DRN-5203546

The complaint

Mr W complains 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 ("s140A") of the Consumer Credit Act 1974 (the "CCA").

Mr W's claims were in relation to solar panels that he had bought and were paid for through a loan with Creation. Mr W is represented in his complaint by a third party but for ease I have referred to all submissions from Mr W and the third party as if made by Mr W.

What happened

In 2015 Mr W entered into a fixed sum loan agreement with Creation. The loan was for a solar panel system which cost £10,150. The loan was to be repaid by regular instalments of £131.21 over the 120-month term. Although the amount borrowed was £10,150, with interest and charges the total amount repayable under the loan was £15,745.49.

Mr W complains that the solar panel system was missold as he 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 Mr W's claim and explained why in its view that Mr W's claims had been submitted too late. Mr W remained unhappy and brought his complaint to our service, where it was considered by one of our investigators. They found that Mr W's claim had not been submitted too late and when looking at the evidence provided, that Mr W 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.

Mr W accepted the investigator's conclusions but as we received no response from Creatin about this complaint, it has been passed to me so that a final decision can be issued as the last stage in our process.

After initially considering the complaint, I asked the investigator to put some further questions to Mr W. Mr W responded to those questions and confirmed that he no longer lives at the property where the solar panels were installed. After a change of circumstances, the house was sold, with the solar panels and any associated benefits of the panels, remaining at the property. Mr W has continued to make the loan repayments to Creation, which is due to end shortly.

I issued a provisional decision on 22 November 2024 and in that decision, I 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.

Mr W 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. Mr W 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 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 Mr W'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 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 his complaint on the unfairness of the credit relationship between himself and Creation, Mr W 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 Mr W'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 Mr 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.

What happened?

Mr W says he was told that the solar panels system would effectively pay for itself within the loan term. So I've taken account of what Mr W says he was told at the time of arranging the solar panel system. I've also reviewed the limited 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 Mr W to be able to understand what was required to be repaid towards the loan agreement. Apart from the loan agreement referring to SOLAR PV under the goods section, there is no reference to any of the estimated benefits of the solar panel system.

Mr W says he 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 Mr W has said that this was a key factor in his decision to buy the solar panels system. I have seen nothing that indicates Mr W had a particular interest in purchasing a solar panels system before he met with the supplier. Mr W has been consistent throughout and I find what he says about the benefits of the system plausible.

It would in my view be difficult to understand why, in this particular case, Mr W would have agreed to install a solar panel system if his monthly outgoings would increase significantly by the amount he 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 Mr W'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 £1,574 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 Mr W 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 Mr W 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 Mr W 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 Mr W 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 Mr W 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 Mr W's point of view.

Fair compensation

As I've found that Mr W 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 Mr W. In all the circumstances I consider that fair compensation should aim to remedy the unfairness of Mr W 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.

Within a few years of installing the solar panels, Mr W's circumstances changed and this resulted in him moving out of the property and the property being sold. I've not seen anything to indicate this was anticipated at the time the solar panels were installed and from what Mr W has said, it does appear that this was not foreseen or expected at the time the solar panels were installed in 2015.

By moving out and selling the property, Mr W would cease to receive any benefit from the solar panels system or associated FIT payments. Mr W was however still required to repay the loan payments that were used to fund the cost of the panels. It would be reasonable in my view for any redress calculation to factor in that Mr W moved out of the property in August 2019 and stopped receiving the benefit of the solar panels at that time.

Creation should repay Mr W a sum that corresponds to the outcome he could reasonably have expected as a result of the solar panels supplier's assurances, up to the point in August 2019 when the property was sold. That is, that Mr W's loan repayments should amount to no more than the financial benefits he received up to August 2019.

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 Mr W's expectation of what he would receive, until the house was sold.

I consider Mr W has lost out, and has suffered unfairness in his relationship with Creation, to the extent that his loan repayments to Creation exceed the benefits from the solar panels. On that basis, I believe my determination results in fair compensation for Mr W.

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 Mr W received from the solar panels system over the 10-year term of the loan, so he pays no more than that, up to August 2019. To do that, I think it's important to consider the benefit Mr W received by way of FIT payments as well as through energy savings, up to August 2019 when the property was sold.

Mr W will need to supply up to date details, where available, of all FIT benefits received and, electricity bills from when he lived at the property 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 Mr W has made towards the solar panel system, up until August 2019 – A

• Use Mr W's bills and FIT statements to work out the benefits he received from the start date of the loan, up until August 2019 – B

• Use B to recalculate what Mr W 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 annual interest to any overpayment from the date of payment until the date of settlement – C*

• Reimburse C to Mr W

**If Creation considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr W how much it's taken off. It should also give Mr W a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.*

Mr W responded to say that he accepted my provisional findings. No response was received 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.

Mr W has accepted my provisional decision and I have received no response from Creation. In the absence of any further submissions or arguments from the parties, I have come to the same conclusions as set out in my provisional decision, for the same reasons.

I am satisfied that Mr W's complaint should be upheld, again for the same reasons set out in

my provisional decision of 22 November 2024 and above.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 7 January 2025.

Mark Hollands
Ombudsman