

The complaint

Mr F has complained about Creation Consumer Finance Ltd's ('Creation') response to a claim he 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 140.A ('s.140A') of the CCA.

Mr F has been represented in bringing his complaint but, to keep things simple, I'll refer to Mr F throughout.

What happened

On 17 November 2014, Mr F bought a solar panel system ('the system') from a company I'll call "M" using a 10-year fixed sum loan from Creation. The loan was for nearly £10,000 and the monthly repayments were roughly £129 for 120 months.

Mr F complained to Creation, he said that he was told by M that the 'feed in tariff' ('FIT') payments and savings he would make would cover the cost of the loan repayments, however that hasn't happened, and he's suffered a financial loss. He also believed that what happened at the time of the sale created an unfair relationship between himself and Creation.

Mr F raised his complaint to Creation on 9 September 2021. Creation issued a final response letter dated 11 November 2021. Creation considered Mr F had brought his claim more than six years after the cause of action occurred under the FCA's rules on dispute resolution and later Creation said the complaint was too late under the Limitation Act ('LA'). Unhappy with Creation's response, Mr F asked us to review his complaint. Mr F brought his complaint to this service on 8 December 2021.

An investigator considered Mr F's complaint, she 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 Mr F and Creation.

On 10 January 2023, the investigator recommended that Mr F keep the system and Creation take into account what Mr F had paid so far, along with the benefits he received, and make sure the system was effectively self-funding.

Mr F accepted the investigator's view. Creation told us on 14 February 2023 that it was seeking external legal counsel and asked for an extension. Creation later told us that it still felt the case was not in our jurisdiction and it suggested the redress was incorrect in not

following court precedent. As Creation did not accept the investigator's assessment, the case was progressed to the next stage of our process, an Ombudsman's decision.

I issued my provisional decision in respect of this complaint on 1 July 2024, a section of which is included below, and forms part of, this decision. In my provisional decision, I set out the reasons why it was my intention to uphold Mr T's complaint. I set out an extract below:

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

My findings on jurisdiction

I'm satisfied I have jurisdiction to consider Mr F's complaint, both in respect of the refusal by Creation to accept and pay his 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 Mr F's s.75 claim on 11 November 2021, this relates to a regulated activity under our compulsory jurisdiction. Mr F brought his complaint about this to the ombudsman service on 8 December 2021. So, his 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

The event complained of here is Creation's participation, for so long as the credit relationship continues, in an alleged unfair relationship with Mr F. Here the relationship was ongoing at the time it was referred to the ombudsman service on 8 December 2021, so the complaint has been brought in time for the purposes of our jurisdiction.

Merits

The unfair relationship under s.140A complaint

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

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 s140A.

What happened?

Mr F has said he was cold called by M about the system, and I haven't seen any evidence he had any prior interest in purchasing Solar Panels.

Mr F also told us that,

- "When discussing what I could afford to pay on a monthly basis, the sales rep predicted that the fit payments I would receive would offset about two thirds of the repayments, the remaining third being what I could comfortably afford.*
- The above is the main reason I decided to purchase the solar panels."*

Mr F said that he was told by M's representative that two thirds of the cost of the system would be fully paid for by the FIT payments he would receive. I've looked at the documents provided by Mr F to see if there was anything contained within it that made it clear that the solar panel system wouldn't provide that much financial benefit.

The loan agreement, signed by Mr F on 17 November 2014, sets out Mr F's responsibilities for repaying the loan amount and the monthly cost of that. Looking at the loan agreement it specifies that the goods being purchased were solar panels. So, I'm satisfied the loan was taken in Mr F's name to solely purchase the system sold by M.

But the loan agreement contains no mention of the income or savings that may be generated. So, there was no way for Mr F to compare his total costs against the financial benefits he was allegedly being promised from that document. Given the contract doesn't contain information about the benefits, Mr F would have looked to M's representative to help him understand how much the panels would cost, what they would bring in and how much he would benefit from the system in order for him to make a decision.

I've also looked at M's website from around the time of the sale. The cache of the website I have seen is from June 2014 (five months before the agreement was signed). I am satisfied on this occasion it is reasonable to take this content into account when considering what's more likely than not to have been said to Mr F.

On the page the deals with solar power, it says:

"Installing Solar PV panels will not only bring down the cost of supplying electricity to your home or business but will actually bring long-term financial benefits by earning you money for years to come.

Not only will Solar PV panels help you save money on bills, they will also generate you tax-free income, and a return of investment of up to 15 per cent for 20 years under Government funding incentives to increase levels of green energy."

And it seems to me most likely that the sales representative Mr F dealt with would've said similar things to those M produced in its promotional literature.

After a first meeting, M sent Mr F a letter summarising the solar system it could provide. I have read that letter and noted that it claims it has enclosed an estimated Feed in Tariff and Energy Saving sheet. Mr F said that estimate was not enclosed in the letter. I have

considered Mr F's testimony and that Mr F has kept safe for many years other documents from the time of the sale. It seems more likely that the document wasn't enclosed. In any event, without it, we can't know what that document may have contained. I note that there was little or no words of caution about the likely performance of solar panels on M's website from around the time of the sale.

Taking all of the promotional material into account, the evidence suggests to me that it supports the testimony provided by Mr F. He told us he was told that the solar panels would provide a significant income and the details I have seen suggest that the rate of income was indicated to be greater than the interest rate Mr F was to pay on the loan he would need to take out to provide the solar panels.

As mentioned above, Mr F told us that B told him the income from the solar panel system would pay off two thirds of the cost of the loan and that he would be able to afford comfortably the remaining third of the loan. I have noted that our investigator thought that Mr P's testimony seemed persuasive and explained why they thought that in their assessment. I have noted that Creation has not responded to that part of the assessment.

Creation hasn't provided evidence to dispute what Mr F said happened. And with no prior interest, Mr F left the meeting having agreed to an interest-bearing loan, with a monthly repayment of around £129, payable for 10 years. Given his lack of prior interest and the financial burden he took on, and in the absence of any evidence from Creation to the contrary, I find Mr F's account of what he was told by M to be credible and persuasive. The loan is a costly long-term commitment, and I can't see why he would have seen this purchase as appealing had he not been given the reassurances he's said he received from M.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £1,551 per year. For the solar panels to pay for two thirds of the cost of the borrowing, as M's representative told Mr F, they would need to produce combined savings and FIT income of around £1,034 per year. I have not seen anything to indicate Mr F's system was not performing as expected but his system was unlikely to produce that and Mr F's testimony is that it didn't. And the information I have seen suggests that the solar panel system failed to generate anything close to the sort of income required to meet two thirds of Mr F's loan repayments.

So, these statements were not true. I think the salesman from M must reasonably have been aware that Mr F'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 the salesman would have known that Mr F's system would not produce enough benefits to cover two thirds of the cost of the borrowing in the timescales stated verbally to Mr F.

Considering Mr F's account about what he was told, and the documentation he was shown at the time of the sale, and in the absence of any other evidence from Creation to the contrary, I think it likely M gave Mr F a false and misleading impression of the likely financial benefits of the solar panel system. On balance, I find Mr F's account to be plausible and convincing.

I consider M's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Mr F was expected to receive by agreeing to the installation of the system. I consider that M's assurances in this regard likely amounted to a contractual promise that the solar panel system would have the capacity to fund two thirds of the loan repayments. But, even if they did not have that effect, they nonetheless represented the basis upon which Mr F went into the transaction.

Either way, I think M's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr F's point of view

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

Where Creation is to be treated as responsible for M's negotiations with Mr F in respect of its misleading and false assurances as to the likely financial benefits of the solar panel system, I'm persuaded a court would likely conclude that because of this the relationship between Mr F and Creation was unfair.

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

The s.75 complaint

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

Fair compensation

In all the circumstances I consider that the fair compensation should aim to remedy the unfairness of Mr F and Creation's relationship arising out of M's misleading and false assurances as to the likely financial benefits of the solar panel system. I require Creation to repay Mr F a sum that corresponds to the outcome he could reasonably have expected as a result of M's assurances. That is, that Mr F's loan repayments should amount to no more than the financial benefits he receives for the duration of the loan agreement. But Mr F told us he expected the financial benefits of the solar panels would meet only two thirds of the cost of the loan. So, when the final calculation is performed the award should be two thirds of any amount calculated.

*Creation told us that it considers our approach to redress should be in accordance with the Court's decision in *Hodgson v Creation Consumer Finance Limited* [2021] EWHC 2167 (Comm) ('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 F's expectation of what he would receive. I consider Mr F 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 F.

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 agreement

based on the known and assumed savings and income Mr F received from the solar panel system over the 10-year term of the loan, so he pays no more than two thirds of that amount. To do that, I think it's important to consider the benefit Mr F received by way of FIT payments as well as through energy savings. Mr F may need to supply up to date details to help Creation make that calculation. But Creation can and should use assumptions when information is not available.

Normally, by recalculating the loan this way, Mr F's monthly repayments would reduce, meaning that he would've paid more each month than he should've done resulting in an overpayment balance. And as a consumer would have been deprived of the monthly overpayment, I would expect a business to add 8% simple interest from the date of the overpayment to the date of settlement.

Mr F told us that the loan is still running.

So, to put things right Creation Consumer Finance Ltd must:

- *Calculate the total repayments Mr F made towards two thirds of the loan up until the date of settlement – A*
- *Use Mr F's electricity bills, FIT statements and meter readings to work out the known and assumed benefits he received and he would have received over the 10 year loan period – B*
- *Use B to recalculate what Mr F should have repaid each month towards the loan and apply 8% simple interest to any overpayment from the date of his payment until the date of settlement – C*
- *Reimburse C to Mr F.*
- *Give Mr F the option of offsetting this amount [C] from any outstanding loan amount, recalculating either his monthly payments or remaining loan term, or a refund of the overpayments.*

I agree Creation's refusal to consider the claim under s140A has also caused Mr F some further inconvenience. And I think the £100 compensation recommended by our investigator is broadly a fair way to recognise that.

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

Creation Consumer Finance Ltd 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."

I asked the parties to the complaint to let me have any further representations that they wished me to consider by 15 July 2024. At the time of writing neither party has accepted my provisional findings, acknowledged the provisional decision, made a further submission or asked for an extension to do so. I think that both parties have had time sufficient to have made a further submission had they wished to do so. So, I am proceeding to my final decision.

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.

So, as neither party has provided any new information or argument for me to consider following my provisional decision, I have no reason to depart from those findings. And as I've already set out my full reasons (above) for upholding Mr F's complaint, I have nothing further to add.

So, having looked again at all the submissions made in this complaint, I am upholding Mr F's complaint and require Creation to calculate and pay the fair compensation detailed above.

Putting things right

I require Creation Consumer Finance Ltd to calculate and pay the fair compensation as detailed above.

My final decision

For the reasons set out, I'm upholding Mr F's complaint about Creation Consumer Finance Ltd. I require Creation Consumer Finance Ltd to calculate and pay the fair compensation as detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 13 August 2024.

Douglas Sayers
Ombudsman