DRN-5047235

The complaint

Mr H 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").

What happened

On 21 August 2014, Mr H signed a loan agreement for a fixed sum loan agreement with Creation to pay for a £10,599 solar panel system from a supplier I'll call "Z". The loan amount was for £10,599 and the total amount payable under the agreement was £16,651.20 and it was due to be paid back with 120 monthly repayments of £138.76.

Creation told us that they received Mr H's letter of complaint on 18 January 2021. In the complaint Mr H explained that he considered he had a valid claim due to misrepresentation and breach of contract by Z. Mr H said he'd been 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. But the income and savings have not been sufficient to cover the cost of the borrowing.

On the basis of the above Mr H said he had a like claim against Creation for breach of contract and misrepresentation under s75. To resolve the claim and complaint, Mr H requested that Creation should make a payment to settle the matter.

Creation told us that they received Mr H's letter of complaint on 18 January 2021. As Mr H had not heard from Creation he brought his complaint to this service on 3 June 2021. Creation provided a final response letter to the complaint on 5 November 2021. Creation rejected Mr H's complaint on the basis it was made out of time based on their understanding of the FCA's DISP rules. Creation did not comment on the s75 claim so far as it concerned a breach of contract or the aspect of the complaint about Section 140A (s140A) of the CCA in its final response.

As Mr H remained unhappy with Creation after their final response, he asked us to review the complaint.

On 16 February 2023, one of our investigators looked into things and thought Z had likely told Mr H the system would be self-funding and that the documentation didn't clearly set out it wasn't. They didn't think the system was self-funding over the course of the loan term, and so they thought Z had misrepresented it. They thought a court would likely find the relationship between Mr H and Creation was unfair and that he'd suffered a loss through entering into the agreement. They thought Creation should recalculate the loan based on known and assumed savings and income over the course of the loan so that Mr H pays no more than that, and he keeps the system. They also recommended £100 compensation for the impact of Creation not investigating the s.140A claim.

As we have not received a response to that assessment from Creation, the case was passed forward for the next stage in our process, an Ombudsman's decision.

I issued my first provisional decision in respect of this complaint on 11 September 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 Mr H's complaint. I set out an extract below:

"I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Jurisdiction to look at the s.75 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 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the "RAO"). In undertaking that activity, the creditor must honour liabilities to the debtor. So, if a debtor advances a valid s.75 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.

On other cases, Creation argues that the event complained of when the matter is brought to our service occurred as and when the supplier caused the alleged s.75 liability to arise in the first place. I disagree: the lender's s.75 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 that claim is presented by the borrower to the lender must the lender do anything about it, which 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 s.75 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 H's claim into a letter that treated Mr H as having brought a complaint which he was entitled to refer to our service. So, its refusal to accept and pay the s.75 claim was inferred from a final response letter of 5 November 2021, in which it told Mr H he could refer his complaint to our service within 6 months.

In those circumstances, because Creation's letter dated 5 November 2021 rejected Mr H's claim under s.75 by saying the complaint had been made too late, (a claim which Mr H 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 H to refer that complaint to our service if he was dissatisfied with the outcome. Creation could have separated those stages, waited for Mr H to complain that the s.75 claim had not been accepted and honoured, and only then issued its final response letter. Instead, it followed the same practice that many other lenders adopt by allowing Mr H to refer the matter directly to the ombudsman service, by way of treating it as a complaint.

Creation has argued in other cases that if a consumer didn't complain to it about the manner in which it dealt with his s.75 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 s.75 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 H's complaint were whether it was fair and reasonable for Creation to reject Mr H's s.75 claim, as they remain to this day.

Creation also refers to DISP 2.8.1R(1) which broadly 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 H a final response letter on 5 November 2021. And in this case, I note that after the complaint was referred by Mr H to the ombudsman service on 3 June 2021, we wrote to Creation providing details of the complaint as submitted to the ombudsman service including details of Mr H's complaint about the s.75 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, it provided information concerning its position on the complaint. It was apparent from this correspondence that, in relation to s.75, Mr H'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 s.75, 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 s.75 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).

Creation also argued on other cases that the complaint was out of our jurisdiction taking into account the Limitation Act 1980 ("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 H's complaint about its rejection of the s.75 claim.

Jurisdiction to look at the complaint about an unfair relationship under s.140A

I have also considered Creation's arguments on other cases about 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.

Mr H is able to make a complaint about an unfair relationship between himself 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 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.

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 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 is responsibility to correct unfairness in the relationship.

In Mr H's case the relationship was ongoing when he referred his complaint to the Financial Ombudsman. At the time, Creation was responsible for the matters which made its relationship with Mr H 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 H therefore complained about an event that was ongoing at the time he referred his 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 Mr H's complaint has been brought in time for the purposes of the alternative three-year rule under DISP 2.8.2R(2)(b).

Merits

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

When considering whether representations and contractual promises by Z 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 Z 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 Z for which Creation was responsible under s.56 when considering whether it is likely Creation had acted fairly and reasonably towards Mr H.

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?

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

The fixed sum loan agreement 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 Mr H to be able to understand what was required to be repaid towards the agreement.

But the loan agreement contains no mention of the income or savings that may be generated. So, there was no way for Mr H to compare his total costs against the financial benefits he was allegedly being promised from that document. Given the contract doesn't contain information about the benefits, Mr H would have looked to Z's representative to help him understand how much the panels would cost, what they would bring in and how much he would benefit from the system in order for him to make a decision.

When thinking about the above I'm mindful of the actions taken by the Renewable Energy Consumer Code ('RECC') against Z. 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 Z 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.

I note that the report of the meeting says,

"In relation to the loan agreements, and the costs being covered by the Feed-in Tariff, the Member's actions amounted to an acceptance that consumers may have been misled, and therefore the Panel finds the facts proved."

So, this seems to support what Mr H 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 Mr H 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 Mr H's complaint around the time that he was sold his system.

And in this case, I've noted a document from the time of sale, a benefits calculation statement and accompanying notes signed by the 'energy adviser'. These accompanying notes say:

'1st Utility will pay you a minimum of £173.91. £141.57 will be taken out to cover the cost of the panels leaving you with £32.94. During this time you will benefit from free

electricity throughout the day. After 5-6 years your panels will be paid and you will benefits from a tax free income of £173.91 for 20 years and free electricity for life.'

This documentary evidence supports Mr H's testimony and I'm persuaded that he entered into the finance agreement on the basis that the solar panel benefits would more than cover the cost of the monthly finance repayment. And that the panels would be self-funding within the lifetime of the loan.

Mr H said he had some interest in green energy in general before Z contacted him. But he said he was motivated to go ahead with the solar panels because Z told him the system would pay for itself. I'm mindful that it would be difficult to understand why, in this particular case, Mr H would have agreed to pay for the system if his monthly outgoings would increase significantly.

On balance I find Mr H's account to be plausible and convincing.

For the solar panels to be self-funding, they'd need to produce a combined savings of around £1,665.12 per year. I've not seen anything to suggest he'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 Z's representative must reasonably have been aware that Mr H'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 Z's representative would have known that Mr H's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to him.

Considering Mr H's account about what he was told; the documentation; and that Creation hasn't disputed what's been said, I think it likely Z gave Mr H a false and misleading impression of the self-funding nature of the system. Given his lack of meaningful prior interest and the financial burden he took on, and considering the estimated performance notes and the RECC findings against Z, I find Mr H's account of what he was told by Z credible and persuasive. The loan is a costly long-term commitment, and I can't see why he would have seen this purchase appealing had Z not given the reassurances he said he received.

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

Because of this shortfall between his costs and the actual benefits, each month he has had to pay more than he expected to cover the difference between his solar benefits and the cost of the loan. So, clearly Creation has benefitted from the interest paid on a loan he would otherwise have not taken out.

Fair compensation

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

Creation told us in other cases that it considers our approach to redress should be in accordance with the Court's decision in Hodgson. I have considered this 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 H's expectation of what he would receive. I consider Mr H has lost out, and has suffered unfairness in his relationship with Creation, to the extent that his loan repayments to it exceed the benefits from the solar panels. On that basis, I believe my determination results in fair compensation for Mr H.

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 Mr H received from the 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 H received by way of FIT payments as well as through energy savings. Mr H will need to supply up to date details of all FIT benefits received, electricity bills and current meter readings to Creation.

Mr H told us that the loan was expected to be repaid on 1 September 2024 – it had run to term.

For the reasons I have explained I'm intending to uphold Mr H's complaint and direct Creation Consumer Finance Ltd to:

- *Calculate the total repayments Mr H made towards the loan up until the date of settlement – A*
- *Use Mr H's electricity bills, FIT statements and meter readings to work out the known and assumed benefits he received and he would have received over the 10 year loan period – B**
- *Use B to recalculate what Mr H should have repaid each month towards the loan and apply 8% simple interest to any overpayment from the date of his payment until the date of settlement – C***
- *Reimburse C to Mr H.*

**Where Mr H has not been able to provide all the details of his meter readings, electricity bills and/or FIT benefits, I am satisfied he has provided sufficient information in order for Creation to complete the calculation I have directed it follow in the circumstances 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 that interest, it should tell Mr H how much it's taken off. It should also give Mr H a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.*

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

Finally, I note Mr H also mentioned claiming damages through s.75. 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 Mr H's s.75 complaint. Furthermore, this doesn't stop me from reaching a fair outcome in the circumstances."

I asked the parties to the complaint to let me have any further representations that they wished me to consider by 25 September 2024. Neither party has acknowledged the provisional decision, made a further submission or asked for an extension to do so.

I think that both parties have had time sufficient to have made a further submission had they wished to do so. So, I am 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.

So, as neither party has provided any new information or argument 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 (above) for upholding Mr H's complaint, I have nothing further to add.

So, having looked again at all the submissions made in this complaint, I am upholding Mr H's complaint and require Creation to calculate and pay the fair compensation detailed above.

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 Mr H'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 Mr H to accept or reject my decision before 25 October 2024.

Douglas Sayers
Ombudsman