DRN-4158520

The complaint

Mr E has complained about Creation Consumer Finance Ltd ("Creation")'s 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 into account Section 140A ('s.140A') of the CCA.

What happened

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

Mr E made a claim to Creation on 14 September 2021. He said that he was told by M that he would never be out of pocket because the system would pay for itself through savings on his electricity bills and income from the Feed-In Tariff ("FIT"). 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 rejected the claim saying that Mr E 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 E made a complaint about this and referred it to our service.

An investigator considered Mr E's complaint. The investigator thought that:

- Given the s.75 claim was likely to be time barred under the LA, Creation's answer seemed fair in respect of that.
- The s.140A complaint was one we could look at under our rules and that it had been referred in time since the credit agreement was ongoing at the time Mr E contacted Creation.
- Misrepresentations could be considered under s.140A.
- A court would likely find an unfair relationship had been created between Mr E and Creation.

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

Mr E accepted the investigator's view. Creation did not respond. 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.

I've decided to uphold this complaint.

My findings on jurisdiction

I'm satisfied I have jurisdiction to consider Mr E'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 E's s.75 claim on 9 November 2021. This relates to a regulated activity under our compulsory jurisdiction. Mr E brought his complaint about this to the ombudsman service on 24 November 2021. So, his complaint in relation to the s.75 claim was brought in time for the purposes of our jurisdiction.

The complaint about an unfair relationship under s.140A

The event complained of here is Creation's participation, for so long as the credit relationship continued, in an alleged unfair relationship with Mr E. Here the relationship was ongoing at the time it was referred to the ombudsman service on 24 November 2021, so the complaint has been brought in time for the purposes of our jurisdiction.

My findings on the merits of the complaint

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 breach of contract cause of action arose when an agreement was entered into on 29 November 2013. Mr E brought his s.75 claim to Creation on 14 September 2021. That is more than six years after he entered into the agreement with Creation. Given this, I think it was fair and reasonable for Creation to have rejected the s.75 claim. So, I do not uphold this part of the complaint.

The complaint about an unfair relationship under s.140A

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 E. 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 s140A.

What happened?

Mr E has said that he was told by M's representative that he would never be out of pocket because the system would pay for itself through savings on his electricity bills and income from selling the electricity generated. Mr E said the sale came about following a door-to-door salesperson knocking on his door. And that prior to this he had no interest in getting solar panels.

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

The credit agreement was signed on 29 November 2013. This included the following information:

- Cash price of the system £5,750.00
- Amount of credit £5,750.00
- Interest charge £3,169.86
- Total amount payable £8,919.86
- 120 monthly repayments of £74.33 per month (this is £891.96 per year)

I've considered the order form signed by Mr E and M. This is undated but M says it would've been signed at the same meeting as the credit agreement, on 29 November 2013. The likely financial benefits of the system aren't included on this document. Mr E provided the above documents to us so I can be sure that he was given a copy of this after he signed it.

However, M has provided a copy of an additional document, which Mr E did not have, showing a personalised estimate of the benefits of the system over:

- One year £542
- The system's lifetime £26,955.82

It also showed a payback time of 9 years – suggesting that the system would pay for itself within the 10-year term of the loan. This was alongside a graph which shows the overall balance is negative in the first 8 years, suggesting the repayments would exceed the benefits in that time. However, because this document is undated and unsigned and Mr E did not have a copy of it in his records, I cannot be sure if or when Mr E was given or shown it.

Overall, I do not think there is sufficient evidence that Mr E was provided this estimated benefits document, or that it reflects what he was told at the time. So, I don't think that Mr E had clear enough information to compare the costs and benefits or to be able to realise that he would be out of pocket – contrary to what he remembers being told.

I am also concerned that the estimated payback time of 9 years does not appear to be very realistic. I don't know what assumptions were used (as these are not shown on the document) but, making what I consider reasonable assumptions at the time of sale, I have calculated that a more likely payback time would be around 15 years. This is significantly longer than shown on the document and means that Mr E is likely to be out of pocket for a significant period of time.

Mr E has explained that he had no interest in solar panels prior to M contacting him, and he wouldn't have purchased the system if he'd been aware that he would be out of pocket for any period. While Mr E has received FIT payments he has not noticed any significant savings on his electricity bills.

Overall, considering all the evidence, I find what Mr E's said to be sufficiently plausible and persuasive. It is not clear that Mr E was shown the estimated benefits document, and in any case I have concerns about whether the assumptions used in those estimates were reasonable. In my opinion the benefits of the system were never likely to cover the cost of the loan on a monthly basis or within the loan term. Yet Mr E was left with the impression that he would at no point be out of pocket.

Creation hasn't provided a response to our investigator's assessment, so I don't know its reasons for disputing the outcome that was reached.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £891.96 per year. Mr E's system was performing as expected in terms of electricity generation and he was receiving FIT payments, but he has not seen the expected level of electricity savings – and thus has not received the promised financial benefits. I've also found that he was unlikely to receive the level of benefit that he was told he would. So, I'm satisfied that what he was told verbally was not true.

I think that M's salesperson must reasonably have been aware that Mr E's system would not have produced benefits at this level, given the estimated benefit document produced at that time showed Mr E would be out of pocket. Whilst there are elements of the calculations that had to be estimated, I think the assumptions used were unreasonable and made the benefits appear much higher than was realistically possible. And, even using those unreasonably generous estimates, the salesman would have known that Mr E's system would not produce enough benefits so that Mr E would not be out of pocket at any point.

Considering all of this, I think it likely that M gave Mr E a false and misleading impression of the self-funding nature of the solar panel system.

I think M's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Mr E was expected to receive by agreeing to purchase the system. I think 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 such that Mr E would not be out of pocket. But, even if they did not have that effect, they nonetheless represented the basis upon which Mr E went into the transaction. Either way, I think M's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr E'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 M's negotiations with Mr E 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 E 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 Mr E would otherwise not have taken out.

Fair compensation

In all the circumstances, I consider that fair compensation should aim to remedy the unfairness of Mr E 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 E a sum that corresponds to the outcome he could reasonably have expected as a result of M's assurances. That is, that Mr E'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 E 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 E received by way of FIT payments as well as through energy savings. If Creation requires, if possible, Mr E 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.

Putting things right

To put things right Creation Consumer Finance Ltd must:

- Calculate the total payments (the deposit and monthly repayments) Mr E has made towards the solar panel system up until the date of settlement – A
- Use Mr E's bills and FIT statements, to work out the benefits she received up until the date of settlement* – B
- Use B to recalculate what Mr E 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 E
- Use Mr E's bills and FIT statements, to work out the benefits he will receive for the period between the settlement of her complaint and the end of the original loan term* – D
- Rework the loan so that the remaining balance is D and recalculate the remaining monthly payments equally over the remaining term of the loan.
- Pay Mr E an additional £100 in recognition of the distress and inconvenience cause by Creation rejecting Mr E's entire claim as having been made too late when it ought to have been evident to Creation that part of it was not.

*Where Mr E is not able to provide all the details of his meter readings, electricity bills and/or FIT benefits, Creation should use 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 E how much it's taken off. It should also give Mr E a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

My final decision

For the reasons I have explained, I uphold Mr E's complaint. Creation Consumer Finance Limited should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr E to accept or reject my decision before 12 June 2024.

Phillip Lai-Fang
Ombudsman