DRN-5154259

The complaint

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

Mr G has been represented in bringing his complaint but, to keep things simple, I'll refer to Mr G throughout.

What happened

In February 2014 Mr G entered into a fixed sum loan agreement with Creation to pay for a £5,995 solar panel system ("the system") from a supplier I'll call "S". The total amount payable under the agreement was £9,299.92 and it was due to be paid back with 120 monthly repayments of £77.49. There was interest of £3,304.92.

In July 2021 Mr G sent a letter of claim to Creation explaining he thought the system was mis-sold. He said S told him he'd effectively be paid for the electricity the system generated through the government's Feed in Tariff (FIT) payments and that he'd have reduced energy bills. He said S told him the panels were maintenance free with a 40-year life expectancy. He said S sold the system as though it would pay for itself. He said the system was misrepresented and believed the statements and several other actions at the time of the sale created an unfair relationship between himself and Creation.

Creation sent a final response letter in October 2021 to say it was dismissing the complaint without consideration because it had been brought out of time.

Unhappy with Creation's response, Mr G decided to refer his complaint to the Financial Ombudsman in November 2021. He highlighted S told him the system would be self-funding within the loan term, which he said was false.

One of our investigators looked into things and thought S had likely told Mr G the system would be self-funding and that the documentation didn't clearly set out it wasn't. She didn't think the system was self-funding over the course of the loan term, and so she thought S had misrepresented it. She thought a court would likely find the relationship between Mr G and Creation was unfair and that he'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 Mr G pays no more than that, and he keeps the system. She also recommended £200 compensation for the impact of Creation not investigating the s.140A claim.

Creation didn't agree. In summary it 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.
- Mr G's allegations of an unfair relationship don't relate to any events post-dating the sale of the system in February 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.
- Mr G had not brought a complaint about Creation's handing of his section 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.
- There's no evidence the representations set out in the letter of claim were misrepresentations.
- The loan documentation and sales documentation were clear on the cost and benefit of the system.
- Mr G made his complaint seven years after installation.
- 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. I can't see we've received any submissions from the parties for why that's not right, so I'm not going to set it out again. For the merits of the complaint, my provisional decision said:

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

What happened?

Mr G says he was verbally misled that the system would effectively pay for itself. So I've taken account of what Mr G says he was told. I've also 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 G to be able to understand what was required to be repaid towards the agreement.

Mr G has supplied documentation he was given at the point of sale. He's sent a certification of roof structure and stability; a quote; an installation pack; an order form; a commissioning confirmation; MCS certificate; an EPC; a welcome pack; and a form with the estimated benefits of the system. I've looked closely at the documents that I think might've helped Mr G compare the costs and benefits of the system.

On the one hand, I can see Mr G signed a satisfaction note. Although I note this was signed after he'd signed the fixed sum loan agreement. It looks like it was signed around the time the system was installed. The form sets out the system was predicted to perform at around 2,500kWh annually. It said:

Expected generation tariff	*£386.02*
Expected export tariff	*£59.74*
Combined total income	*£445.75*
Savings from electricity used	*£234.34*
Estimated 1st year savings	*£680.11*

On the other hand, Mr G has also supplied a copy of a form setting out the estimated benefits. This form sets out:

Summary of 1st year figures	*£680*
Lifetime electricity bills savings	*£11,166*
Total tariff rate income	*£14,084*

This form sets out the payback time was 8 years, which is supported by a graph. And the lifetime benefit was £25,249.56.

Neither of the forms set out details of the interest Mr G was required to pay under the fixed sum loan agreement. I'm conscious the estimated benefits form says it was an 8-year payback time – although as I've said, the form didn't have the interest included. But even with interest being applied and Mr G being asked to pay back around £9,300 in total, given the estimated lifetime benefit was over £25,000, I can understand why he felt the system would be self-funding within the loan term. And even though the first-year annual saving estimate of around £680 wouldn't have covered the annual loan repayment of around £900, I'm mindful the estimated savings would have been expected to grow year on year, in line with the information on the graph. I think it should have been made much clearer the payback time was not applicable if the system was paid for using a finance agreement. The figures matched what was set out on the satisfaction note document, so I don't think this would have necessarily alerted Mr G to there being an issue. I think it should have been made clearer to Mr G that the system wouldn't have been self-funding within the loan term, with the interest that was applied.

I've also looked at S's website from around the time Mr G bought the system. I can see it sets out details about solar panels that pay for themselves and gives details of the type of investment solar panels offer. There's also a section on solar finance that sets out plans were offered where the FIT and bill savings can contribute to the monthly instalments.

I think it follows that if the website from around the time emphasises the benefits of a solar panel system and how they can contribute to repaying finance agreements this was likely a central part of the conversation between S and Mr G. I think this also supports Mr G's testimony that if he bought the system with finance it would pay for itself.

For the solar panels to be self-funding, they'd need to produce a combined savings and FIT income of around £900 per year. But I've not seen anything to suggest Mr G achieved the benefits required to make the system self-funding within the term of the agreement, even though it seems as though the system is performing slightly higher than was estimated. I therefore find the representations that were likely made weren't true. I think the salesperson ought to have known this and made it clear the system wouldn't have produced enough benefits to cover the overall cost of the fixed sum loan agreement.

Considering Mr G's account about what he was told, the documentation; and the information on S's website, I think it likely S gave Mr G a false and misleading impression of the self-funding nature of the system.

I consider S's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Mr G was expected to receive by agreeing to the installation of the system. I consider that S'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 G went into the transaction. Either way, I think S's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr G'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 S's negotiations with Mr G 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 G 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 G and Creation's relationship arising out of S's misleading and false assurances as to the self-funding nature of the solar panel system. Creation should repay Mr G a sum that corresponds to the outcome he could reasonably have expected as a result of S's assurances. That is, that Mr G's loan repayments should amount to no more than the financial benefits he received 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 Mr G 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 G received by way of FIT payments as well as through energy savings. Mr G will need to supply up to date details of all FIT benefits received, electricity bills and current meter readings to Creation.

Creation has highlighted 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 Mr G's expectation of what he would receive. I consider Mr G has lost out, and has suffered unfairness in his relationship with Creation, to the extent that his loan repayments to Creation exceed the benefits from the solar panels. On that basis, I believe my determination results in fair compensation for Mr G.

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.

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 any of the other claims raised by Mr G. Furthermore, this doesn't stop me from reaching a fair outcome in the circumstances.

Finally, I consider that Creation's failure to fully deal with Mr G's s.140A claim or complaint caused Mr G some degree of trouble and upset. In recognition of this, and in addition to what I have already set out above, Creation should also pay Mr G £100.

Mr G accepted the decision. 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 I've been provided anything 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 Mr G's complaint and direct Creation Consumer Finance Ltd to:

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

*Where Mr G is unable 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 G how much it's taken off. It should also give Mr G a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 17 December 2024.

Simon Wingfield
Ombudsman