DRN-4072605

Financial Ombudsman Service

The complaint

Mrs S 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 5 November 2013, Mrs S bought a solar panel system ('the system') from a company I'll call "M" using a 5-year fixed sum loan from Creation.

Mrs S complained to Creation, she said that she was told by M that the 'feed in tariff' ('FIT') payments would cover the cost of the loan repayments. However, despite buying a booster in October 2017, that hasn't happened, and she's suffered a financial loss.

Creation told us they received a complaint from Mrs S on 8 December 2020. Creation issued a final response letter dated 5 November 2021. Creation considered Mrs S 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 S brought her complaint to this service on 21 November 2021 as she was unhappy with Creation's response and Mrs S asked us to review her complaint.

An investigator considered Mrs S'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 S and Creation.

On 16 March 2023, the investigator recommended that Mrs S keep the system and Creation take into account what Mrs S had paid so far, along with the benefits she received, and make sure the system was effectively self-funding.

Mrs S accepted the investigator's view. Creation told us on 31 March 2023 that it was seeking external legal counsel and asked for an extension, however we did not hear from it. So, the case was progressed to the next stage of our process, an Ombudsman's decision. I consider that Creation have now had over a year to respond to the investigator's findings had it wished to.

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

I'm satisfied I have jurisdiction to consider Mrs S'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 S's s.75 claim on 5 November 2021, this relates to a regulated activity under our compulsory jurisdiction. Mrs S brought her complaint about this to the ombudsman service on 21 November 2021. 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 S. Here the relationship came to an end when the loan was repaid on 14 November 2018. The loan ran to its term. And Mrs S referred her complaint to the ombudsman service on 21 November 2021, 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, 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 on 6 November 2013. Mrs S brought her s.75 claim to Creation on 8 December 2020 that is more than six years after she entered into an agreement with them. Given this, I think it was fair and reasonable for Creation to have not accepted the s.75 claim. So, I do not uphold this aspect of the complaint.

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 S.

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 S 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 she would receive and the savings she would make. Mrs S 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 S 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 S on 5 November 2013 and by Creation on 6 November 2013, sets out Mrs S's responsibilities for repaying the loan amount and the monthly cost of that. So, I'm satisfied the loan was taken in Mrs S'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 S 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 S 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.

When thinking about the above I'm mindful of the actions taken by the Renewable Energy Consumer Code ('RECC') against M. My understanding is that the RECC administers the renewable energy consumer Code and ensures that its members comply with the Code.

I have considered that P were found to be in breach of the Renewable Energy Consumer Code in September 2014. And one of the breaches was found to be that consumers may have been misled about the costs of the loan being met fully by income generated from the solar panels. So, this seems to support what Mrs S told us; that the cost of the solar panels would be fully met from the income and savings they could generate. So, this does not undermine the testimony Mrs S has given us.

Whilst I accept that the above represents findings based on different cases the RECC were looking at, the findings do suggest that there were conduct concerns in the areas that relate to Mrs S's complaint around the time that she was sold her system.

Creation hasn't provided evidence to dispute what Mrs S said happened. Yet with no prior interest, Mrs S left the meeting having agreed to an interest-bearing loan, with a monthly repayment of around £86, payable for five years. And I have considered that Mrs S told us that at that time she was retired. Given her lack of prior interest and the financial burden she took on, I find Mrs S'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.

I have noted that our investigator thought that Mrs S's testimony seemed persuasive and explained why they thought that in their assessment. I have noted that Creation has not responded to that assessment.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £1,041.48 per year. I have not seen anything to indicate Mrs S's system was not performing as expected but Mrs S's system did not produce

sufficiently to meet the loan repayments. When it became clear to Mrs S that she wasn't receiving he expected levels of performance, she bought a booster for £2,000. Looking at the FIT payments summary, it appears the booster became active in roughly October 2017 – when the system's productivity went up by approximately 10%. However, even then, 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 S'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 S's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to Mrs S.

Considering Mrs S'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 S a false and misleading impression of the self-funding nature of the solar panel system. On balance, I find Mrs S'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 S 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 S went into the transaction. Either way, I think M's assurances were seriously misleading and false, undermining the purpose of the transaction from Mrs S'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 S 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 S 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.

Putting things right

Fair compensation

In all the circumstances I consider that the fair compensation should aim to remedy the unfairness of Mrs S 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 S a sum that corresponds to the outcome she could reasonably have expected as a result of M's assurances. That is, that Mrs S's loan repayments should amount to no more than the financial benefits she receives 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 S 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 S received by way of FIT payments as well as through energy savings. Mrs S 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.

Creation has explained Mrs S settled the loan agreement on 14 November 2018 after it had run to term.

Creation should:

- Calculate the total repayments Mrs S made towards the loan up until she repaid it – A
- Use Mrs S's electricity bills, FIT statements and meter readings to work out the known and assumed benefits she received up until she repaid the loan (minus 10% of the financial benefits of the FIT payments provided from October 2017 onwards, to reflect those benefits attributable to the booster) – B
- Use B to recalculate what Mrs S 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
- Reimburse C to Mrs S.

I agree Creation's refusal to consider the claim under s140A has also caused Mrs S 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 S how much tax it's taken off. It should also give Mrs S a tax deduction certificate if she asks for one, so she 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.

My final decision

For the reasons I have explained I uphold Mrs S's complaint. 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 S to accept or reject my decision before 17 June 2024.

Douglas Sayers
Ombudsman