DRN-4158490

The complaint

Mr E 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 140A ('s.140A') of the CCA.

What happened

In May 2013, Mr E bought a solar panel system ('the system') from a company I'll call "P" using a 10-year fixed sum loan from Creation. The agreement sets out the amount of credit is £11,155, the monthly payments are £145.94, the total charge for credit is £6,222.80, a £135 arrangement fee is included, and the total amount payable is £17,512.80.

Mr E sent a letter of claim to Creation on 27 September 2022, explaining he thought the system was mis-sold. In summary he said:

- He was told by P that the 'feed in tariff' ('FIT') payments and electricity saving from the system would cover the cost of the loan repayments
- P said he had guaranteed income for 20 years
- He would earn 10% per annum tax free
- His property value would increase
- The system was maintenance free with a 25-year life expectancy

Mr E also said that there had been breaches under the CCA and Financial Conduct Authority ('FCA') rules, and the relationship between Creation and himself was unfair under s.140A because either Creation or P:

- Failed to undertake a suitable and sufficient creditworthiness assessment
- Failed to supply pre contractual information, and where information was provided, he wasn't given any time to consider it
- Failed to provide Mr E with a cancellation notice
- Conducted a high-pressure sale
- Didn't explain the full details of the credit agreement
- Didn't disclose payment of any commission made and/or received

Creation responded to the claim on 17 February 2023 in its final response. It considered Mr E had brought his claim more than six years after the cause of action occurred under the Limitation Act ('LA').
Unhappy with Creation's response, Mr E referred his complaint to our service on 22 February 2023.

An investigator considered Mr E's complaint, she thought that –

- 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 E and Creation.

She recommended that Mr E keep the system and Creation take into account what Mr E had paid so far, along with the benefits he received, making sure the system was effectively self-funding. And that Creation should pay Mr E £100 for the trouble and upset caused by not originally looking into the s.140A complaint.

I can't see that either party responded so, the case was progressed to the next stage of our process, an Ombudsman's 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.

My findings on jurisdiction

I'm satisfied I have jurisdiction to consider Mr E'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 E's s.75 claim on 17 February 2023. This relates to a regulated activity under our compulsory jurisdiction. Mr E brought his complaint about this to the ombudsman service on 22 February 2023. 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 E. Here the relationship was ongoing at the time it was referred to the ombudsman service on 22 February 2023, 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 P 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 P 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 P for which Creation were responsible under s.56 when considering whether it is likely Creation had acted fairly and reasonably towards Mr E.

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 E has said he was told by P's representative that the monthly payments and savings he would receive would cover his monthly finance payments. Mr E told us that he'd not considered purchasing solar panels before P approached him, and I haven't seen any other evidence Mr E had any prior interest in purchasing them.

Mr E has said he remembers being given documentation from P; however, he's not been able to locate everything. I've looked at the documents Mr E has been able to provide to see if there was anything contained within them that made it clear that the solar panel system wouldn't be self-funding.

I've considered Mr E's loan agreement. I'm satisfied it 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 haven't been provided with anything further from the point of sale e.g., a copy of the contract, so I'm not able to say if the likely financial benefits of the system are included on further documents, or if there was a way for Mr E to compare his total costs against the financial benefits he was allegedly being promised.

However, Mr E has said the financial benefits were discussed. So, I've looked at a copy of P's website from May 2013, on the main page it states –

'Embrace the benefits of solar power and renewable energy saving systems.

- ✓ *Tax free*
- ✓ *High yield*
- ✓ *No risk*
- ✓ *Inflation proof*
- ✓ *Non depreciating asset'*

Further down the page there is a section titled *'PV Solar Systems'*, where the following is stated –

'The most common sustainable energy product on the market at the moment is the solar PV systems. These create electricity for your home during daylight hours free of charge and give you a tax-free income guaranteed by the government feed in tariff. Yes you get paid for generating energy and it is TAX FREE!'

And at the bottom of the page there is a section titled *'Finance'*, which includes –

'We have calculated a Pay As You Go plan to suit each and every client, so that all the savings and tariffs pay for your new products'

I think it follows that if the website emphasises the benefits of a solar panel system, and how they would pay for the products being offered by P it's likely this would have been a central part of P's conversation when selling the product. I think the website also supports Mr E's

testimony that P's representative told him the monthly payments and savings he would receive would cover his monthly finance payments.

So, I find what Mr E's said believable, I think P's website supports his testimony that the potential benefits were discussed. I'm of the opinion that they would be a key reason to purchase the system and his savings on his electrical bills and income from the FIT scheme would have been a central part of the conversation.

I think Mr E would have looked to P'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. And as I've said I think the website supports Mr E's testimony that he was told by P's representative the system would be self-funding.

Important to note here are the actions taken by the Renewable Energy Consumer Code ('RECC') against P. My understanding is that the RECC oversees the renewable energy consumer Code and makes sure that its members comply with it.

The RECC investigated P's conduct and informed P of its concerns in 2014. Significantly RECC had concerns about P using false or misleading information and that pressured sales were taking place.

The RECC Panel heard the case and decided the following were proved -

- allegations consumers had been given misleading information about payment and payback
- allegations consumers were not given certain technical information before signing the contract

So, the Panel decided P was in breach of Section 5.2 of the code (which required members not to provide false or misleading information to consumers) and Section 5.3 (which concerned members providing clear information so consumers could make an informed decision). Given RECC's concern about P's culture and conduct, it made the decision to terminate P's membership of RECC.

Whilst I accept that the above is findings on different cases the RECC was looking at, the findings suggest that there were conduct concerns in the same areas that Mr E has complained about, at a similar time he was sold his system.

I think it important to highlight the following points the panel considered in its decision:

- '*The Regulator was particularly uncomfortable with the fact that so many consumers appeared not to understand the benefit of the system sold. They were told one thing but the reality was different*'
- *'There is a large volume of complaints with a consistent theme that suggest that some consumers have been given false or misleading information before signing contracts. … The Panel decided that a fundamental cultural change was needed within the company…. Given the duration, seriousness and breadth of the breaches upheld… [P's membership of RECC] should be terminated.'*

Creation have also told this service that following the RECC report it terminated its relationship with P. This is also set out in P's liquidation report produced in June 2016 available on companies house. The report states that mis-selling issues by P were brought up by Creation, which led to it terminating the contract with P and also withholding funds as it expected claims from consumers under s.75. I think Creation's actions strongly suggest it had serious concerns about the way P was selling Solar Panels.

I'm of the opinion that all of the above information strongly supports Mr E's testimony.

Creation hasn't provided evidence to dispute what Mr E's said happened. Yet with no prior interest Mr E left the meeting having agreed to an interest-bearing loan, with a monthly repayment of £145.94, payable for 10 years. Given his lack of prior interest and the financial burden he took on I find Mr E's account of what he was told by P, 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 he not been given the reassurances he's said he received from P.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £1,751.28 per year. Mr E's system looks like it's performing less than the estimate on his MCS certificate. Mr E has mentioned that he's been advised since installation that the panels aren't working as he thought they would. Essentially, the way P installed the panels means that if one goes into shade all the rest switch off. This isn't something that was part of the original complaint that Creation considered, which is what I'm looking at here.

However, importantly the system has not and would not produce enough benefits based on the actual and estimated output, to be self-funding within the term of the loan. So, these statements were not true. I think P's representative must reasonably have been aware that Mr E'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 P's representative would have known that Mr E's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to Mr E.

Considering Mr E's account about what he was told, P's website, RECC's findings, Creation's actions and the fact it hasn't disputed these facts, I think it likely P gave Mr E a false and misleading impression of the self-funding nature of the solar panel system.

I consider P's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Mr E was expected to receive by agreeing to the installation of the system. I consider that P'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 Mr E went into the transaction. Either way, I think P's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr E's point of view.

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

Where Creation is to be treated as responsible for P's negotiations with Mr E 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 E 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.

The s.75 complaint and additional s.140A complaint points

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 E's s.75 complaint and his other s.140A complaint points. Furthermore, this doesn't stop me from reaching a fair outcome in the circumstances.

Fair compensation

In all the circumstances I consider that fair compensation should aim to remedy the unfairness of Mr E and Creation's relationship arising out of P's misleading and false assurances as to the self-funding nature of the solar panel system. Creation should repay Mr E a sum that corresponds to the outcome he could reasonably have expected as a result of P's assurances. That is, that Mr E'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 E received 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 E received by way of FIT payments as well as through energy savings. Mr E will need to supply up to date details, where available, of all FIT benefits received, electricity bills and current meter readings to Creation. Mr E's loan has now run to full term; therefore, he will only have one option that's tenable as opposed to the 4 the investigator recommended.

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.

Finally, I consider that Creation's failure to fully deal with Mr E's complaint in a reasonable timeframe, with minimal communication, caused Mr E some degree of trouble and upset. In recognition of this, and in addition to what I have already set out above, Creation should also pay Mr E £100.

My final decision

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

- Calculate the total payments Mr E has made towards the solar panel system up until the date of settlement of his complaint – A
- Use Mr E's bills and FIT statements, to work out the benefits he received up until the loan term* – B
- Use B to recalculate what Mr E 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 of his complaint** – C
- Reimburse C to Mr E
- Pay Mr E £100 for trouble and upset caused

*Where Mr E 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 E how much it's taken off. It should also give Mr E 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 E to accept or reject my decision before 26 July 2024.

Helen Boulton-Agg
Ombudsman