

The complaint

Mr K has complained about Creation Consumer Finance Ltd's ('Creation') response to a claim he 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.

What happened

In August 2013, Mr K bought a solar panel system ('the system') from a company I'll call "M" using a 10-year fixed sum loan from Creation.

Mr K complained to Creation, he said that he was told by M that the 'feed in tariff' ('FIT') payments would cover the cost of the loan repayments, however that hasn't happened, and he's suffered a financial loss. He also believed that what happened at the time of the sale created an unfair relationship between himself and Creation.

Creation responded to the complaint in its final response, it considered Mr K had brought his claim more than six years after the cause of action occurred under the Limitation Act ('LA').

Unhappy with Creation's response, Mr K referred his complaint to our service.

An investigator considered Mr K's complaint, she ultimately thought that –

- Given the s.75 claim was more likely to be time barred under the LA, 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 Mr K and Creation.

She recommended that Mr K keep the system and Creation take into account what Mr K had paid so far, along with the benefits he received, making sure the system was effectively self-funding.

Mr K accepted the investigator's view. Creation said it was seeking external legal counsel and asked for an extension, however we did not hear from it. So, the case was progressed to the next stage of our process, an Ombudsman's 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.

My findings on jurisdiction

I'm satisfied I have jurisdiction to consider Mr K's complaint, both in respect of the refusal by Creation to accept and pay his s.75 claim and the allegations of an unfair relationship under s.140A.

The s.75 complaint

The event complained of here is Creation's alleged wrongful rejection of Mr K's s.75 claim on 29 April 2020, this relates to a regulated activity under our compulsory jurisdiction. Mr K brought his complaint about this to the ombudsman service on 28 May 2020. So, his 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 Mr K. Here the relationship was ongoing at the time it was referred to the ombudsman service on 28 May 2020, so the complaint has been brought in time for the purposes of our jurisdiction.

Merits

The s.75 complaint

The law imposes a six-year limitation period on claims for misrepresentation and breach of contract, after which they become time barred.

In this case the alleged misrepresentation and alleged breach cause of action arose when an agreement was entered into on 26 August 2013. Mr K brought his s.75 claim to Creation on 18 November 2019 that is more than six years after he entered into an agreement with it. Given this I think it was fair and reasonable for Creation to have not accepted the s.75 claim. So, I do not uphold this aspect of the complaint.

The unfair relationship under s.140A complaint

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

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 K has said that he was told by M's representative that the cost of the system would be fully paid for by the FIT payments he would receive. Mr K said he was reassured by M's representative that this was a government backed scheme to ensure carbon targets were reached. That a government subsidy would be paid in addition to meet any shortfalls against the loan cost.

Mr K has said he was cold called by M about the system, and I haven't seen any evidence he had any prior interest in purchasing solar panels.

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

I don't have a copy of the loan agreement, we've asked Creation to provide this multiple times however it's not done so. Mr K has provided a loan statement and a Creation welcome letter, looking at these documents I'm satisfied the loan was taken in Mr K's name to solely purchase the system sold by M. Given I don't have a copy of the agreement I'm not able to say with certainty if the total amount payable, and the monthly cost of the loan were clear to Mr K.

I've considered the contract signed by Mr K and M. The likely financial benefits of the system aren't included on this document, so in any case there was no way for Mr K to compare his total costs against the financial benefits he was allegedly being promised.

Mr K has said the financial benefits were discussed; despite the paperwork I've seen not including information about them. I've looked at a copy of M's website from September 2013, on the Solar PV page, under financial predictions it states –

11. Financial predictions.

The financial predictions we create use a bespoke system design for your property to predict how much electricity you will generate .

Using this figure alongside the Feed-in Tariff payment we can estimate your first year earnings. By estimating how much electricity you will use on site we can also predict how much you will save once we know how much you pay for a unit of electricity.

For a 20 year forecast we take into account the degression of the panels (as they do reduce in efficiency over time), the expected inflation rate (RPI- retail price index) and also the rate we expect electricity prices to increase by. This detailed analysis can tell us what return on investment you should be able to expect, and also the total amount of profit the system could earn you.

Along with the above, potential benefits of a solar panel system purchased from M are mentioned several times on the website. I think it follows that if the website heavily emphasises the benefits of a solar panel system and the profit and return on the investment (as mentioned above), it's likely this would have been a central part of M's conversation when selling the product.

So, I find what Mr K's said believable, I think M's website supports his testimony that the potential benefits were discussed. I'm of the opinion that they would be a key reason to purchase the system and his savings on his electrical bills and income from the FIT scheme would have been a central part of the conversation.

Given the contract doesn't contain information about the benefits, Mr K would have looked to M'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.

When thinking about the above I'm mindful of the actions taken by the Renewable Energy Consumer Code ('RECC') against M. My understanding is that the RECC administers the renewable energy consumer Code and ensures that its members comply with the Code.

The RECC investigated M's conduct. In September 2014, and later in November 2015, it determined that M was in breach of a number of sections of the code including, but not limited to, sections 5.2 and 5.4. These two sections relate to requiring members not to provide false or misleading information to consumers and providing clear and accurate information about the cost and benefits of the product sold.

I'm also aware that Citizens Advice Bureau ('CAB') carried out analysis on 292 cases where consumers had contacted it for advice about M. It then provided a statement to RECC about M in September 2015. This statement raised a number of issues with M's conduct, including but not limited to, misleading marketing claims where consumers were told that the solar panels were 'free' and that the FIT payments 'would comfortably cover the loan repayments on their finance deals'.

Whilst I accept that the above is findings on different cases the RECC and CAB were looking at, the findings do suggest that there were conduct concerns in the areas that relate to Mr K's complaint around the time that he was sold his system.

Creation hasn't provided evidence to dispute what Mr K's said happened. Yet with no prior interest Mr K left the meeting having agreed to an interest-bearing loan, with a monthly repayment of around £137, payable for 10 years. Given his lack of prior interest and the financial burden he took on I find Mr K's account of what he was told by M, 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 he not been given the reassurances he's said he received from M.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £1,644 per year. I have not seen anything to indicate Mr K's system was not performing as expected, but his system has not produced this. So, these statements were not true. I think M's representative must reasonably have been aware that Mr K'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 M's representative would have known that Mr K's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to Mr K.

Considering Mr K's account about what he was told, the documentation he was shown at the time of the sale, and the fact Creation hasn't disputed these facts, I think it likely M gave Mr K a false and misleading impression of the self-funding nature of the solar panel system.

I consider M's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Mr K was 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 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 Mr K went into the transaction. Either way, I think M's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr K'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 M's negotiations with Mr K 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 K 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 K 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 Mr K a sum that corresponds to the outcome he could reasonably have expected as a result of M's assurances. That is, that Mr K'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 K 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 K received by way of FIT payments as well as through energy savings. Mr K will need to supply up to date details, where available, of all FIT benefits received, electricity bills and current meter readings to Creation.

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.

Finally, I consider that Creation's failure to deal with Mr K's complaint in a reasonable timeframe, with minimal communication, caused Mr K 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 K £200.

My final decision

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

- Calculate the total payments (the deposit and monthly repayments) Mr K has made towards the solar panel system up until the date of settlement – A
- Use Mr K's bills and FIT statements, to work out the benefits he received up until the loan term* – B
- Use B to recalculate what Mr K 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 interest to any overpayment from the date of payment until the date of settlement** – C
- Reimburse C to Mr K

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

I also think the way Creation handled Mr K's complaint has caused him trouble and upset, and an award of £200 is appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 5 June 2024.

Helen Boulton-Agg
Ombudsman