

The complaint

Mrs T 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 17 February 2015, Mrs T bought a solar panel system ('the system') from a company I'll call "M" using a 10-year fixed sum loan from Creation. The loan amount was for £9,995 and the total amount payable under the agreement was £15,714 and it was due to be paid back with 120 monthly repayments of £130.95.

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

Creation told us they received a complaint from Mrs T on 16 July 2021. Creation issued a final response letter dated 20 October 2021. Creation considered Mrs T 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 T brought her complaint to this service on 16 December 2021 as she was unhappy with Creation's response and Mrs T asked us to review her complaint.

An investigator considered Mrs T'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 T and Creation.

On 27 February 2023, the investigator recommended that Mrs T keep the system and Creation take into account what Mrs T had paid so far, along with the benefits she received, and make sure the system was effectively self-funding.

Mrs T accepted the investigator's view. Creation told us on 18 April 2023 that it was seeking external legal counsel and told us it disagreed with our assessment. However, we have not heard from Creation after that. 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.

In February 2023 Mrs T told us that her solar panels had stopped working a few years before that. I have asked for more information about this but have not received a substantive response. So, I do not have enough information to begin to look at this matter.

In any event, this isn't an issue that Mrs T has previously raised with Creation. I consider this to be a separate complaint point and one that Creation has not had the opportunity to make a response to. So, if Mrs T wishes that complaint to be looked at, she ought to raise that with Creation directly in the first place.

I issued my provisional decision on 1 July 2024, a section of which is included below, and forms part of, this decision. In my provisional decision, I set out the reasons why it was my intention to uphold Mrs T's complaint. I set out an extract below:

"On 17 February 2015, Mrs T bought a solar panel system ('the system') from a company I'll call "M" using a 10-year fixed sum loan from Creation. The loan amount was for £9,995 and the total amount payable under the agreement was £15,714 and it was due to be paid back with 120 monthly repayments of £130.95.

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"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 T'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 T's s.75 claim on 20 October 2021, this relates to a regulated activity under our compulsory jurisdiction. Mrs T brought her complaint about this to the ombudsman service on 16 December 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 T. Here the relationship came to an end when the loan was repaid. Mrs T told us that the loan was repaid on 14 March 2022. And Mrs T referred her complaint to the ombudsman service on 16 December 2021, 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 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 T.

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 T 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 and electricity she would receive and the savings she would make. Mrs T 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 T 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 T on 17 February 2015 and by Creation on 2 March 2015, sets out Mrs T's responsibilities for repaying the loan amount and the monthly cost of that. So, I'm satisfied the loan was taken in Mrs T'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 T 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 T 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 T 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 T 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 T's complaint around the time that she was sold her system.

Creation hasn't provided evidence to dispute what Mrs T said happened. Yet with no prior interest, Mrs T left the meeting having agreed to an interest-bearing loan, with a monthly repayment of around £130, payable for ten years. And I have considered that Mrs T told us that at that time she had several children and that money was tight. Given her lack of prior interest and the financial burden she took on, I find Mrs T'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 T'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 £1,571.40 per year. I have not seen anything to indicate Mrs T's system was not performing as expected but Mrs T's system did not produce sufficiently to meet the loan repayments. 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 T'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 T's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to Mrs T.

Considering Mrs T'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 T a false and misleading impression of the self-funding nature of the solar panel system. On balance, I find Mrs T'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 T 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 T went into the transaction. Either way, I think M's assurances were seriously misleading and false, undermining the purpose of the transaction from Mrs T'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 T 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 T 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.

The s.75 complaint

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 Ms B's s.75 complaint. Furthermore, this doesn't stop me from reaching a fair outcome in the circumstances.

Fair compensation

In all the circumstances I consider that the fair compensation should aim to remedy the unfairness of Mrs T 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 T a sum that corresponds to the outcome she could reasonably have expected as a result of M's assurances. That is, that Mrs T'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 T 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 T received by way of FIT payments as well as through energy savings. Mrs T 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. This is particularly important in this case as in February 2023, Mrs T told us that the solar panels stopped working a few years prior to that.

So, Creation will need to be mindful that there's a period of time when the panels may have not produced benefits. So, Creation will have to make assumptions about what benefits the system was likely to have made had it been working.

Mrs T told us that she settled the loan agreement on 14 March 2022.

So, to put things right Creation Consumer Finance Ltd must:

- Calculate the total repayments Mrs T made towards the loan up until she repaid it – A
- Use Mrs T's electricity bills, FIT statements and meter readings to work out the known and assumed benefits she received up until she repaid the loan – B
- Use B to recalculate what Mrs T 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
- Use her electricity bills, FIT statements and meter readings to work out the known and assumed benefits she received between the loan being paid off and the end of the original loan term – D
- Deduct D from the amount Mrs T paid off the loan – E
- Add 8% simple annual interest* to E from the date Mrs T 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 T C + F

I agree Creation's refusal to consider the claim under s140A has also caused Mrs T 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 T how much tax it's taken off. It should also give Mrs T 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."

I asked the parties to the complaint to let me have any further representations that they wished me to consider by 15 July 2024. Mrs T has accepted the provisional findings. At the time of writing, Creation has not acknowledged receiving the provisional decision, made any further submissions or asked for an extension to do so. I consider that both parties have had sufficient time to make a further submission had they wished to do so. So, I'm proceeding to my final 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.

Given that there's no new information for me to consider following my provisional decision, I have no reason to depart from those findings. And as I've already set out my full reasons for upholding Mrs T's complaint, I have nothing further to add.

Putting things right

I require Creation Consumer Finance Ltd to calculate and pay the fair compensation as detailed above.

My final decision

For the reasons set out, I'm upholding Mrs T's complaint about Creation Consumer Finance Ltd. 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 T to accept or reject my decision before 13 August 2024.

Douglas Sayers
Ombudsman