

The complaint

Mr Q has complained 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 (“s.140A”) of the Consumer Credit Act 1974 (the “CCA”).

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

What happened

In April 2015 Mr Q entered into a fixed sum loan agreement with Creation to pay for a £10,999 solar panel system (“the system”) from a supplier I’ll call “E”. The total amount payable under the agreement was £17,062.52 and it was due to be paid back with 120 monthly repayments of £142.18.

The supply contract was for the installation of 16 solar panels, and I understand the system was installed in May 2015.

In October 2021 Mr Q sent a letter of claim to Creation explaining he thought the system was mis-sold. He said E told him he’d effectively get paid for the electricity the system generated through the government’s Feed in Tariff (“FIT”) payments, and that he’d receive a guaranteed income for 20 years. He said E told him he’d earn up to 10% per year tax free and that the value of the property would increase. He said E told him his energy bills would go down and the system was maintenance free with a 40-year life expectancy.

Mr Q said the system was misrepresented and believed the statements and several other actions at the time of the sale created an unfair relationship between himself and Creation.

Creation responded in its final response letter in December 2021 to say it was dismissing the complaint without consideration because it had been brought out of time.

Unhappy with Creation’s response, Mr Q decided to refer his complaint to the Financial Ombudsman in February 2022.

One of our investigators looked into things and thought E had likely told Mr Q the system would be self-funding and that the 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 E had misrepresented it. She thought a court would likely find the relationship between Mr Q and Creation was unfair and that he’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 the course of the loan so that he pays no more than that, and he keeps the system. She also thought Creation should pay £100 compensation for the impact of not considering the claim.

Mr Q agreed, but I can’t see we received a response from Creation. As things weren’t resolved, the complaint has been passed to me to decide.

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.

My findings on 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 Q. Here the relationship was ongoing at the time it was referred to the Financial Ombudsman in February 2022, 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 E 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 E 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 E for which Creation were responsible under s.56 when considering whether it is likely Creation had acted fairly and reasonably towards Mr Q.

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 Q says he was verbally misled that the system would effectively pay for itself. So I've taken account of what Mr Q says he was told. I've also reviewed the documentation that I've been supplied.

Mr Q says E told him he'd make savings through bills, and he'd receive payments for electricity he didn't use along with government subsidies for installing the solar panels. He says E told him he'd be in a positive position i.e., the amount he paid for the system would be less than the savings made. He says there wasn't much discussion about the agreement other than it would be available at a decent rate.

The fixed sum loan agreement signed on 24 April 2015 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 Q to be able to understand what was required to be repaid towards the agreement.

Having looked at other documentation from around the time of sale I can see Mr Q signed a solar PV contract on 9 April 2015. This set out the type of property, the type of panels and that the order price was £10,999. He was also given a calculations document to sign on the same day that set out the total estimate of 3,087kWh per year. And Mr Q was given another document to sign that set out a five-year guarantee along with an estimate for the system including benefits. This form set out there was a potential year one benefit of £719 through the FIT, export tariff and electricity savings. And it said the estimated 20-year benefit was £14,380. The form also had a section in relation to further heating savings and said the total estimated year one benefit was £528 and the potential 20-year benefit was £10,560.

I'm conscious Mr Q signed the documents including estimates more than two weeks before he signed the fixed sum loan agreement. The contract only set out the price of the system, and not the total amount payable or monthly repayments. I don't think there was an easy way for Mr Q to have been able to compare the total cost against the benefits he was allegedly being promised. Mr Q has indicated he signed the fixed sum loan agreement based on what he was told by E – i.e., that the system would be self-funding. From looking at the estimate form Mr Q received, I think it would be easy to have thought his year one benefit would be the sum of the two estimates – over £1,200. And that over 20 years the benefit was estimated to be around £25,000. So I can understand why when he came to sign the agreement for a system costing around £11,000 with monthly repayments of around £140 he could have been reasonably led to believe the system would pay for itself within the loan term. I don't think he was given information in an accessible and easy to understand format to have enabled him to clearly see the system wouldn't be self-funding. The sales documentation doesn't show a comparison. And it doesn't show the true cost of the system because it doesn't include any information about the interest charged. I note the contract mentions heat keepers. I think these are used to reflect heat from radiators. It's not clear if these were paid for under the agreement and Creation hasn't offered any submissions on this point. Given I understand you can purchase 30 packs of heat keepers for less than £100 I'm satisfied the vast majority, if not all, of the contract price was for the solar panels.

For the solar panels to be self-funding, they'd need to produce a combined savings and FIT income of around £1,700 per year. I've not seen anything to suggest the system isn't working as expected. But I've also not seen anything to suggest Mr Q achieved the benefits required to make the system self-funding within the term of the agreement. I therefore find the representations that were likely made weren't true. Whilst there are elements of the calculations that had to be estimated, the amount of sunlight as an example, I think the salesperson ought to have known this and made it clear the system wouldn't have produced enough benefits to cover the overall cost of the fixed sum loan agreement.

Considering Mr Q's account about what he was told; the documentation not being very clear; the time in between the initial sales meeting and the date he signed the agreement; and the fact Creation hasn't disputed what's been said, I think it likely E gave Mr Q a false and misleading impression of the self-funding nature of the system. Given his lack of prior interest and the financial burden he took on I find Mr Q's account of what he was told by E credible and persuasive. The loan is a costly long-term commitment, and I can't see why he would have seen this purchase appealing had E not given him the reassurances he's said he received.

I consider E's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Mr Q was expected to receive by agreeing to the installation of the system. I consider that E's assurances in this regard likely amounted to a contractual promise that the 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 Q went into the transaction. Either way, I think E's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr Q'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 E's negotiations with Mr Q 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 Mr Q 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 the cost of the loan. So, clearly Creation has benefitted from the interest paid on a loan he would otherwise have not taken out.

Fair compensation

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

Therefore, to resolve the complaint, Creation should recalculate the agreement based on the known and assumed savings and income Mr Q received (or will receive) from the system over the 10-year term of the loan, so he pays no more than that. To do that, I think it's important to consider the benefit Mr Q received by way of FIT payments as well as through energy savings. Mr Q will need to supply up to date details of all available FIT benefits received, electricity bills and current meter readings to Creation.

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.

I note Mr Q has raised other points that he considers supports his allegations there was an unfair relationship, but I don't think I need to consider those further points to reach a fair outcome given what I've already decided is fair compensation for the reasons given above.

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

My final decision

For the reasons I have explained I uphold Mr Q's complaint. To put things right Creation Consumer Finance Ltd must:

- Calculate the total payments (the deposit and monthly repayments) Mr Q has made towards the solar panel system up until the date of settlement of his complaint – A
- Use Mr Q's bills and FIT statements to work out the benefits he received up until the date of settlement of his complaint* – B
- Use B to recalculate what Mr Q 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 each payment until the date of settlement** – C
- Reimburse C to Mr Q
- Use Mr Q's bills and FIT statements to work out the benefits he will receive for the period between the settlement of his 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.
- Pay Mr Q an additional £100 compensation

*Where Mr Q has not been able to provide all the details of his meter readings, electricity bills and/or FIT benefits, I am satisfied he has provided sufficient information in order for Creation to complete the calculation I have directed it follow in the circumstances using known and reasonably assumed benefits.

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr Q to accept or reject my decision before 28 June 2024.

Simon Wingfield
Ombudsman