

The complaint

Mrs G has complained about the way Creation Consumer Finance Limited (“Creation”) responded to a claim she made under s75 of the Consumer Credit Act 1974 (the “CCA”) and in relation to an alleged unfair relationship taking into account s140A of the CCA.

What happened

In January 2014, Mrs G bought a solar panel system from a company I’ll call “M” using a 10-year fixed sum loan from Creation.

The price of the panels was £7,495 and this plus the additional costs of the loan (interest of £4,205.60 and an arrangement fee of £135) made the total amount payable £11,835.60.

Mrs G via her representatives sent a letter before claim to Creation on 2 March 2020 to propose claims under s.75 for breach of contract and misrepresentation by M and arising out of an unfair relationship under s.140A of the CCA. She said she was led to believe the electricity savings and FIT payment income from the panels would cover the costs of the loan she’d taken out but in fact, there was a shortfall between the cost of the loan payments and the benefits, causing her a financial loss.

Mrs G said she had not been made aware that Creation had been paid commission on the sale, Creation had failed to ensure P observed the relevant codes at the time of sale, and insufficient checks had been carried out to make sure she could afford the repayments on the loan.

In response to Ms G’s letter before claim Creation sent a final response letter dated 6 March 2020 and treating the matter as a complaint. Creation declined to take further action on the basis that it considered Mrs G had brought her claim more than six years after it believed her cause of action had arisen.

Dissatisfied with Creation’s response Ms T referred a complaint to our service about the s.75 claim and the alleged unfair relationship under s.140A on 23 March 2020.

An investigator thought Mrs G’s complaint should be upheld. He said that as Mrs G had brought her complaint about Creation’s handling of her s.75 claim to us within six years of it declining to meet that claim on 6 March 2020, she had brought it in time under our rules.

However, given his view that the matters giving rise to the s.75 claim took place around the time the agreement was entered into during January 2014 he considered it was likely that the provisions of the Limitation Act 1980 (the ‘LA’) meant that Mrs G did not have a valid claim against M and therefore no like claim against Creation under s.75. So, he didn’t think Creation had treated Mrs G unfairly by declining her s.75 claim.

However, he thought that Ms G’s complaint about Creation’s participation in an allegedly unfair relationship per s.140A was made in time where Ms G’s loan agreement with Creation was ongoing.

The investigator went on to conclude that that the benefits of the panels had likely been misrepresented to Mrs G at the time of the sale and those misrepresentations had created an unfair relationship. He recommended that Creation should recalculate the loan and ensure that Mrs G paid no more than the likely benefits she would receive over the loan period.

The investigator recommended that Creation should calculate the benefits from the panels over 10 years (the period of the loan) and ensure that Mrs G paid no more than that. He also recommended that Creation pay Mrs G £100 compensation for the distress and inconvenience caused by not addressing her claim made under s.140 of the CCA.

Mrs G accepted the investigator's view. Creation said it was seeking further guidance and asked for an extension, however we did not hear from it by the deadline we set it to respond. So, the case was progressed to the next stage of our process, an Ombudsman's decision.

While awaiting an ombudsman's decision Mrs G said she repaid the loan in full in October 2023 having moved house.

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.

Jurisdiction

I'm satisfied I have jurisdiction to consider Mrs G'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 G's s.75 claim on 6 March 2020, this relates to a regulated activity under our compulsory jurisdiction. Mrs G brought her complaint about this to the ombudsman service on 23 March 2020. So, her complaint in relation to the s.75 claim was brought in time for the purposes of our jurisdiction.

The unfair relationship complaint

The event complained of here is Creation's participation, for so long as the credit relationship continued, in an alleged unfair relationship with Mrs G. Here the relationship was ongoing at the time it was referred to the ombudsman service on 23 March 2020, so the complaint has been brought in time for the purposes of our jurisdiction.

Merits

The s.75 complaint

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

In this case the alleged misrepresentation and alleged breach of contract cause of action arose when an agreement was entered into in January 2014. Mrs G brought her s.75 claim to Creation on 2 March 2020 which is more than six years after she entered into an agreement with it.

Where it is unlikely a claim against the supplier could succeed due to the expiry of the likely relevant limitation periods of six years, I am persuaded that it was fair and reasonable for Creation to decline the s.75 claim. So, I do not uphold this aspect of the complaint.

The unfair relationship 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 G.

But in doing so, I should take into account all the circumstances and consider whether the relationship with Creation would likely be unfair under s.140A.

Mrs G has said she was told by M's representative that the cost of the system would be fully paid for by the FIT payments she would receive. Mrs G said she was reassured by M's representative that she would "*have excess money each month*".

Mrs G has said she had no interest in solar panels until she was cold called by M about the system, I haven't seen anything within the available evidence to suggest otherwise.

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

Mrs G provided us a document called 'your system explained'. This set out that the year 1 benefit of the panels would be £1,183.56 – the exact sum of Mrs G annual repayments on her loan. It also said the system monthly cost would be £98.63 of which Mrs G's contribution would be "0".

This document is neither dated nor personally addressed to Mrs G. And it was provided to this service nearly two years after Mrs G brought her claim and was not provided in either her original submissions to us or in her letter before claim to Creation. Given how the document, if legitimate, could provide considerable support to Mrs G's complaint, I find it surprising it was not provided earlier. On the other hand, I've noted that Creation has not sought to challenge the document. I've kept all of this in mind when considering how much weight I should attach to this document.

Mrs G's loan agreement clearly sets out, amongst other things, the amount being borrowed, the interest to be charged, total amount payable, the term of the loan and the contractual monthly loan repayments.

I've looked at the sales contract with M. The likely financial benefits of the system aren't

included on this document. There is a box entitled 'calculating a SAP calculation' but this hasn't been filled out.

Overall, if I am (for the moment) to discount the 'your system explained' document it seems that there was no clear information within the available paperwork provided at the time of the sale that would have allowed Mrs G to compare the estimated benefits of the solar panels with the total costs of the loan.

I find it likely therefore that Mrs G 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.

I've looked at an archived version of M's website from around the time of the sale in 2014. It is mentioned several times on the website that the solar panels will "bring long term financial benefits by earning you money for years to come". I think it follows that if the website heavily emphasises the benefits of a solar panel system and the profit and return on the investment it's likely this would have been a central part of M's conversation when selling the product.

Given Mrs G's apparent prior lack of interest in solar panels, and the long-term financial burden it appears likely she'd need to take on, I can't see why she would have seen this purchase appealing had she not been given the reassurances about those benefits she said she received from M. I'm conscious also that Creation has not supplied any evidence or reasoning to challenge Mrs G's account, or the documentation supplied.

I think it is unlikely that Mrs G would've agreed to the solar panel system and a loan with Creation unless she'd been led to believe that it would be self-funding and come at no additional cost to her overall. Therefore, I consider Mrs G's account persuasive and I accept her version of events. If I am to give any significant weight to the 'your system explained' document, this provides further support for this conclusion as it effectively confirms the system would be self-funding, but even without this document my conclusion remains the same.

For the solar panels to start paying for themselves as Mrs G says she was told, they would need to cover the costs of the loan and produce combined savings and fit income of over £1,183.56 per year. I have not seen anything to indicate Mrs G's system was not performing as expected but it has not produced this. So, these statements were not true.

I think the salesman from M must reasonably have been aware that Mrs G's system would not have produced benefits at this level. Whilst there are elements of a calculation of benefits that had to be estimated, I think the salesman would have known that Mrs G's system would not produce enough benefits to cover the overall cost of her panels in the timescales stated verbally to Mrs G.

I consider M's misleading presentation went to an important aspect of the transaction for the system, namely the benefits which Mrs G was expected to receive by agreeing to 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 G went into the transaction. Either way, M's assurances were seriously misleading and false, undermining the purpose of the transaction from Mrs G's point of view.

Where Creation is to be treated as responsible for M's negotiations with Mrs G in respect of its misleading and false assurances as to the self-funding nature of the solar panel system, I'm persuaded it's likely the relationship between Mrs G and Creation would be found unfair.

Because of the shortfall between Mrs G's 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.

In all the circumstances I consider that fair compensation should aim to remedy the unfairness of Mrs G and Creation's relationship arising out of M's misleading and false assurances as to the self-funding nature of the solar panel system. Creation should repay Mrs G a sum that corresponds to the outcome she could reasonably have expected as a result of M's assurances. That is, that Mrs G's loan repayments should amount to no more than the financial benefits she 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 Mrs G received from the 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 G received by way of FIT payments as well as through energy savings. Mrs G will need to supply up to date details, where available, of FIT benefits received, electricity bills and current meter readings to Creation.

I am satisfied that if Mrs G is able to supply information to Creation which covers the last six years this will be sufficient in order for Creation to complete the calculation relying on that information.

If Mrs G cannot provide information covering the last six years – such as where the electricity company has gone out of business – Creation should seek to complete the calculation using reasonably assumed benefits.

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.

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 address Mrs G's other complaint points about irresponsible lending and commission. Furthermore, this doesn't stop me from reaching a fair outcome in the circumstances.

I also find Creation's refusal to consider the claim under s140A has also caused Mrs G 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 Mrs G's complaint. To put things right Creation Consumer Finance Ltd must:

- Calculate the total payments (any deposit and monthly repayments) Mrs G made towards the solar panel system up until the date she repaid it – A
- Use Mrs G's bills and FIT statements, to work out the known and reasonably assumed benefits she received up until when she repaid the loan* – B
- Use B to recalculate what Mrs G should have paid each month towards the loan over that period and calculate the difference, between what she actually repaid (A), and what she should have repaid, adding 8% simple interest per year to any overpayment

from the date of each payment until the date of settlement of her complaint** – C

- Use Mrs G's bills, FIT statements and meter readings to work out the known and reasonably assumed benefits she received for the period between the loan being paid off and the end of original loan term* – D
- Deduct D from the sum Mrs G paid to settle the loan in October 2023 – E
- Add 8% simple annual interest** to E from the date Mrs G 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 G C + F
- Pay Mrs G £100 compensation for distress and inconvenience.

* If Mrs G is able to supply information to Creation Consumer Finance Ltd which covers the last six years this will be sufficient in order for Creation Consumer Finance Ltd to complete the calculation relying on that information.

If Mrs G cannot provide information covering the last six years – such as where the electricity company has gone out of business – Creation Consumer Finance Ltd should seek to complete the calculation using 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 Mrs G how much tax it's taken off. It should also give Mrs G a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs G to accept or reject my decision before 26 July 2024.

Michael Ball
Ombudsman