DRN-5230672

The complaint

Mrs W has complained about the way Creation Consumer Finance Ltd ("Creation") responded to claims she 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.

What happened

In February 2015, Mrs W entered into a fixed sum loan agreement with Creation to pay for a solar panel system ("the system") from a supplier I'll call "A".

In September 2021, Mrs W sent a letter of claim to Creation explaining she thought the system was mis-sold. She said A told her she'd be paid for the electricity the system generated though the government's Feed in Tariff (FIT) payments. She also said A told her that her energy bills would reduce, and that the system would be maintenance free with a 40-year life expectancy.

Mrs W said the system was misrepresented and believed the statements and several other actions at the time of the sale created an unfair relationship between her and Creation.

Creation sent a final response letter in November 2021 to say they were dismissing the complaint without consideration because it had been brought out of time.

Mrs W wasn't happy with Creation's response, so she referred his complaint to our service in January 2022.

One of our investigators looked into what had happened. She thought A had led Mrs W to believe the system was self-funding and that their documentation didn't clearly set out it wasn't. She didn't think the system was self-funding over the course of the loan term, and so she thought A had misrepresented it. Our investigator thought a court would likely find the relationship between Mrs W and Creation was unfair and that she'd suffered a loss through entering into the agreement. She thought Creation should recalculate the loan based on known and assumed savings and income over eight years so that Mrs W pays no more than that, and that she keeps the system. She also recommended £300 compensation for the impact of Creation not investigating the s.140A claim.

Mrs W said she wasn't happy with our investigator's proposed resolution. She said she didn't want to pay another penny towards the solar panels. Mrs W wanted the debt written off and her credit standing restored.

Creation didn't reply, so as things remained unresolved, the complaint was passed to me for a decision.

I issued my provisional decision on 5 December 2024, relevant extracts of which I include below.

'Jurisdiction to look at the "Section 75" complaint

Where Creation exercises its right and duties as a creditor under a credit agreement, they are carrying out a regulated activity within the scope of our compulsory jurisdiction under Article 60B(2) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001. In undertaking that activity, the creditor must honour liabilities to the debtor. So, if a debtor advances a valid claim under section 75 of the Consumer Credit Act 1974 (s.75) in respect of the credit agreement, the creditor has to honour that liability and failing or refusing to do so comes under our compulsory jurisdiction.

Creation argues that the event complained of when the matter is brought to our service occurred as and when the supplier caused the alleged s.75 liability to arise in the first place. I disagree with this though. The lender's s.75 liability in damages doesn't arise as a result of any act or omission of the lender in performing a regulated activity – it's simply a claim given by statute to the borrower against the lender. And it arises from the acts or omissions of a third party, the supplier. Only when and if that claim is presented by the borrower to the lender must the lender do anything about it, which is to honour its statutory liability by paying the claim if it's a valid one. Until then, the lender's acts and omissions are simply to have lent money to the borrower at the borrower's request, and that's not the matter complained about.

So, when a borrower brings a complaint to our service alleging that they were due money under s.75 when the lender refused to pay, "the event complained of" in such circumstances isn't the supplier's conduct; it's the lender's refusal to honour its alleged statutory liability when the borrower made the claim.

In this case, Creation rolled up their consideration of Mrs W's claim into a letter that explained why it would not be paying the claim and treated Mrs W as having brought a complaint which she was entitled to refer to our service. So, their refusal to accept and pay the s.75 claim was contained in a final response letter of 11 November 2021, in which they told Mrs W she could refer his complaint to our service within six months.

In those circumstances, because Creation's letter rejected Mrs W's claim under s.75, it constituted "the event complained of". It also set out Creation's response to any complaint that flowed from this and invited Mrs W to refer that complaint to our service if she was dissatisfied with the outcome. Creation could have separated those stages, waited for Mrs W to complain that the s.75 claim hadn't been accepted and honoured, and only then issued their final response letter. Instead, they followed the same practice that many other lenders adopt by allowing Mrs W to refer the matter directly to the ombudsman service, by way of treating it as a complaint. And Mrs W referred her complaint to us in January 2022, which was within the six months given in Creation's final response letter.

I note that Creation in their submissions to us referred to DISP 2.8.2R. However, the fact that Creation refused to accept the s.75 claim within a final response letter doesn't give rise to any difficulties calculating when time begins to run under DISP 2.8.2R.
Merits of the s.75 complaint

The law imposes a six-year limitation period on claims for misrepresentation and breach of contract, after which they become time barred.

In this case, the alleged misrepresentation and alleged breach cause of action arose when an agreement was entered into in February 2015. Mrs W brought her s.75 claim to Creation in September 2021. That is more than six years after she entered into an agreement with them. Given this, I don't think it was unfair for Creation not to have accepted the s.75 claim. So, I don't uphold this aspect of the complaint.

The unfair relationship under s.140A

Our investigator thought that a court would likely find the relationship between Mrs W and Creation was unfair. However, I'm afraid I don't currently agree with this.

In the context of this complaint, the law relating to unfair relationships is described in s.140 of the Consumer Credit Act 1974. It says a court may make an order under s.140 if it determines a relationship between the creditor and the debtor is unfair. The consumer is the debtor and s.140 defines the creditor as "the person to whom his rights and duties under the agreement have passed by assignment or operation of law".

I note here that Creation sold Mrs W's debt to a debt purchaser in October 2017. Bearing in mind my comments above around how s.140 is set out, it follows that the debt purchaser is now the creditor for the purpose of the credit agreement. Mrs W sent her letter of claim to Creation after the debt was sold and I don't believe that a claim about an unfair relationship can be brought by her against them as they were no longer the creditor when she made that claim.

I appreciate that the reasons I've given are very technical in nature and that this follows on from our investigator's view where she felt that Mrs W was entitled to compensation. I'm aware that Mrs W will likely be disappointed with my provisional decision as a result. For the reasons I've set out above though, I don't currently intend on upholding this complaint.

I asked Mrs W and Creation to provide any further comments or evidence for me to consider.

Creation replied saying they agreed with my provisional decision.

Mrs W didn't agree. She said, in summary, that the system had been misrepresented to her and she had suffered a financial loss. Mrs W also said that she tried to contact A but wasn't able to, and the fact the debt with Creation had now been sold on wasn't something she had influenced. Mrs W asked whether A and Creation had an agreement about financing the solar panels.

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.

I realise that Mrs W feels that A misrepresented the system and that she's suffered a financial loss because of this. However, I set out in my provisional decision why I felt that Creation's decision not to accept her s.75 claim wasn't unfair, because the claim had been brought outside of the six year time limit as set out in law. And I also set out why I didn't think a court would find the relationship between Mrs W and Creation was unfair because the debt had been sold on before her claim to Creation was made.

I'm afraid I haven't been given any further comments or evidence around this that would make me think that my provisional findings on these points were unfair and incorrect. I appreciate that Mrs W had no influence over the debt being sold. I'm afraid though that doesn't change my findings on these points. And while A and Creation likely did have a specific agreement around how the solar panels were financed, in that there were likely pre-existing agreements that A would arrange finance for customers from Creation, that also doesn't affect the specific points I made about Creation's decision not to uphold the s.75 claim or how a court would likely assess an unfair relationship between the two parties.

Having considered Mrs W's response to my provisional decision, I won't be upholding the

complaint for the reasons I've set out in both my provisional decision and my final decision.

My final decision

I don't uphold the complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs W to accept or reject my decision before 21 January 2025.

Daniel Picken
Ombudsman