DRN-4963001

The complaint and what happened

Mrs G 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 140A ('s.140A') of the CCA.

I've included relevant sections of my provisional decision from July 2024, which form part of this final decision. In my provisional decision I set out the reasons why I wasn't planning to uphold this complaint. In brief that was because I wasn't persuaded that Mrs G was induced into buying the solar panel system at the heart of this dispute by misrepresentations, so I didn't find the basis of an unfair relationship between her and Creation.

I asked both parties to let me have any more information they wanted me to consider. Neither has responded.

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.

Having done so, I find that this complaint is within my jurisdiction to consider, but that the merits of it should not be upheld. I will reiterate why, but first include here the relevant sections of my provisional decision:

> ***"What happened***
>
> *In September 2013, Mrs G bought a solar panel system ('the system') using a 10-year fixed sum loan from Creation. She bought it from a supplier I'll call "S". The total amount payable under the agreement was £9,307.68, and it was due to be paid back with 120 monthly repayments of £77.56.*
>
> *Mrs G complained to Creation, she said that she was told by a salesperson that the 'feed in tariff' ('FIT') payments and electricity savings she would make would cover the cost of the loan repayments, however that hasn't happened, and she's suffered a financial loss. She also believed that what happened at the time of the sale created an unfair relationship between herself and Creation.*
>
> *Creation responded to the complaint in its final response, it considered Mrs G had brought her claim more than six years after the cause of action occurred under the Limitation Act ('LA').*
>
> *Unhappy with Creation's response, Mrs G referred her complaint to our service.*
>
> *An adjudicator considered Mrs G's complaint, she ultimately 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 Mrs G and Creation.*

She recommended that Mrs G keep the system and Creation take into account what Mrs G had paid so far, along with the benefits she received, making sure the system was effectively self-funding. She also recommended an award of £100 distress and inconvenience as a result of the poor and protracted way in which Creation had dealt with this matter.

Mrs G accepted the adjudicator's view. Creation did not, highlighting again that the event complained of occurred in September 2013, and had therefore been brought too late for this service to consider it. Several months later it reiterated that objection, and went on to disagree with the adjudicator's findings around how things should be put right for Mrs G. So, the case was progressed to the next stage of our process, an Ombudsman's decision.

Since then, we asked Mrs G for some more information about the sale, which she has helpfully provided. Some of that evidence has led me to provisionally reach a different outcome to this case, which I will explain in detail.

What I've provisionally 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.

Having done so, I'm planning to find that this complaint is within my jurisdiction to consider, but that the merits of it should not be upheld.

My provisional findings on jurisdiction

The s.75 complaint

The event complained of here is Creation's alleged wrongful rejection of Mrs G's s.75 claim on 4 October 2021, this relates to a regulated activity under our compulsory jurisdiction. Mrs G brought her complaint about this to the ombudsman service on 20 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

I have also considered Creation's arguments in its response on our jurisdiction over the complaint about an unfair relationship under s.140A. I am satisfied this aspect of the complaint was brought in time so that the Financial Ombudsman has jurisdiction.

Mrs G is able to make a complaint about an unfair relationship between herself and Creation per s.140A. 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 her. 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.
S.140A doesn't impose a liability to pay a sum of money in the same way as s.75. Rather, it sets out the basis for treating relationships between creditors and debtors as unfair. Under s.140A 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 s.140A 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 s.140A 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 ongoing, 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 is responsibility to correct unfairness in the relationship.

In Mrs G's case the relationship was ongoing when she referred her complaint to the Financial Ombudsman. At the time, Creation was responsible for the matters which made its relationship with Mrs G 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 her complaint on the unfairness of the credit relationship between himself and Creation, Mrs G therefore complained about an event that was ongoing at the time she referred her complaint to the Financial Ombudsman.

Therefore, taking into account DISP 2.8.2R(2)(a), I am satisfied it has been brought in time. I am otherwise satisfied the complaint is within the ombudsman service's jurisdiction to consider and it's not necessary to consider whether Mrs G's complaint has been brought in time for the purposes of the alternative three-year rule under DISP 2.8.2R(2)(b).

Merits
The unfair relationship under s.140A complaint

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

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.

Given my above conclusions and bearing in mind the purpose of my decision is to provide a fair outcome quickly with minimal formality, and that I can consider the alleged misrepresentations under the unfair relationship complaint, I don't think I need to provide a detailed analysis of Mrs F's s.75 complaint. Furthermore, this doesn't stop me from reaching a fair outcome in the circumstances.

What happened?

Mrs G has said that she was told by S'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 on her electricity charges. Mrs G says that she was "cold called" on the telephone by S.

I've looked at the documents provided by Mrs G to see if there was anything contained within them that made it clear that the solar panel system wouldn't be self-funding.

I have a copy of the loan agreement, which shows that both the total amount payable, and the monthly cost of the loan were clear to Mrs G. However, there is no mention on the agreement of the potential benefits of the panels.

But Mrs G has provided a document entitled "Performance Expectations Based Upon the 2009 Government Sap Calculations". It was clearly completed by S and given to her, as she still has it in her possession. It sets out the size of the system being installed along with some expectations about what she would be paid for effectively selling electricity back to the grid, and also how much she would likely save on her own electricity costs. It concludes by saying that Mrs G should expect a "total first year payback" of £448.91.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £931 per year. Whilst I accept her genuinely held recollections about what was said to her at the time by S, I also think that the "Performance Expectations Based Upon the 2009 Government Sap Calculations" ought to have, as a minimum, led her to question what she was being told about the system paying for itself.

In saying that, I've thought carefully about the documentation in the round, based on what I've seen. I think that the document in question is brief, clear, and so I think it would have been straight-forward enough for her to have seen the system wouldn't be self-funding, based on the evidence she had a the time which she's supplied as part of her claim and complaint."

Bearing in mind that neither party has responded to my provisional decision, I have no basis on which to change the findings therein. Namely that I'm not persuaded there's sufficient evidence Mrs G was misled the system would be self-funding, and that is what induced her to enter into the contract in question. And so it follows that I don't have the grounds to say that Creation's decision to decline the claim was unfair, and therefore do not uphold this complaint.

My final decision

For the reasons I've explained, I don't uphold this complaint and Creation does not need to do anything.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs G to accept or reject my decision before 11 September 2024.

Siobhan McBride
Ombudsman