DRN-5113391

The complaint

Ms W complains about a credit agreement she took out with Creation Consumer Finance Ltd in relation to some home energy improvements. More specifically, that Creation did not accept her claims under s.75 and s.140A of the Consumer Credit Act.

What happened

Around June 2014 Ms W entered into a Green Deal arrangement with a company I shall refer to as H. It was agreed that Ms W would receive a new boiler and solar panels. The total price for all of these new items was I understand £9,230 (although I note there is reference to the cost being £9,500) and this was to be funded mostly through a Green Deal loan, a loan with Creation and funds from Ms W.

Ms W is represented in her complaint but for ease I have referred to all submissions from Ms W and her representative as if made by Ms W. Ms W has said that she was told the Gren Deal arrangement would be fully self-funded and the new items would therefore not actually cost her anything. Ms W believes the arrangement was misrepresented to her as it has actually cost her money and the arrangement has not been self-funding as she was told.

Ms W believes she has valid claims under s.75 and s.140A of the Consumer Credit Act and is unhappy that Creation has not upheld her claims.

Creation did not consider that Ms W had submitted her claims in time and it believes this complaint is outside the time limits permitted in the FCA's DISP Rules.

The complaint was referred to our service, where it was considered by an investigator. In summary, the investigator found that when considering s.75 and the Limitations Act, Ms W's s.75 claim is likely to be time barred as it was made too late. This was because Ms W had submitted her claim more than 6 years from the date she had entered into the loan agreement and suffered a loss.

The investigator set out how the limitation period in relation to a s.140A claim starts from when the relationship between the parties ended and as the relationship is ongoing, Ms W's claim under s.140A has been made in time.

The investigator found that Ms W's complaint about misrepresentation can be considered under s.140A, through s.56 Consumer Credit Act as H was acting as Creation's agent when negotiating the provisions of the loan and the sale of energy efficient measures. When considering the evidence presented in this case, which included the requirements of the 'Golden Rule' under the Green Deal scheme, there had been a misrepresentation to Ms W. And that Ms W had relied on that misrepresentation when deciding to enter into the contract with H, and she had suffered a financial loss as a result of this.

The investigator upheld Ms W's complaint and set out what Creation should now do to put things right.

Ms W accepted what the investigator had set out and proposed. We did not receive a

response to the investigator's view from Creation on this specific complaint. As the complaint could not be resolved informally, it was then referred to me for consideration as the last stage in our process.

I issued a provisional decision setting out why I was minded to uphold Ms W's complaint and what I considered to be fair redress. The provisional decision set out the following:

The Green Deal

Before I set out my findings in this case I think it will be helpful to include some further details of the Green Deal scheme and in particular the 'Golden Rule'.

The energy efficient measures that Ms W entered into with H were through the government Green Deal initiative. It will be helpful therefore to set out some detail around this initiative and in particular the requirements of the 'Golden Rule' under the Green Deal scheme.

The Green Deal scheme was a government backed initiative intended to remove the upfront cost to consumers of installing energy efficiency measures into their homes. It did this by allowing Green Deal Providers ("Provider") to enter finance agreements with consumers to pay for the measures, which were then repaid via the consumer's electricity bill. The finance agreement was part of what was known as the Green Deal Plan ("Plan").

The Green Deal Provider Guidance issued by the Department of Energy & Climate Change (now part of the Department for Business, Energy & Industrial Strategy) set out the general structure of a Green Deal arrangement and the duties and responsibilities of various parties. Typically, this worked as follows:

- *If a consumer was interested in the Green Deal arrangement, an accredited Green Deal Assessor ("Assessor") would visit their home and assess possible improvements the consumer could introduce to make the home more energy efficient. This assessment should have taken place at least 24 hours after any initial introduction to the Green Deal scheme, unless the consumer opted to waive their right to this in writing.*

- *The Assessor produced an Energy Performance Certificate ("EPC") which showed the energy use of a typical household of the relevant type. And a Green Deal Advice Report ("GDAR"), which included an Occupancy Assessment certificate ("OA").*

- *The OA formed part of the qualifying assessment. And would have set out the actual use of energy by the customer's household at the time the assessment was carried out. It then detailed the potential measures which could improve energy efficiency for the property and what savings these measures would likely lead to.*

- *Once a GDAR was registered in a centralised register, it could be taken to any Provider, or several, to obtain quotes for a Plan. The Provider should have ensured that the quote covered all payments that were to be recovered from the consumer for supply and installation of the improvements and the provision of credit.*

- *It was the Provider who was ultimately responsible for designing the specification of works and the implementation of the Plan. This would include ensuring that the improvement measures were properly integrated into the overarching design of the package of improvements agreed upon.*

- *The Provider would arrange for a Green Deal Installer ("Installer") to install the measures under the plan. The Provider had to provide the Installer with a clear design and specification for all works to be carried out, including how the various products should be integrated into the overarching design for the package of improvements.*

- *Once the installation was complete, the Green Deal payments were collected by electricity suppliers alongside the collection of energy payments. In doing so, the supplier would be acting on behalf of the Provider.*

- *The Plan was a contract between the Provider and the consumer. It was a contract for energy efficiency improvements to be made to a property and for finance to pay for those improvements.*

- *The Provider had to establish the Plan in line with requirements set out in the Energy Act 2011, the Green Deal Framework (Disclosure, Acknowledgement, Redress etc.) Regulations 2012 ("the Framework") and the Green Deal Code of Practice.*

The Golden Rule

A significant key principle of the Green Deal scheme was that the amount of finance that could be provided for the improvement measures was limited to the estimated financial benefit to the customer that was likely to be made by those measures. This limitation was partly constructed through a comparison of the estimated saving from having the benefits with the repayments made, in the first year of the agreement.

This principle is known as the "Golden Rule" and it forms part of the legislative provisions governing Plans. Regulation 30 of the Framework stated: "The first year instalments must not exceed the estimated first year savings…"

As the Plan remained with the property, and so was not dependent on the usage of energy by the specific occupant at the time of the assessment, the total amount of finance that could be provided was based on the benefits that could be achieved for a typical property of the type the consumer had.

Before entering into a Plan, the Provider had to estimate the overall savings which were likely to be made if the improvements were carried out. It was also the responsibility of the Provider to ensure that the "Golden Rule" was satisfied and that it was properly explained to the consumer.

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.

When considering what is fair and reasonable, I am required to take into account relevant law and regulations; regulator's rules, guidance and standards, and codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

Where the evidence is incomplete, inconclusive or contradictory (as some of it is here), I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in light of the available evidence and the wider circumstances.

S.140A Consumer Credit Act

As the investigator has already set out in some detail, Ms W has complained about the misrepresentations made by H have created an unfair relationship, as set out in s.140A Consumer Credit Act. Ms W 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 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 Ms W'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 W 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 W 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 W's complaint has been brought in time for the purposes of the alternative three-year rule under DISP 2.8.2R(2)(b).

I understand Ms W's credit agreement with Creation has now ended, but this has no impact on the finding I have reached above.

The unfair relationship under s.140A complaint

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

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.

Ms W's case

Ms W says she was misled that the new measures would effectively pay for themselves. I've taken account of what Ms W says she was told, and I've reviewed the documentation that I've been supplied with.

The cost of the solar panels and replacement boiler was £9,230. This was to be funded by a green deal loan of £4,535, a £3,500 loan with Creation, plus £1,195 payment from Ms W. Ms W would be eligible for FIT payments as she was installing solar panels but instead of receiving those payments, I understand Ms W transferred those rights away and has not received any financial benefit through the FIT payments.

Ms W's Green Deal credit agreement refers to the total estimated first year savings that she can expect to make on her energy bills based on the improvements being made for a typical property. It is noted that these are not guaranteed savings but Ms W's estimated first year savings are noted as being £456.80.

I think it's important to note the Green Deal credit agreement also states, "Under the Green Deal the total estimated first year savings must be equal to, or greater than, your repayments in the first year of this agreement. This is called the "Golden Rule"."

H was responsible for ensuring that the whole package of instalments was taken into account when producing the Plan. The Green Deal Provider Guidance states:

> *"The Green Deal Provider has responsibility for designing the specification of works to be carried out for the property in question. In practice this means working with the customer to select products and ensuring that they are properly integrated into the overarching design of the package of improvements agreed upon. This is important in development of the quote stage because costing will depend on, amongst other things, the price of the products and any requirements for integration. It is the Green*

> *Deal Provider's responsibility to ensure that they take any necessary steps to satisfy themselves and their customers that the specification of works is comprehensive, ensures the proper integration of measures and meets all the necessary requirements."*

And:

> *"The Green Deal Provider should ensure that the quote issued to the customer covers all payments that are to be recovered from the Improver and bill payer for supply and installation of the improvements and the provision of credit."*

So, I think it reasonable that H should have known that not all of the cost was being funded by the Plan.

The annual repayments required under the Green Deal credit agreement are approximately £448.95, which is clearly less than the estimated savings of £456.80. Considering this in isolation, it would appear that the Golden Rule was met here, as the savings are likely to exceed the cost of the measures.

But the cost of the energy efficient measures Ms W was acquiring far exceeded the amount being borrowed under the Green Deal loan and Ms W was therefore required to make repayments to Creation for the £3,500 loan, in addition to the repayments to the Green Deal loan. When including the required repayments for the Creation loan, the Golden Rule was not even close to be being met.

Furthermore, one of the well-known benefits of solar panels is that the consumer is then eligible for FIT payments. From what I have seen in this case, I think it is more likely than not that the FIT payments would have been incorporated into the savings that Ms W was told she would receive. But as already referred to above, it appears Ms W would not be in receipt of the FIT payments as these were transferred elsewhere. Therefore leaving Ms W without the benefit of the FIT payments.

H should also have been aware that any assignment of FIT payments to a third party would lower the overall savings that the customer would make as a result of the measures. So, the associated reduction in the overall savings would need to be taken into account when considering whether the Plan – including the whole package of agreed improvements – met the Golden Rule.

In Ms W's case, H should have been aware that the overall savings estimated to be achieved under the Plan would not be met if the FIT payments were assigned elsewhere. As the assignment of the FIT rights did reduce this overall saving below the annual cost of the finance, I don't consider the Plan met the Golden Rule. I also think that by indicating to Ms W that the measures being financed through the Plan would result in an estimated overall saving, H provided Ms W with misleading information.

Ms W has been consistent and clear about her intentions of taking out the energy efficient measures here and that it was because she was told they would be self-funding and therefore essentially cost her nothing. Had Ms W been made aware that the installation of the measures would come at a net cost to her, I don't think she would have agreed to the Plan. I don't think she would have agreed to have the new boiler, insulation and solar panels installed or have entered the finance agreement with Creation.

Ms W complains about the arrangement being misrepresented to her and a misrepresentation is generally considered to be a false statement of fact that has the result of inducing the other party to enter a contract. For the reasons set out here, I am satisfied

that there was a false statement of fact around the actual cost of the measures as these were not self-funding as Ms W was led to believe. Ms W has said that it was that the measures would be self-funding and therefore not cost her anything that was behind her decision to enter into the agreement. This is to me entirely plausible, and I'm satisfied the false statement about the measures being self-funding is what induced Ms W into entering into the arrangement.

Would the court be likely to make a finding of unfairness under s.140A?

The relationship between Ms W and Creation was built on the misrepresentation made by H, Creation's agent and having considered the submissions in this case, I consider it more likely than not that Ms W would not have agreed to take out the energy efficiency measures had she been correctly informed about the true costs of the arrangements.

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

In my view, the original misrepresentations and the resulting collection of the loan repayments gave rise to the level of unfairness required to trigger a likely finding by a Court under s.140A. As the investigator has set out, the whole relationship is tainted by the untrue statements made by Creation's agent.

It follows that I think a court would likely find the relationship in question unfair. Given that, I've also concluded that Ms W has suffered a loss through entering the agreement. And I find that she's been treated unfairly and unreasonably and as a result her complaint should be upheld.

Putting things right

As I am persuaded a court would find the relationship between Creation and Ms W to have been unfair, I will now set out what I consider to be fair and reasonable redress.

The aim of any award will be to try and put Ms W in the position she would have been in had an unfair relationship not been created and H had not misrepresented the benefits of the solar panel system and boiler. But to achieve this Creation would need to arrange for the removal of the solar panels and boiler. This is likely to be expensive to Creation, who would need to employ other parties to carry out the work. And this would create significant disruption for Ms W. I'm also mindful of these items working in line with the way they should and would likely be scrapped if now removed. It would therefore be more reasonable in my view for the solar panels and boiler to stay in place.

Ms W agreed to purchase the energy efficient measures on the basis that they would be self-funding. So I've considered whether it would be fair and reasonable for Creation to take action now to ensure that Ms W does not lose out financially and the package of measures Ms W received don't cost her more than the benefits she's receiving and will continue to receive. I appreciate this is not our service's normal approach where there has been a misrepresentation, but I'm satisfied this is a fair remedy in this instance when considering the alternatives.

The cost of the solar panels and replacement boiler was £7,000 and £2,230 respectively. The repayment period for each of the measures under the Green Deal finance is 23 and 12 years respectively. The first year estimated savings was £456.80.

It's not been possible to determine the individual estimated savings for each of the three measures. In the absence of the individual measure's savings I consider it reasonable to apportion the first year estimated savings of £456.80 proportionately across each of the two measures, under the total cost price of £9,230.

Measure	*Cost price*	*% of overall cost*	*% of total first year savings*
Solar Panels	*£7,000*	*76%*	*£347.17*
Boiler	*£2,230*	*24%*	*£109.63*

The repayment term of the boiler is shown to be 12 years on the Green Deal credit agreement. When considering what the Golden Rule sets out and what Ms W was led to believe, it would be reasonable in my view to limit the amount she should pay for this measure to an amount equivalent to the savings she would have likely received over the repayment term. I calculate that to be £1,315.56 (£109.63 X 12 years) for the boiler.

Turning to the solar panels, as I have set out above, Ms W has not received the FIT payments for the solar panels. But she would however have received the savings on her electricity usage, and it would in my view be reasonable to include these savings in any repayment calculation.

The Energy Savings Trust has looked at the electricity usage at a wide range of properties over different times in the day, they found that on average consumers actually used 37% of the energy from their panels to reduce their electricity usage. Bearing this in mind, I think 37% of £347.17 was likely the first-year benefit Ms W received from the panels, which is £128.45. The Green Deal credit agreement says the repayment period for the panels is 25 years and in my view Ms W should therefore pay no more than £3,211.25 for this measure.

So for all three energy saving measures Ms W should be required to pay no more than £4,526.81 (£1,315.56 + £3,211.25) in total. Creation should now take steps to ensure Ms W does not pay more than £4,526.81 across both the Green Deal loan and Creation loan. To do this, Creation should:

- *Refund any instalments paid, with 8% simple interest which should be calculated from the date of the payment to the date of the settlement.*

Creation should also calculate how much Ms W has paid towards the Green Deal loan:

- *If she has paid more than £4,526.81 Creation should refund any payments made above that amount, with 8% simple interest and compensate her for the outstanding amount left on the Green Deal loan.*

- *If Ms W has not yet paid £4,526.81, Creation should compensate her for any payments due under the Green Deal loan above this amount.*

Finally, as I've already mentioned, the rights to receive FIT payments were transferred to a third party to fund the remaining costs of the measures. I haven't seen a full copy of the contract for this transfer, but it seems Ms W may be liable to pay a buyout price, if in the future, she decides to remove the solar panels from the property and/or sell her house. The contract may also place other obligations on Ms W.

Without seeing the full contract, itself, at this stage it's unclear what the liabilities could be, if any. Additionally, there's no guarantee when these liabilities will arise, if at all. Therefore, to

resolve this issue, it would be reasonable for Creation to propose to undertake any/all liabilities that may arise from a third party, in relation to the sale of the FIT contract.

My provisional decision

My provisional decision is that I uphold Ms W's complaint against Creation Consumer Finance Ltd and direct it to settle the complaint in accordance with what I have set out above in the putting things right section.

Ms W responded to the provisional decision to say that she accepts the findings. Our service did not receive a response from Creation.

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, and in the absence of any further arguments from the parties, I have reached the same overall conclusions, for the same reasons, as set out in my provisional decision. I am satisfied, again for the reasons set out above and in my provisional decision, that Ms W's complaint should be upheld.

Creation should settle the complaint in line with what I have set out above in the putting things right section.

My final decision

My final decision is that I uphold Ms W's complaint against Creation Consumer Finance Ltd.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms W to accept or reject my decision before 26 November 2024.

Mark Hollands
Ombudsman