DRN-3957645

The complaint

Mrs B has complained about Creation Consumer Finance Ltd's ('Creation') response to a claim she 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.

What happened

On 3 December 2013, Mrs B agreed to a 10-year fixed sum loan from Creation for a solar panel system ('the system') from a company I'll call "M". The loan amount was for £8,250 and the total amount payable under the agreement was £13,006.80 and it was due to be paid back with 120 monthly repayments of £108.39.

Mrs B complained to Creation, she said that she was told by M that the 'feed in tariff' ('FIT') payments and the savings she would make would cover the cost of the loan repayments. However, that hasn't happened, and she's suffered a financial loss.

Creation told us they received a complaint from Mrs B on 12 March 2020. Creation issued a final response letter dated 20 March 2020. Creation considered Mrs B had brought her 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'). Mrs B brought her complaint to this service on 28 May 2020 as she was unhappy with Creation's response and Mrs B asked us to review her complaint.

An investigator considered Mrs B'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 Mrs B and Creation.

On 20 December 2022, the investigator recommended that Mrs B keep the system and Creation take into account what Mrs B had paid so far, along with the benefits she received, and make sure the system was effectively self-funding.

Mrs B accepted the investigator's view. Creation told us on 9 January 2023 that it was seeking external legal counsel. On 4 May 2023 Creation told us it disagreed with our assessment. So, the case was progressed to the next stage of our process, an Ombudsman's decision.

I issued my provisional decision on 24 June 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 Mrs B'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 provisional findings

Jurisdiction

I'm satisfied I have jurisdiction to consider Mrs B's complaint, both in respect of the refusal by Creation to accept and pay her 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 Mrs B's s.75 claim on 20 March 2020, this relates to a regulated activity under our compulsory jurisdiction. Mrs B brought her complaint about this to the ombudsman service on 28 May 2020. So, her 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 Mrs B. Here the relationship came to an end when the loan was repaid. Mrs B told us that the loan was repaid on 6 August 2015. And Mrs B referred her complaint to the ombudsman service on 28 May 2020, 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 Mrs B.

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?

Mrs B has said that she was told by M's representative that the cost of the system would be fully paid for by the FIT payments and electricity she would receive and the savings she would make. Mrs B has said she was cold called by M about the system, and I haven't seen any evidence she had any prior interest in purchasing Solar Panels.

I've looked at the documents provided by Mrs B to see if there was anything contained within it that made it clear that the solar panel system wouldn't be self-funding.

The loan agreement, signed by Mrs B on 3 December 2013 and by Creation on 9 December 2013, sets out Mrs B's responsibilities for repaying the loan amount and the monthly cost of that. So, I'm satisfied the loan was taken in Mrs B'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 Mrs B to compare her total costs against the financial benefits she was allegedly being promised from that document. Given the contract doesn't contain information about the benefits, Mrs B would have looked to M's representative to help her understand how much the panels would cost, what they would bring in and how much she would benefit from the system in order for her to make a decision.

Mrs B has provided a copy of a document called "Your system explained". The document is undated but Mrs B told us that it was completed by the representative of M before she signed for the loan. The document explains that 'Year 1 benefit from SOLAR PV £1300.08. Benefit over 25 years from SOLAR PV £39,020.40'. The document also says the 'SYSTEM COST MONTHLY IS £108.39' but goes on to say that 'YOUR CONTRIBUTION TO THIS IS £0'.

This document does not compare the benefits with the costs and seems to suggest that there are no costs because of the benefits – I refer to 'YOUR CONTRIBUTION TO THIS IS £0'. In any event, I cannot see how this document could be thought to demonstrate in a way that is sufficiently clear to Mrs B that the loan would not be self funding.

Creation hasn't provided evidence to dispute what Mrs B said happened. Yet with no prior interest, Mrs B left the meeting having agreed to an interest-bearing loan, with a monthly repayment of around £108, payable for ten years. And I have considered that Mrs B had passed her state retirement age at that time. Given her lack of prior interest and the financial burden she took on, I find Mrs B's account of what she was told by M to be credible and persuasive. The loan is a costly long-term commitment, and I can't see why she would have seen this purchase as appealing had she not been given the reassurances she's said she received from M.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £1,300 per year. I have not seen anything to indicate Mrs B's system was not performing as expected but Mrs B's system did not produce sufficiently to meet the loan repayments. The evidence suggests the solar system was not self-funding.

So, the statements made by M were not true. I think the salesman from M must reasonably have been aware that Mrs B'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 Mrs B's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to Mrs B.

Considering Mrs B's account about what she was told, and the documentation she 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 Mrs B a false and misleading impression of the self-funding nature of the solar panel system. On balance, I find Mrs B'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 Mrs B 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 the loan repayments. But, even if they did not have that effect, they nonetheless represented the basis upon which Mrs B went into the transaction. Either way, I think M's assurances were seriously misleading and false, undermining the purpose of the transaction from Mrs B'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 Mrs B in respect of its misleading and false assurances as to the self-funding nature of the solar panel system, I'm persuaded a court would likely conclude that because of this the relationship between Mrs B and Creation was unfair.

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

Fair compensation

In all the circumstances I consider that the fair compensation should aim to remedy the unfairness of Mrs B and Creation's relationship arising out of M's misleading and false assurances as to the self-funding nature of the solar panel system. I require Creation to repay Mrs B a sum that corresponds to the outcome she could reasonably have expected as a result of M's assurances. That is, that Mrs B's loan repayments should amount to no more than the financial benefits she receives for the duration of the loan agreement.

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 Mrs B's expectation of what he would receive. I consider Mrs B 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 Mrs B.

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 Mrs B received from the solar panel 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 B received by way of FIT payments as well as through energy savings. Mrs B 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.

Mrs B told us that she settled the loan agreement on 6 August 2015.

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

- *Calculate the total repayments Mrs B made towards the loan up until she repaid it – A*
- *Use Mrs B's electricity bills, FIT statements and meter readings to work out the known and assumed benefits she received up until she repaid the loan – B*
- *Use B to recalculate what Mrs B should have repaid each month towards the loan over that period and reimburse her the difference between what she actually repaid (A) and what she should have repaid, adding 8% simple annual interest* to any overpayment, from the date of repayment until the date of settlement – C*
- *Use her electricity bills, FIT statements and meter readings to work out the known and assumed benefits she received between the loan being paid off and the end of the original loan term – D*
- *Deduct D from the amount Mrs B paid off the loan – E*
- *Add 8% simple annual interest* to E from the date Mrs B paid off the loan until the date of settlement – F*
- *Subject to receiving the available up to date FIT benefits, electricity bills, and meter readings Creation should pay Mrs B C + F*

I agree Creation's refusal to consider the claim under s140A has also caused Mrs B 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 Mrs B how much tax it's taken off. It should also give Mrs B a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate."*

I asked the parties to the complaint to let me have any further representations that they wished me to consider by 8 July 2024. At the time of writing, neither Mrs B nor Creation have acknowledged receiving the provisional decision, made any further submissions or asked for an extension to do so. I consider that both parties have had sufficient time to make a further submission had they wished to do so. So, I'm 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.

Given that there's no new information 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 for upholding Mrs B's complaint, I have nothing further to add.

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 Mrs B'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 Mrs B to accept or reject my decision before 7 August 2024.

Douglas Sayers
Ombudsman