DRN-4676135

The complaint

Mr M has complained about the way Creation Consumer Finance Limited ("Creation") responded to a claim he'd made under section 75 (s75) of the Consumer Credit Act 1974 (the "CCA") and in relation to an alleged unfair relationship taking into account section 140A (s140A) of the CCA.

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

What happened

In December 2013 Mr M entered into a fixed sum loan agreement with Creation to pay for a £9,000 solar panel system from a supplier I'll call "P". The total amount payable under the agreement was £14,170.80 and it was due to be paid back with 120 monthly repayments of £118.09.

The supply contract was for the installation of 10 solar panels. Mr M signed the supply contract the same day as the fixed sum loan agreement. Creation has explained Mr M settled the loan agreement on 31 October 2016.

On 20 February 2020 Mr M sent a letter of complaint to Creation explaining that he considered he had a valid claim against it under s75 due to misrepresentation and breach of contract by P, and also claimed there had been an unfair relationship under s140A. Mr M said he'd been cold called and told he could be entitled to a solar panel system at no cost to him. He says he was told the system would be fully self-funding, and so he agreed to a sales meeting. In summary, Mr M says:

- P's representative misled him the total cost of the system was £9,000 when the actual cost of the system including interest was £14,170.80.
- P promised him a tax-free, year-1 benefit of £1,416.96 from Feed in Tariff (FIT) payments, whereas after making the loan repayments there was a deficit of around £800 per year.
- P told him the FIT payments would cover the cost of the loan repayments.
- He would not have entered into the agreement if he knew he'd have to pay around £800 per year towards it for 10 years.
- Many other customers of P have stated similar, if not identical experiences.
- He was pressured into signing the agreement. P's representative spent two hours at his home.
- P said this was a government backed scheme to reduce solar emissions and reach carbon targets.
- P told him the government would subsidise any shortfall.
- P told him the inverter would be under warranty for 10 years.
- P didn't tell him the performance of the system would deteriorate over the years.
- He was induced into the agreement by false statements from P. He wouldn't have entered into the agreement had it not been for those statements.

On the basis of the above Mr M said he had a like claim against Creation for breach of contract and misrepresentation under s75. He also said section 56 (s56) of the CCA deemed P the agent of Creation when carrying out antecedent negotiations, and that the relationship between Creation and him was also unfair under s140A because either Creation or P:

- Failed to assess Mr M's creditworthiness.
- Didn't act honestly, fairly and professionally with his best interests in mind.
- Didn't disclose payment of any commission and/or inducements paid and/or received.
- Didn't provide a cooling off period.
- Didn't notify Mr M of his cancellation rights.
- Didn't comply with the Renewable Energy Consumer Code.

To resolve the claim and complaint, Mr M requested:

- A refund of all sums paid for the system.
- The agreement is ended.
- A refund of any commission.
- 8% simple annual interest on the above amounts.

Creation sent a final response letter on 27 February 2020 rejecting Mr M's s75 claim for misrepresentation on the basis it was 'time-barred' taking into account the Limitation Act 1980 (the 'LA'). Creation did not comment on the s75 claim so far as it concerned a breach of contract nor the s140A aspect of the complaint in its final response.

Mr M wasn't happy with the response to the complaint so decided to refer it to our service on 20 July 2020.

Creation explained in response to the ombudsman service that it stood by its decision to reject the complaint in its final response letter, and that it considered the s75 claim to be time-barred under the LA such that it had no liability to Mr M. It also considered the complaint to be out of our jurisdiction to consider due to the limitation period under the LA having expired.

Following the investigator's view – which was accepted by Mr M but not by Creation - I issued a provisional decision on 15 December 2023 setting our why I planned to uphold Mr M's complaint. I said the following:

> *<u>Our approach to jurisdiction to consider the complaint</u>*
>
> *Our powers to consider complaints are set out in the Financial Services and Markets Act 2000 ("FSMA") and in rules and guidance contained in the FCA's Handbook known as DISP.*
>
> *The rules surrounding time limits within which to refer complaints are set out in DISP 2.8.2R which include that:*
>
> > *"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:*
> >
> > *(1) more than six months after the date on which the respondent the complainant its final response, redress determination or summary resolution communication; or*

(2) more than:

(a) six years after the event complained of; or (if later)

(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;

unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received"

Further, DISP 2.3.1R sets out the activities which I can consider under our compulsory jurisdiction, and within scope are complaints which relate to acts or omissions by firms in carrying on one or more regulated activities (see DISP 2.3.1R(1)). The regulated activities are set out in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("RAO").

There are several other rules and guidance provisions relevant to our jurisdiction, and for the avoidance of doubt I have only set out relevant DISP rules and guidance so far as is necessary for the purposes of addressing this complaint.

I consider the complaint to have been referred to the ombudsman service on 20 July 2020 which is the date when Mr M's representative sent details of his complaint to our service. This is slightly different to the investigator's finding that the referral date was 14 July 2020 which appears to have been based on the date Mr M signed his complaint form.

I'll first consider our service's jurisdiction to consider Mr M's s75 and s140A complaints, before turning to the merits of those complaints.

My findings on jurisdiction

(1) Jurisdiction to look at the s75 complaint

Where Creation exercises its right and duties as a creditor under a credit agreement it is carrying out a regulated activity within scope of our compulsory jurisdiction under Article 60B(2) of the RAO. In undertaking that activity, the creditor must honour liabilities to the debtor. So, if a debtor advances a valid s75 claim in respect of the credit agreement, the creditor has to honour that liability and failing or refusing to do so comes under our compulsory jurisdiction.

The event complained of here is Creation's allegedly wrongful rejection of Mr M's s75 claim on 27 February 2020. Mr M brought his complaint about this to the ombudsman service on 20 July 2020. So his complaint in relation to the s75 claim was brought in time for the purposes of our service's jurisdiction.

Creation argued the complaint was out of our jurisdiction taking into account the LA, but our service has its own rules under DISP 2.8.2R saying when a complaint is brought too late. The LA does not limit our jurisdiction. However, I do consider that the LA is relevant law for the purposes of the merits of Mr M's complaint about its rejection of the s75 claim, and I have set out why that is the case later in this decision.

(2) Jurisdiction to look at the complaint about an unfair relationship under s140A

Creation has referred us to its final response letter, saying the s75 claim was time-barred under the LA but has not explicitly raised any objections to our jurisdiction to consider the s140A complaint. However, to the extent it may be implied that Creation also disputes our jurisdiction to consider the s140A aspect of the complaint, I shall address this.

Mr M is able to make a complaint about an unfair relationship between himself and Creation per s140A. The event complained of for the purposes of DISP 2.8.2R(2)(a) is Creation's participation, for so long as the credit relationship continued, in an allegedly unfair relationship with him. This accords with the court's approach to assessing unfair relationships – the assessment is performed as at the date when the credit relationship ended: Smith v Royal Bank of Scotland plc [2023] UKSC 34.

In this case the credit relationship ended on 31 October 2016 and the complaint in relation to s140A was referred to the ombudsman service on 20 July 2020. So, the s140A complaint was brought less than six years after the event complained of and has been brought in time.

I am satisfied I have jurisdiction to consider the complaint about the alleged unfair relationship per s140A in the circumstances.

Merits

(1) <u>My findings on the merits of the s75 complaint</u>

Creditors have no means of knowing what s75 liabilities they may have, nor of investigating such liabilities nor of recovering them from suppliers, unless or until debtors raise s75 claims against them; and (as I have explained above) raising the claim, if it's a valid one, brings the creditor under a duty then to honour its liability.

But it would not be fair or reasonable to require a creditor to respond to s75 claims however long in the past they arose. And our service must decide complaints on the basis of what is fair and reasonable in all the circumstances of a case.

The law imposes a six-year limitation period on the relevant claims, after which they become time barred. Taking into account this time period, the particular nature of liability under s75, and the need for the debtor to raise a s75 claim against their creditor before a cause for complaint to our service can arise, I consider it is fair and reasonable for a creditor not to have to look into or honour a s75 claim that was first raised with it by the debtor after the claim had become time barred under LA. This is in line with our service's long-standing approach to complaints under s75.

Creation has said the s75 claim was brought outside of the relevant six-year limitation period under the LA for misrepresentation claims though it does not address the allegations of the s75 claim arising from a breach of contract. The alleged misrepresentation cause of action arose when an agreement was entered into during December 2013 based on the alleged misrepresentations. The alleged breach of contract isn't defined but I take it to be that P (acting on behalf of Creation) warranted that the solar panel system it agreed to provide had the capacity to finance the loan repayments, when that was incorrect. As such, the alleged breach of contract also occurred as soon as the agreement was entered into.

The s75 claim wasn't raised with Creation until 20 February 2020, that is more than six years after the causes of action against P for misrepresentation and breach of contract would have accrued for the purposes of the LA around December 2013.

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 s75 claim. So, I do not uphold this aspect of the complaint.

(2) My findings on the merits of the complaint about an unfair relationship under s140A

I've considered whether representations and contractual promises by P can be considered under s140A.

Therefore, I've considered the court's approach so far as it is relevant to the merits of the s140A complaint I am considering. I have taken into account the Court of Appeal's judgment in Scotland & Reast v British Credit Trust [2014] EWCA Civ 790 ("Scotland") which said the following when considering what could be relevant to an unfair relationship claim under s140A:

> *"In this regard it is important to have in mind that the court must consider the whole relationship between the creditor and the debtor arising out of the credit agreement and whether it is unfair having regard to one or more of the three matters set out ins.140A(1), which include 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 of relevant and important aspects of the transaction seem to me to fall squarely within the scope of this provision."*

Scotland makes it clear that relevant matters would include misrepresentations and other false or misleading statements as to relevant and important aspects of a transaction. As I've already set out, s56 has the effect of deeming P to be the agent of Creation in any antecedent negotiations. Creation is responsible for the antecedent negotiations P carried out direct with Mr M.

I think the negotiations were antecedent because they preceded the relevant conclusion of the agreement. The scope of 'negotiations' and 'dealings' is wide. And 'representations' covers statements of fact, contractual statements and other undertakings. Taking this into account, I find it would be fair and reasonable in all the circumstances for me to consider P's negotiations and arrangements for which Creation was responsible under s56 of the CCA when deciding whether it's likely Creation had acted fairly and reasonably toward Mr M.

But in doing so, I should take into account all the circumstances and consider whether a Court would find the relationship with Creation was unfair under s140A.

The negotiations

Creation hasn't supplied any evidence on what was (or wasn't) discussed or negotiated between Mr M and P.

Our investigator spoke to Mr M. In summary, he said P's salesperson came to visit him and told him he'd save a fortune. He said the salesperson told him he would be paid by the electricity company because he would sell electricity to it.

Mr M said the salesperson told him the income from the solar panel system would pay off the agreement. He said he was left with paperwork, but he couldn't understand all of it.

I've also looked at the paperwork that has been supplied to see if there was any evidence to support Mr M's allegation he was told it would be self-funding. I've been supplied a sales brochure from P. I'm not sure if this is the paperwork that was left with Mr M, but it's indicative of the sort of paperwork that was used by P at the time.

Mr M has supplied a copy of the Standard Assessment Procedure (SAP) Calculations and 1st Year Returns form. This sets out that the total benefit for Mr M based on Generations Earnings + Electricity Savings + Export Earnings equalled £528.97. Given his monthly repayments towards the agreement were around £120 this document doesn't show the solar panel system would be self-funding. I consider the fixed sum loan agreement to be clearly set out. So, I've looked at the other documentation available.

I note that a sales document from P sets out when discussing funding options: Finance over 10 years. The unique self funding scheme means the FIT covers the monthly loan repayments. You will never be out of pocket. The brochure also seems to indicate the customer could benefit from a tax-free return of between 8% to 15% per annum. Although I should point out the brochure refers to a different finance company to Creation.

I've not seen anything to indicate Mr M had an interest in purchasing a solar panel system before P contacted him. Mr M has said he only agreed to the purchase because the system would be self-funding. I'm mindful that it would be difficult to understand why, in this particular case, Mr M would have agreed to install a solar panel system if his monthly outgoings would increase significantly.

In all the circumstances, I don't think the information on the SAP Calculations and 1st Year Returns showed the solar panel installation would be self-funding. But I think the sales documentation likely left with Mr M did tell him the solar panel system would be self-funding and that he'd not be out of pocket.

This is supported by Mr M's allegations that the salesperson also told him the income from the solar panel system would pay off the agreement. So, on balance, I find Mr M's account to be plausible and convincing.

For the solar panels to be self-funding, they'd need to produce a combined savings and FIT income of around £1,400 per year. I've not seen anything to indicate there's a problem with Mr M's solar panel system. But I've also not seen enough to suggest he's achieved this benefit. For the year's FIT statements I've seen (from 18 August 2018 to 20 August 2019) he received a total of £624.75. I've not been supplied copies of Mr M's electricity bills, so I don't know what savings he made. But based on what I have seen and taking into account the SAP calculations that I've referred to above, I think it's more likely than not the system wasn't self-funding. I therefore find the statements made as to the self-funding nature of the system weren't true. I think the salesperson ought to have known this and made it clear that the solar panel system wouldn't have produced enough benefits to cover the overall cost of the fixed sum loan agreement. However, I think it's important to take into account any savings Mr M made, so I will come back to this later on in this provisional decision.

Taking into account what I've said above, I think it likely P gave Mr M 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 which Mr M was expected to receive by agreeing to 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 M went into the transaction. Either way, P's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr M's point of view.

Would a court likely make a finding of unfairness under s140A?

Where Creation is to be treated as responsible for P's negotiations with Mr M in respect of its misleading and false assurances as to the self-funding nature of the solar panel system, I am satisfied that a court would likely find the relationship between Mr M and Creation to have been unfair.

Mr M has had to pay more than he expected to cover the shortfall towards the repayments. Creation has benefited from the interest paid on a loan Mr M otherwise wouldn't have taken out. Therefore, I am also satisfied that Creation has not treated Mr M fairly or reasonably in all the circumstances of the complaint. I consider the fairest way to address this is to resolve the matter as I set out below.

Fair compensation

In all the circumstances I consider that the fair compensation should aim to remedy the unfairness of Mr M and Creation's relationship arising out of P's misleading and false assurances as to the self-funding nature of the solar panel system. I intend to require Creation to repay Mr M a sum that corresponds to the outcome he could reasonably have expected as a result of P's assurances. That is, that Mr M's loan repayments should amount to no more than the financial benefits he 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 Mr M received from the solar panel 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 M received by way of FIT payments as well as through energy savings. Mr M will need to supply up to date details of all FIT benefits received, electricity bills and current meter readings to Creation. Creation can use assumptions when information is not available – if, for example, the electricity company has gone out of business. Mr M should let us know in response to this provisional decision if he's unable to supply any of the relevant FIT benefits, electricity bills and meter reading, and the reasons why.

Creation should:

- *Calculate the total repayments Mr M made towards the loan up until he repaid it – A*
- *Use Mr M's electricity bills, FIT statements and meter readings to work out the known and assumed benefits he received up until he repaid the loan – B*
- *Use B to recalculate what Mr M should have repaid each month towards the loan over that period and reimburse him the difference between what he actually repaid (A) and what he should have repaid, adding 8% simple annual interest* to any overpayment, from the date of repayment until the date of*

settlement – C

- *Use his electricity bills, FIT statements and meter readings to work out the known and assumed benefits he received between the loan being paid off and the end of the original loan term – D*
- *Deduct D from the amount Mr M paid off the loan – E*
- *Add 8% simple annual interest* to E from the date Mr M 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 Mr M C + F*

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

Mr M responded to say he may not be able to obtain all his electricity bills or FIT benefits and wanted to know how redress would be calculated. But he said he'd put in a request for the information.

Creation disagreed with my provisional decision and responded on 15 January 2024 to explain its position that:

- The complaint was brought more than six years after the events complained of, so outside the time limits which apply to the jurisdiction of the ombudsman service.
- Mr M's allegations of an unfair relationship do not relate to any events post-dating the sale of the solar panel system on or around 9 December 2013.
- The end of a credit relationship may be the starting point for limitation purposes in civil litigation, but it isn't the starting point for the six-year period under DISP 2.8.2R(2)(a), where the unfair relationship itself would not constitute an event. It is the event(s) giving rise to an unfair relationship which are the 'events complained of' for the purposes of that rule.
- Mr M had not brought a complaint about Creation's handling of his s75 claim. Creation explained it had no record of receiving such a complaint and did not issue a final response letter in relation to one.
- Creation considers my analysis conflates the jurisdiction rules on the ombudsman service's time limits for bringing complaints under DISP 2.8.2R(2)(a) and DISP 2.8.2R(1). It considers my approach allows any complainant to bring an otherwise time-barred claim in time by complaining about the decision not to uphold the complaint.
- Without prejudice to its position on jurisdiction it considers my approach to redress should be in accordance with the Court's decision in *Hodgson v Creation Consumer Finance Limited* [2021] EWHC 2167 (Comm) ('Hodgson*').*

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.

I'd like to thank the parties for their responses.

I've considered all the available evidence and arguments to decide whether the ombudsman service's jurisdiction permits me to consider the entire subject matter of this complaint and, if relevant, what's a fair and reasonable resolution of the complaint in all the circumstances.

In summary, my conclusions are that:

- I do have jurisdiction to consider Mr M's complaint, both in respect of the allegations of an unfair relationship under s140A and the refusal by Creation to accept and pay his s75 claim.
- I don't consider the complaint about the s75 claim to have merit because I am satisfied it was fair and reasonable for Creation to reject that claim on the basis relevant limitation periods would have expired, providing Creation a defence to the s75 claim under the LA.
- I uphold the complaint alleging that Creation was party to an unfair relationship under s140A on the basis that the assurances provided to Mr M were false and misleading.
- Fair compensation in the particular circumstances of this complaint should be based upon fulfilling the assurance given to Mr M that the system would be self-funding.
- With respect to Mr M's position that he may not be able to provide all of the details of his meter readings, electricity bills and/or FIT benefits, I am satisfied that if he 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 Creation insists on obtaining this information.
- If Mr M 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 by reasonably using assumed benefits.

Jurisdiction over the complaint about the s75 claim

The ombudsman service's jurisdiction over complaints that a business is liable under s75 is based upon the lender's failure to honour its liability when the borrower makes a valid claim under that section. When a borrower under a regulated credit agreement seeks payment from the lender of the damages he or she has suffered under a connected transaction because of something done or said by the supplier, the lender may or may not have a liability to the borrower under s75.

But if the borrower's claim is valid, the lender should honour its liability – and its failure to do so is a matter to which the Financial Ombudsman's jurisdiction extends. That is because it is part of the lender's regulated activities to exercise its duties under a regulated credit agreement – and a complaint about a firm's acts or omissions in carrying on a regulated activity (or any ancillary activity carried on by the firm in connection with a regulated activity) come with our jurisdiction under DISP 2.3.1R.

Creation argues that the event complained of when the matter is brought to our service occurred as and when the supplier caused the alleged s75 liability to arise in the first place. I disagree: the lender's s75 liability in damages doesn't arise as a result of any act or omission of the lender in performing a regulated activity – it is simply a claim given by statute to the borrower against the lender. And it arises from the acts or omissions of a third party, the supplier. Only when and if grounds for a claim are presented by the borrower to the lender must the lender do anything about it, which (as I have said) is to honour its statutory liability by paying the claim if it is a valid one. Until then, the lender's acts and omissions are simply to have lent money to the borrower at the borrower's request, and that is not the matter complained about.

So, when a borrower brings a complaint to our service alleging that they were due money under s75 which the lender has refused to pay, the "event complained of" in such circumstances isn't the supplier's conduct; it is the lender's refusal to honour its alleged statutory liability when the borrower made the claim.

In this case, Creation rolled up its consideration of Mr M's s75 claim into a letter that both explained why it would not be paying the claim and treated Mr M as having brought a complaint which he was entitled to refer to our service. So, its refusal to accept and pay the s75 claim was contained in a final response letter of 27 February 2020, in which it told Mr M he could refer his complaint to our service within 6 months.

In those circumstances, because Creation' letter dated 27 February 2020 rejected Mr M's claim under s75 (which Mr M says is valid) it constituted "the event complained of". It also set out Creation's response to any complaint that flowed from this and invited Mr M to refer that complaint to our service if he was dissatisfied with the outcome. Creation could have separated those stages, waited for Mr M to complain that the s75 claim had not been accepted and honoured, and only then issue its final response letter. Instead, it followed the same practice that many other lenders adopt by allowing Mr M to refer the matter directly to the ombudsman service, by way of treating it as a complaint.

Creation argues that Mr M didn't complain to it about the manner in which it dealt with his s75 claim, and that it has never responded to such a complaint. But, that ignores the fact that it was Creation's choice to roll the answer to the s75 claim into a final response letter in the way that I've described. That was a reasonable and pragmatic way of proceeding, because the issues between the parties on this part of Mr M's complaint were whether it was fair and reasonable for Creation to reject Mr M's s75 claim, as they remain to this day.

Creation also refers to DISP 2.8.1R(1) in its response to my provisional decision which provides a complaint can only be considered if the respondent has sent the complainant its final response (or summary resolution communication).

However, Creation did send Mr M a final response letter on 27 February 2020. After the complaint was referred by Mr M to the ombudsman service on 20 July 2020, we wrote to Creation on 23 September 2020 providing details of the complaint as submitted to the ombudsman service including details of Mr M's complaint about the s75 claim.

If Creation's position had been that it denied it received any such complaint, it could have raised this with the ombudsman service at the time, but it did not. Instead, on 5 October, 23 November 2020 and on 1 June 2022, it provided information concerning its position on the complaint. It was apparent from this correspondence that, in relation to s75, Mr M's complaint was that Creation had a liability to him which it was declining to pay.

So, even if no final response had been issued in respect of the complaint about s75, in accordance with DISP 2.8.1R(2) Creation has had well over eight weeks to respond to the complaint and our service is entitled to deal with it.

There has been no conflation with the six-month time limit under DISP 2.8.2R(1) in this regard. That Creation refused to accept the s75 claim within a final response letter does not give rise to any difficulties calculating when time begins to run under DISP 2.8.2R(2)(a).

In any event, Creation's points around our jurisdiction to consider the complaint about the s75 claim are somewhat academic, as I have not upheld this aspect of the complaint on the merits.

Merits of the complaint about the s75 claim

On the merits of the complaint, I remain persuaded it was fair and reasonable for Creation not to have accepted and paid Mr M's s75 claim, because the relevant limitation periods were for the alleged misrepresentation(s) and/or breach(es) of contract of the supplier had expired before Mr M first brought his s75 claim to Creation.

Jurisdiction over the complaint about an unfair relationship under s140A

I have also considered Creation's arguments in its response to my provisional decision on our jurisdiction over the complaint about an unfair relationship under s140A. Again, I am satisfied this aspect of the complaint was brought in time so that the ombudsman service had jurisdiction.

Section 140A doesn't impose a liability to pay a sum of money in the same way as s75. Rather, it sets out the basis for treating relationships between creditors and debtors as unfair. Under s140A a court can find a debtor-creditor relationship is unfair, because of the terms of the credit agreement and any related agreement, how the creditor exercised or enforced their rights under these agreements, and anything done or not done by the supplier on the creditor's behalf before or after the making of a credit agreement or any related agreement. A court must make its determination under s140A with regard to all matters it thinks relevant, including matters relating to the creditor and matters relating to the debtor.

The High Court's judgment in *Patel v Patel* [2009] EWHC 3264 QB established that determining whether the relationship complained of was unfair has to be made *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination"*. The time for making determination in the case of an existing relationship is the date of trial, if the credit relationship is still alive at trial, or otherwise the date when the credit relationship ended. This judgment has recently been approved by the Supreme Court in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('Smith').

Throughout the period of the credit agreement, a creditor should conduct its relationship with the borrower fairly, including by taking corrective measures. In particular, the creditor should take the steps which it would be reasonable to expect it to take in the interest of fairness to reverse the consequences of unfairness, so that the relationship can no longer be regarded as unfair: see Smith at [27]-[29] and [66]. Whether that has, or has not, been done by the creditor is a consideration in whether such an unfair relationship was in existence for the purposes of s140A when the relationship ended.

In other words, determining whether there is or was an unfair credit relationship isn't just a question of deciding whether a credit relationship was unfair when it started. The question is whether it was still unfair when it ended; or, if the relationship is still on foot, whether it is still unfair at the time of considering its fairness. That requires paying regard to the whole relationship and matters relevant to it right up to that point, including the extent to which the creditor has fulfilled its responsibility to correct unfairness in the relationship.

Therefore, in the present case, up until the moment Creation's credit agreement with Mr M ended on 31 October 2016, Creation was responsible for the matters which made its relationship with Mr M unfair and for taking steps to remove the source of that unfairness or mitigate its consequences so that the relationship was no longer unfair. By relying in his complaint on the unfairness of the credit relationship between himself and Creation, Mr M therefore complained about an event that continued until that relationship ended, namely that Creation participated in and perpetuated an unfair credit relationship with him until 31 October 2016. So, time ran on the six-year period for bringing that complaint from that date.

The same date would have also been the starting point for time to run under the limitation period for bringing a s140A claim in court. So, I don't consider the result a surprising one.

Therefore, taking into account DISP 2.8.2R(2)(a), I am satisfied – where Mr M's credit relationship with Creation ended on 31 October 2016 and he referred his complaint to the ombudsman service on 20 July 2020 – that it has been brought in time. I am otherwise satisfied the complaint is within the ombudsman service's jurisdiction to consider.
In these circumstances, I don't consider it necessary to consider whether Mr M's complaint has been brought in time for the purposes of the alternative three-year rule under DISP 2.8.2R(2)(b).

Merits of the complaint about an unfair relationship per s140A

Creation has not responded in respect of the merits of the complaint about an unfair relationship except to the extent it has requested I adopt the approach in Hodgson when determining what is fair compensation, if I uphold the complaint.

I remain of the view expressed in my provisional decision that the complaint about an unfair relationship should be upheld for the same reasons I expressed in my provisional decision. In summary, I am persuaded that Creation participated in, and perpetuated an unfair relationship with Mr M which has arisen out of P's misleading and false assurances as to the self-funding nature of the solar panel system.

I am also satisfied the approach to fair compensation which I set out in my provisional decision remains the fair and reasonable way of resolving Mr M's complaint.

I consider P's misleading presentation of the package of solar panels and financing went to an important aspect of the transaction for the system, namely the benefits which Mr M was expected to receive. P's assurances in this regard likely amounted to a contractual promise that the solar panels 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 M went into the transaction. Either way, P's assurances were seriously misleading and they put Mr M into a position where the financial reality for him was less satisfactory than he had been led to expect.

In my view, the fairest way to put this right is for Creation to repay Mr M a sum that corresponds to the outcome he could reasonably have expected as a result of P's assurances. That is, that Mr M's loan repayments should amount to no more than the financial benefits he received from the solar panels.

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 Mr M's expectation of what he would receive. I consider Mr M 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 Mr M.

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.

My final decision

For the reasons given above, I'm not going to depart from the conclusions I reached in my provisional decision.

Creation Consumer Finance Limited should:

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

As I explained earlier in my decision with respect to Mr M's position that he may not be able to provide all of the details of his meter readings, electricity bills and/or FIT benefits, I am satisfied that if he 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 Creation wishes to insist they're provided).

If Mr M 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.

I also find Creation's refusal to consider the claim under s140A has also caused Mr M 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 Mr M how much tax it's taken off. It should also give Mr M 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 M to accept or reject my decision before 10 April 2024.
Simon Wingfield
Ombudsman