

The complaint

Mrs J has complained about Creation Consumer Finance Ltd ('Creation')'s 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 into account Section 140A ('s.140A') of the CCA.

What happened

In July 2013, Mrs J bought a solar panel system ('the system'), from a company I'll call "R", using a ten-year fixed sum loan from Creation.

In October 2022, Mrs J complained to Creation through a claims management company ("CMC"). She said that she was told by R that the reductions in energy bills and the funds generated through the feed in tariff ("FIT") would be sufficient to fund the cost of the credit agreement, therefore not placing her in a position where she would be financially worse off per month. However, that hasn't happened and as a result Mrs J has suffered a financial loss. The CMC also believed that what happened at the time of the sale created an unfair relationship between Mrs J and Creation.

Creation responded to the complaint in its final response, it said that Mrs J had made her complaint more than six years after the event complained of and more than three years after she knew or ought to have known there was a problem. So, her complaint was made too late.

Unhappy with Creation's response, Mrs J referred her complaint to our service. Creation then told us that as well as the reasons given in its final response, Mrs J's s.75 claim was made too late under the relevant legislation.

Our Investigator considered Mrs J's complaint. They ultimately thought that:

- Given the s.75 claim was likely to be time barred under the Limitation Act, 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 J and Creation.

Our Investigator recommended that Mrs J keep the system and Creation take into account what Mrs J had paid so far, along with the benefits she received, making sure the system was effectively self-funding.

Creation didn't respond. So, the case was progressed to the next stage of our process, an Ombudsman's decision. I issued a provisional decision explaining why I was planning to uphold the complaint.

Neither Mrs J nor her representative nor Creation responded by the deadline I gave. So, my final decision is in line with my provisional one.

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've decided to uphold this complaint.

My findings on jurisdiction

I'm satisfied I have jurisdiction to consider Mrs J'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. Creation is aware of our approach to complaints like this, which has been explained in more detail in a number of other provisional and final decisions, so I do not think it is necessary to set out that level of detail here.

The s.75 complaint

The event complained of here is Creation's alleged wrongful rejection of Mrs J's s.75 claim on 17 January 2022. This relates to a regulated activity under our compulsory jurisdiction. Mrs J brought her complaint about this to the ombudsman service on 8 February 2022. 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 J. And given the relationship was ongoing at the time it was referred to the ombudsman service, that particular complaint has been brought in time for the purposes of our jurisdiction.

My findings on the merits of the complaint

The unfair relationship under s.140A complaint

When considering whether representations and contractual promises by R 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 R 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 R for which Creation were responsible under s.56 when considering whether it is likely Creation had acted fairly and reasonably towards Mrs J.

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

Mrs J has said that she was told by R's representative that the reductions in energy bills and the funds generated through the FIT would be sufficient to fund the cost of the credit agreement, therefore not placing Mrs J in a position where they would be financially worse off per month.

Mrs J has said R knocked on her door to offer the system to her, and she had no prior interest in purchasing solar panels.

The only document provided to me from the time of sale is the credit agreement. This shows how much Mrs J agreed to pay for the system but understandably does not include any information about the benefits the system would provide. Mrs J has not retained any additional sales documents.

From the evidence available, it appears that Mrs J relied on what she was told about the benefits of the system. And her recollection is that she was told the system would pay for itself and leave her with extra money as profit.

Creation hasn't provided evidence to dispute what Mrs J's said happened. Yet with no prior interest Mrs J left the meeting having agreed to an interest-bearing loan, with a monthly repayment of around £118, payable for ten years. Given her lack of prior interest and the financial burden she took on I find Mrs J's account of what she was told by R is credible and persuasive. The loan is a costly long-term commitment, and she found the purchase appealing because of the assurances she says R gave her.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £1,417 per year. I have not seen anything to indicate Mrs J's system was not performing as expected, but she has told us her system has not produced this level of benefit. So, these statements were not true.

I think R's representative must reasonably have been aware that Mrs J'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 R's representative would have known that Mrs J's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to Mrs J.

Considering Mrs J's account about what she was told, the documentation available from the time of the sale, and that Creation hasn't disputed her recollection, I think it likely R gave Mrs J a false and misleading impression of the self-funding nature of the solar panel system.

I consider R's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Mrs J was expected to receive by agreeing to the installation of the system. I consider that R'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 J went into the transaction. Either way, I think R's assurances were seriously misleading and false, undermining the purpose of the transaction from Mrs J'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 R's negotiations with Mrs J 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 J and Creation was unfair.

Because of this shortfall between her costs and the actual benefits, each month Mrs J 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 not otherwise have taken out.

The s.75 complaint and other 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 Mrs J's s.75 complaint and other 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 Mrs J and Creation's relationship arising out of R's misleading and false assurances as to the self-funding nature of the solar panel system. Creation should repay Mrs J a sum that corresponds to the outcome she could reasonably have expected as a result of R's assurances. That is, that Mrs J's loan repayments should amount to no more than the financial benefits she received for the duration of the loan agreement.

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.

Therefore, to resolve the complaint, Creation should recalculate the agreement based on the known and assumed savings and income Mrs J received from the system over the ten-year term of the loan, so Mrs J pays no more than that. To do that, I think it's important to consider the benefit Mrs J received by way of FIT payments as well as through energy savings.

Mrs J will need to provide Creation with up-to-date details of her electricity generation meter reading and, where available, all relevant FIT statements and electricity bills. But Creation can use reasonable assumptions for periods where evidence of the actual benefits is not available.

Finally, I consider that Creation's failure to consider the fairness of its relationship with Mrs J when responding to her caused her some degree of trouble and upset. In recognition of this Creation should also pay Mrs J additional compensation as set out below.

My final decision

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

- Calculate the total payments (including any advance payment/deposit and admin fees) Mrs J has made towards the solar panel system up until the date of settlement – A

- Use Mrs J's meter readings and (where available) her bills and FIT statements, to work out the benefits she received up until the end of the original loan term* – B
- Calculate the difference between what Mrs J actually paid (A), and what she should have paid (B), applying 8% simple interest per year to any overpayment from the date of overpayment until the date of settlement of the complaint** – C
- Pay C to Mrs J
- Pay Mrs J £100 additional compensation

*Where Mrs J has not been able to provide all of her electricity bills and/or FIT benefits, Creation Consumer Finance Ltd should complete the calculation 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 the interest, it should tell Mrs J how much it's deducted. It should also give Mrs J 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 J to accept or reject my decision before 10 September 2024.

Phillip Lai-Fang
Ombudsman