 5.2 of the code (which required members not to provide false or misleading information to consumers) and Section 5.3 (which concerned members providing clear information so consumers could make an informed decision). Given RECC's concern about I's culture and conduct, it made the decision to terminate I's membership of RECC.

Whilst I accept that the above is findings on different cases the RECC was looking at, the findings suggest that there were conduct concerns in the same areas that Ms C has complained about, at a similar time she was sold her system.

I think it important to highlight the following points the panel considered in its decision:

- *'The Regulator was particularly uncomfortable with the fact that so many consumers appeared not to understand the benefit of the system sold. They were told one thing but the reality was different'*
- *'There is a large volume of complaints with a consistent theme that suggest that some consumers have been given false or misleading information before signing contracts. … The Panel decided that a fundamental cultural change was needed within the company…. Given the duration, seriousness and breadth of the breaches upheld… [I's membership of RECC] should be terminated.'*

Creation has also confirmed to this service that following the RECC report it terminated its relationship with I. This is also set out in I's liquidation report produced in June 2016 available on the Companies House website. The report states that mis-selling issues by I were brought up by Creation, which led to it terminating the contract with I and also withholding funds as it expected claims from consumers under s.75. I think Creation's actions very clearly demonstrate that it had serious concerns about the way I was selling solar panel systems.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of just under £1,200 per year. I have not seen anything to indicate Ms C's system was not performing as expected, but her system has not produced this. So, these statements were not true. I think I's representative must reasonably have been aware that Ms C'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 I's representative would have known that Ms C's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to Ms C.

Considering Ms C's account about what she was told; the available documentation she was shown at the time of the sale; the fact Creation hasn't disputed these facts; and the subsequent actions taken against I by both the RECC and Creation itself, I think it extremely likely I gave Ms C a false and misleading impression of the self-funding nature of the solar panel system.

I consider I's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Ms C was expected to receive by agreeing to the installation of the system. I consider that I'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 Ms C went into the transaction. Either way, I think I's assurances were seriously misleading and false, undermining the purpose of the transaction from Ms C's point of view.

<u>Would a court be likely to make a finding of unfairness under s.140A?</u>

Where Creation is to be treated as responsible for I's negotiations with Ms C 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 Ms C and Creation was unfair.

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

<u>The s.75 complaint</u>

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 Ms C's s.75 complaint. Furthermore, this doesn't stop me from reaching a fair outcome in the circumstances.

<u>Fair compensation</u>

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

Therefore, to resolve the complaint, I plan to direct Creation to recalculate the agreement based on the known and assumed savings and income Ms C received from the system over the 10-year term of the loan, so she pays no more than that. To do that, I think it's important to consider the benefit Ms C received by way of FIT payments as well as through energy savings. Ms C will need to supply up to date details, where available, of all FIT benefits received, electricity bills and current meter readings to Creation.

I have considered the Hodgson judgment, cited by Creation in its rejection of the adjudicator's view. 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 Ms C's expectation of what she would receive. I consider Ms C has lost out, and has suffered unfairness in her relationship with Creation, to the extent that her loan repayments to Creation exceed the benefits from the solar panels.

On that basis, I believe my determination results in fair compensation for Ms C. 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 Ms C's complaint in a reasonable timeframe, with minimal communication, caused Ms C some degree of trouble and upset. In recognition of this, and in addition to what I have already set out above, Creation should also pay Ms C £100."

As mentioned above, neither Ms C nor Creation has replied to my provisional decision. Therefore I have seen nothing which alters my findings as set out therein. And so it follows that I uphold this complaint.

Putting things right

In order to put things right for Ms C, Creation Consumer Finance Ltd must now:

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

*If Ms C is not able to provide all the details of her meter readings, electricity bills and/or FIT benefits, I am satisfied she has provided sufficient information in order for Creation to complete the calculation I have directed it to 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 Ms C how much it's taken off. It should also give Ms C a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

I also think the way Creation handled Ms C's complaint has caused her trouble and upset, and an award of £100 is appropriate.

My final decision

For the reasons I've explained, I uphold this complaint and Creation Consumer Finance Ltd must put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms C to accept or reject my decision before 12 November 2024.

Siobhan McBride
Ombudsman