DRN-4996505

Financial Ombudsman Service

The complaint

Mrs S has complained about the way Creation Consumer Finance Ltd ("Creation") responded to claims she'd made in relation to misrepresentation, breach of contract, and an alleged unfair relationship taking into account section 140A ("s140A") of the Consumer Credit Act 1974 (the "CCA").

Mrs S has been represented in bringing her complaint but, to keep things simple, I'll refer to Mrs S throughout.

What happened

In January 2014 Mrs S entered into a fixed sum loan agreement with Creation to pay for a £11,485 solar panel system ("the system") from a supplier I'll call "M". The total amount payable under the agreement was £18,025.20 and it was due to be paid back with 120 monthly repayments of £150.21. There was a £135 arrangement fee and an interest charge of £6,405.20.

I understand the loan was settled in March 2019.

In October 2021 Mrs S sent a letter of claim to Creation explaining she thought the system was mis-sold.

Creation responded in its final response letter in November 2021 to say it was dismissing the complaint without consideration because it had been brought out of time.

Unhappy with Creation's response, Mrs S decided to refer her complaint to the Financial Ombudsman in February 2022. She gave some more details of her complaint. She said M said she'd receive a financial incentive through taking out the system. She said M told her the system would pay for itself whereas it hasn't, and she's lost out financially. Mrs S said the system was misrepresented and believed the statements and several other actions at the time of the sale created an unfair relationship between herself and Creation.

One of our investigators looked into the complaint and thought M had likely told Mrs S the system would be self-funding. She didn't think the system was self-funding over the course of the loan term, and so she thought M had misrepresented it. She thought a court would likely find the relationship between Mrs S and Creation was unfair and that she'd suffered a loss through entering into the agreement. She thought Creation should recalculate the loan based on known and assumed savings and income over the course of the loan so that she pays no more than that, and she keeps the system. She also thought Creation should pay £100 for not looking into the s.140A claim.

Mrs S agreed, but Creation didn't. In summary, Creation said:

- 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 Financial Ombudsman.
- Mrs S's allegations of an unfair relationship don't relate to any events post-dating the sale of the system in around January 2014.

- 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.
- Mrs S had not brought a complaint about Creation's handing of her section 75 ("s.75") claim and it did not issue a final response letter in relation to one.
- The investigator conflates the jurisdiction rules on the Financial Ombudsman's time limits for bringing complaints under DISP 2.8.2R(2)(a) and DISP 2.8.2R(1). It considers the 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 the approach to redress should be in accordance with the Court decision in Hodgson v Creation Consumer Finance Limited [2021] EWHC 2167 (Comm) ("Hodgson*").*

I issued a provisional decision setting out why I thought the complaint was within our jurisdiction. Neither party disagreed with what I said, so I'm not going to set it out again. With regards to the merits of the complaint, in my provisional decision I said:

Merits

<u>The unfair relationship under s.140A complaint</u>

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 was responsible under s.56 when considering whether it is likely Creation had acted fairly and reasonably towards Mrs S.

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.

<u>What happened?</u>

Mrs S says she was verbally misled that the system would effectively pay for itself. I've taken account of what Mrs S says she was told, and I've reviewed the documentation that I've been supplied.

The fixed sum loan agreement, signed on 15 January 2014, sets out the amount being borrowed; the interest charged; the total amount payable; the term; and the contractual monthly loan repayments. I think this was set out clearly enough for Mrs S to be able to understand what was required to be repaid towards the agreement. But it doesn't set out any details of the benefits she'd likely receive from having the system installed.

I've not seen any other documents from around the time Mrs S signed the fixed sum loan agreement that demonstrate the estimated benefits she'd likely receive. However, I've been supplied a satisfaction note signed on 30 January 2014, which was around the time of the installation. This sets out:

Expected generation tariff income	*£534.76*
Expected export tariff income	*£83.27*
Savings from electricity used	*£287.12*
Estimated first year annual savings	*£905.15*

Our investigator contacted Mrs S to ask about the document and to find out a bit more about why she thought the system would be self-funding. Mrs S said M told her the system would provide enough income to pay for the loan and give her a benefit over the cost of it. She said M told her this would happen once the panels had 'bedded in' after around a year.

Mrs S said the loan cost her around £1,800 a year and M told her this would be covered by the system, and she'd receive a benefit on top. She said having reviewed the payments she'd received from her electricity provider for a couple of years she received around £1,600 but that this didn't even cover the £900 benefit M said she'd receive.

Mrs S didn't sign the satisfaction note until around the time of the installation. I've not seen Mrs S was given enough information around the time of signing the fixed sum loan agreement to have been able to realise the system wouldn't be self-funding. She's given an explanation for why she may have expected the system to take a while to bed in. And she's also explained she thought the £900 benefit would be in addition to the savings she'd be making. She's also explained that around the time of the installation she had young children, but she was sold the benefits of the system which is why she proceeded with the purchase. On balance, I think her explanation is plausible.

I'm also conscious that M's website from 2014 included information about the benefits of a solar panel system. It said solar panels would bring down the cost of supplying electricity and that it would bring long-term financial benefits earning the customer money for years to come. It said solar panels would generate tax-free income and a return of investment of up to 15% for 20 years. I think it follows that if the website emphasises the benefits of a solar panel system and the return on the investment, it's likely this would have been a central part of M's conversation when selling the product.

Creation hasn't provided evidence to dispute what Mrs S said happened. Yet with no prior interest Mrs S left the meeting having agreed to an interest-bearing loan, with a monthly repayment of £150.21, payable for 10 years. Given her lack of prior interest and the financial burden she took on I find Mrs S's account of what she was told by M, credible and persuasive. The loan is a costly long-term commitment, and I can't see why she would have seen this purchase appealing had she not been given the reassurances she's said she received from M.

For the solar panels to be self-funding, they'd need to produce a combined savings of around £1,800 per year. I've not seen anything to suggest she's achieved anywhere near this benefit. I therefore find the statements that were likely made as to the self-funding nature of the system weren't true.
I think M's representative must reasonably have been aware that Mrs S's system would not have produced benefits at the level required to be self-funding. While there are elements of the calculations that had to be estimated, the amount of sunlight as an example, I think M's representative would have known that Mrs S's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to her.

Considering Mrs S's account about what she was told; the website; the documentation; and that Creation hasn't disputed what's been said, I think it likely M gave Mrs S a false and misleading impression of the self-funding nature of the system. Given her lack of prior interest and the financial burden she took on I find Mrs S's account of what she was told by M credible and persuasive. The loan is a costly long-term commitment, and I can't see why she would have seen this purchase appealing had M not given the reassurances she said she received.

I consider M's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Mrs S 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 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 S went into the transaction. Either way, I think M's assurances were seriously misleading and false, undermining the purpose of the transaction from Mrs S's point of view.

<u>Would the court be likely to make a finding of unfairness under s.140A</u>

Where Creation is to be treated as responsible for M's negotiations with Mrs S 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 S 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.

<u>The s.75 complaint and additional s.140A complaint points</u>

Given my findings above I'm not proposing to provide a detailed analysis of Mrs S's s.75 complaint and also her other s.140A complaint points.

This doesn't stop me from reaching a fair outcome in the circumstances, and I'm mindful the purpose of my decision is to provide a fair outcome quickly with minimal formality.

<u>Fair compensation</u>

In all the circumstances I consider that fair compensation should aim to remedy the unfairness of Mrs S and Creation's relationship arising out of M's misleading and false assurances as to the self-funding nature of the solar panel system. Creation should repay Mrs S a sum that corresponds to the outcome she could reasonably have expected as a result of M's assurances. That is, that Mrs S's loan repayments should amount to no more than the financial benefits she received for the term of the loan agreement.

Creation told us that it considers our approach to redress should be in accordance with the court's decision in Hodgson.

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 Mrs S's expectation of what she would receive. I consider Mrs S has lost out, and has suffered unfairness in her relationship with

Creation, to the extent that her loan repayments to Creation exceed the benefits from the solar panels. On that basis, I believe my determination results in fair compensation for Mrs S.

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 S 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 S received by way of FIT payments as well as through energy savings. Mrs S will need to supply up to date details, where available, of all FIT benefits received, electricity bills and current meter readings to Creation.

I also find Creation's refusal to consider the s.140A claim has also caused Mrs S some further inconvenience. And I think the £100 compensation recommended by our investigator is broadly a fair way to recognise that.

Mrs S agreed with the provisional decision, but I can't see we received a response from Creation.

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.

Seeing as though I can't see we've received anything materially new to consider, I see no reason to depart from the conclusions I reached in my provisional decision.

My final decision

For the reasons I have explained my final decision is that I uphold Mrs S's complaint and direct Creation Consumer Finance Ltd to:

- Calculate the total payments (the monthly and settlement payment) Mrs S has made towards the solar panel system – A
- Use Mrs S's bills and FIT statements to work out the benefits she received from the start date of the loan, up until the end of the term* – B
- Use B to recalculate what Mrs S should have paid each month towards the loan over that period and calculate the difference, between what she actually paid (A), and what she should have paid, applying 8% simple annual interest to any overpayment from the date of payment until the date of settlement** – C
- Reimburse C to Mrs S
- Pay Mrs S £100 compensation

*Where Mrs S has not been able to provide all the details of her meter readings, electricity bills and/or FIT benefits, I am satisfied she has provided sufficient information in order for Creation to complete the calculation I have directed it to follow in the circumstances using known and reasonably assumed benefits.

**If Creation considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mrs S how much it's taken off. It should also give Mrs S 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 S to accept or reject my decision before 30 September 2024.

Simon Wingfield
Ombudsman