

The complaint

Mrs M complains about the way Creation Consumer Finance Ltd (Creation) responded to claims she'd made in relation to misrepresentation, breach of contract, and an alleged unfair relationship taking into account section 140A ("s140A") of the Consumer Credit Act 1974 (the "CCA").

Mrs M's claims were in relation to solar panels that she had bought and were paid for through a loan with Creation.

Mrs M is represented in her complaint by a third party but for ease I have referred to all submissions from Mrs M and the third party as if made by Mrs M.

What happened

In January 2015 Mrs M entered into a fixed sum loan agreement with Creation. The loan was for a solar panel system which cost £9,900. The loan was to be repaid by regular instalments of £129.72 over the 120 month term. Although the amount borrowed was £9,900, with interest and charges the total amount repayable under the loan was £15,566.40.

Mrs M complains that the solar panel system was misold as she was told the solar panels would pay for themselves. More specifically, that the electricity savings from the system and the income generated from the Feed in Tariff (FIT) payments would more than cover the cost of the loan repayments.

Creation responded to Mrs M's claim and explained why in its view that Mrs M's claims had been submitted too late. Mrs M remained unhappy and brought her complaint to our service, where it was considered by one of our investigators. They found that Mrs M's claim had not been submitted too late and when looking at the evidence provided, that Mrs M was misled about the potential benefits of the solar panel system. They set out what they considered to be fair redress to put things right.

Mrs M accepted the investigator's conclusions but as we received no response from Creation about this complaint, it was passed to me so that a final decision can be issued as the last stage in our process.

I issued a provisional decision on 28 October 2024 and in that decision set out the following:

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

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.

Mrs M has complained about the misrepresentations made by the solar panels supplier have created an unfair relationship, as set out in s.140A Consumer Credit Act. Mrs M 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 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 its responsibility to correct unfairness in the relationship. In *Mrs M'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 *Mrs M* 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, *Mrs M* 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 *Mrs M's* complaint has been brought in time for the purposes of the alternative three-year rule under DISP 2.8.2R(2)(b).

The unfair relationship under s.140A complaint

When considering whether representations and contractual promises by the solar panels supplier 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 the solar panels supplier 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 the solar panels supplier for which Creation was responsible under s.56 when considering whether it is likely Creation had acted fairly and reasonably towards Mrs M. 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?

Mrs M says she was told that the solar panels system would effectively pay for itself within the loan term. So I've taken account of what Mrs M says she was told at the time of arranging the solar panel system. I've also reviewed the documentation that has been presented to me in this case.

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 Mrs M to be able to understand what was required to be repaid towards the loan agreement. Apart from the loan agreement referring to SOLAR PV ARRAY under the goods section, there is no reference to any of the estimated benefits of the solar panel system.

Mrs M has provided a copy of a document she was given at the time by the supplier of solar panels system and this does refer to various things about the system she was buying. Amongst other things, this referred to the number and location of the panels and the amount of electricity they would generate. An amount of £360 was shown to be the assumed 50% savings usage and the feed in tariff and export tariff returns were shown to be £495 and £89 respectively. The cost of the system, plus VAT at 5%, and the total amount were also included, showing the £9,900 total.

Although the cost of the system is shown to be £9,900, there is no reference on the document to the additional £5,666.04 that Mrs M would be required to pay in interest and charges on the Creation loan. It would not in my view have been easy to have established from this document whether or not the solar panel system would have actually generated enough in savings and returns to have more than covered the loan repayment costs to Creation.

Mrs M says she was told the cost of the loan would be covered by the savings and amounts generated by the solar panels system. It is clear from what Mrs M has said that this was a key factor in her decision to buy the solar panels system. I have seen nothing that indicates Mrs M had a particular interest in purchasing a solar panels system before she met with the supplier. Mrs M has been consistent throughout and I find what she says about the benefits of the system plausible.

It would in my view be difficult to understand why, in this particular case, Mrs M would have agreed to install a solar panel system if her monthly outgoings would increase significantly by the amount she was required to pay through the loan repayments.

I'm required to decide the case quickly and with minimum formality and I need to consider

what is fair and reasonable in all the circumstances. As I have already set out above, where the evidence is incomplete or inconclusive, 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 the light of the available evidence and the wider circumstances. On balance, I find Mrs M's account to be plausible and convincing. For the solar panels to be self-funding, they'd need to produce a combined savings of around £1,548 per year.

Having considered the estimated production amounts on the MCS certificate and compared those to the benefits and savings they would likely produce, I've not seen anything to suggest Mrs M would achieve the benefits required to make the system self-funding within the ten year loan term. Based on what I've tried to calculate, taking into account the likely generation and export FIT, it seems like it would take significantly longer than the loan term to be self-funding.

I therefore find the statements that were likely made as to the self funding nature of the system weren't true and misleading. I think the salesperson of the solar panels system ought to have known this and made it clear to Mrs M that the solar panels system wouldn't have produced enough benefits to cover the overall cost of the fixed sum loan agreement within the term.

Taking into account what I've said above, I think it likely the supplier of the solar panels system gave Mrs M a false and misleading impression of the self-funding nature of the solar panels system. I consider this misleading presentation went to an important aspect of the transaction for the system, namely the benefits which Mrs M was expected to receive by agreeing to the installation of the system. I consider that the assurances in this regard likely amounted to a contractual promise that the solar panels 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 Mrs M went into the transaction. Either way, on balance, I think the solar panels system supplier's assurances were misleading and false, undermining the purpose of the transaction from Mrs M's point of view.

Fair compensation

As I've found that Mrs M was misled into entering into the solar panels system and taking out the loan, I will now consider what is required as fair compensation to Mrs M. In all the circumstances I consider that fair compensation should aim to remedy the unfairness of Mrs M and Creation's relationship arising out of the solar panels supplier's misleading and false assurances as to the self-funding nature of the solar panels system.

Creation should repay Mrs M a sum that corresponds to the outcome she could reasonably have expected as a result of the solar panels supplier's assurances. That is, that Mrs M's loan repayments should amount to no more than the financial benefits she received for the duration of the loan agreement.

Although Creation hasn't specifically argued it in this case, I have had regard to court's decision in Hodgson. I have considered the Hodgson 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 Mrs M's expectation of what she would receive.

I consider Mrs M 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 Mrs M.

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 credit agreement based on the known and/or assumed savings and income Mrs M received (or will receive) from the solar panels 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 Mrs M received (or will receive) by way of FIT payments as well as through energy savings.

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

My provisional decision

My provisional decision is that I'm intending to uphold this complaint and direct Creation Consumer Finance Ltd to:

- *Calculate the total payments Mrs M has made towards the solar panel system – A*
- *Use Mrs M's bills and FIT statements to work out the benefits she received from the start date of the loan, up until the date of settlement – B*
- *Use B to recalculate what Mrs M 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 Mrs M*
- *Use Mrs M's bills and FIT statements to work out the benefits she will receive for the period between the settlement of her complaint and the end of the original loan term – D*
- *Rework the loan so that the remaining balance is D and recalculate the remaining monthly payments equally over the remaining term of the loan or allow Mrs M to continue with her current payment so the loan finishes early*

**If Creation considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mrs M how much it's taken off.*

It should also give Mrs M a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

I invited any further submissions from the parties, but did not receive any.

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 submissions from the parties, I have

come to the same overall conclusions as set out in my provisional decision. I am satisfied Mrs M was misled about the cost and benefits of the solar panel system and this induced her into the contract with Creation.

My final decision

My final decision is that I uphold Mrs M's complaint against Creation Consumer Finance Ltd and direct Creation to settle the complaint in accordance with what I have set out above in the fair compensation section.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 11 December 2024.

Mark Hollands
Ombudsman