DRN-3996317

The complaint

Mrs P has complained about Mitsubishi HC Capital UK Plc trading as Hitachi Capital Consumer Finance's ('Mitsubishi') response to a claim she 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 July 2013, Mrs P bought a solar panel system ('the system'), from a company I'll call "A", using an eight-year fixed sum loan from Mitsubishi.

In January 2021, Mrs P complained to Mitsubishi via the Financial Ombudsman Service. She said that she was told by A that the benefits of the system would cover the costs of the loan by about halfway through the loan term. However, that hasn't happened. If Mrs P had understood the actual benefits she'd receive were much less than this, she wouldn't have agreed to the purchase, nor would she have taken out the loan. She felt what had happened was unfair. She tried to raise this with A after about three years but didn't get anywhere – and didn't realise until recently that she may be able to complain to Mitsubishi instead.

Mitsubishi responded to the complaint in its final response. It said that Mrs P had brought her claim more than six years after the cause of action occurred under the Limitation Act ('LA'). So, the claim was out of time and Mitsubishi had no liability.

Mrs P was unhappy with this, so our investigator looked into what had happened. Our Investigator thought that:

- Given the s.75 claim was more likely to be time barred under the LA, Mitsubishi's answer seemed fair.
- The s.140A complaint was one we could look at under our rules and 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 Mrs P and Mitsubishi.

Our Investigator recommended that Mrs P keep the system and Mitsubishi ensure she paid no more for it than the benefits she'd received within the original loan term.

Mrs P accepted the investigator's view.

Mitsubishi said that the complaint was outside of our jurisdiction because it was referred to us too late, but that if we disagreed and the complaint was upheld, the redress should follow the approach of the Courts in a certain case, known as "Hodgson". So, the complaint 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 Mrs P's complaint, both in respect of the refusal by Mitsubishi to accept and pay her s.75 claim and the allegations of an unfair relationship under s.140A.

The s.75 complaint

The event complained of here is Mitsubishi's alleged wrongful rejection of Mrs P's s.75 claim on 17 September 2021, this relates to a regulated activity under our compulsory jurisdiction. Mrs P told the ombudsman service she was unhappy with this response on 29 September 2021. So, her 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

It seems to me that Mrs P's complaint is, at its heart, about the unfairness of her relationship with Mitsubishi, which was entered in to as a result of alleged misleading representations and contractual promises made by A. So, I'm satisfied her concerns include a complaint about Mitsubishi's participation and perpetuation of an unfair relationship.

The event complained of here is Mitsubishi's participation, for so long as the credit relationship continues, in an alleged unfair relationship with Mrs P. Here the relationship ended around August 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 cause of action arose when an agreement was entered into on 12 July 2013. Mrs P brought her s.75 claim to Mitsubishi via the Financial Ombudsman Service in 2021. This is more than six years after she entered into the credit agreement with Mitsubishi. Given this, I think it was fair and reasonable for Mitsubishi to have not accepted the s.75 claim. So, I do not uphold this part of the complaint.

The unfair relationship under s.140A complaint

When considering whether representations and contractual promises by A 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 A to be the agent of Mitsubishi 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 A for which Mitsubishi were responsible under s.56 when considering whether it is likely Mitsubishi had acted fairly and reasonably towards Mrs P.

But in doing so, I should take into account all the circumstances and consider whether a Court would likely find the relationship with Mitsubishi was unfair under s.140A.

What happened

Mrs P has said that she was told by A's representative that the benefits of the system would cover the costs of the loan by about halfway through the loan term. That hasn't happened. And if Mrs P had realised it wouldn't, then she wouldn't have agreed to the purchase nor entered into the credit agreement with Mitsubishi.

I've looked at the documents provided by Mrs P from the time of sale, to see if there was anything contained within them that made it clear that the solar panel system wouldn't be self-funding. The sales documents show the purchase price of the system. And the credit agreement makes clear exactly what Mrs P had agreed to pay, including loan interest. But there is nothing in the documents that shows the estimated benefits of the system. So, it appears Mrs P had to rely on what A told her verbally.

I'm mindful that A was found to be in breach of the Renewal Energy Consumer Code ("RECC") in May 2013, including in relation to failing to provide accurate performance information and predictions and sufficient pre-contractual information. This followed mystery shopping exercises and an audit of A's records. RECC's non-compliance panel concluded that A had shown a persistent pattern of non-compliance with the code. While this does not mean that A did things wrong in every sale, it indicates that the sort of issues that Mrs P says happened during her purchase were happening around that time with other customers of A.

Mitsubishi hasn't provided evidence to dispute what Mrs P has said happened. Yet with no prior interest Mrs P left the meeting having agreed to an interest-bearing loan, with a monthly repayment of around £199, payable for eight years. Given the financial burden she took on I think Mrs P's account of what she was told by A is plausible and persuasive.

The loan is a costly long-term commitment. For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £2,394 per year. From the evidence available, the benefits Mrs P received from the system were much less than this throughout the loan term. So, A's statements were not true. I think A's representative must reasonably have been aware that Mrs P's system would not have produced benefits at this level. Using reasonable assumptions at the time, the system could've been expected to generate income and savings of less than £8,000 during the loan term.

Considering Mrs P's account about what she was told, the documentation she was shown at the time of the sale, and the fact Mitsubishi hasn't disputed her recollection of events, I think it likely that A gave Mrs P a false and misleading impression of the benefits of the solar panel system.

I consider A's misleading presentation went to an important aspect of the transaction for the system, namely the income and savings which Mrs P was expected to receive by agreeing to the installation of the system. I consider that A'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 within the loan term. But, even if they did not have that effect, they nonetheless represented the basis upon which Mrs P went into the transaction. Either way, I think A's assurances were seriously misleading and false, undermining the purpose of the transaction from Mrs P's point of view.

Would a court be likely to make a finding of unfairness under s.140A?

Where Mitsubishi is to be treated as responsible for A's negotiations with Mrs P 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 P and Mitsubishi 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 Mitsubishi has benefitted from the interest paid on a loan she would not otherwise have taken out.

Fair compensation

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

Mitsubishi told us that it considers our approach to redress should be in accordance with the Court's decision in *Hodgson v Mitsubishi Consumer Finance Limited [2021] EWHC 2167 (Comm)* ('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 P's expectation of what she would receive. I consider Mrs P has lost out and has suffered unfairness in her relationship with Mitsubishi, to the extent that her loan repayments to Mitsubishi exceed the benefits from the solar panels. On that basis, I believe my determination results in fair compensation for Mrs P.

Mitsubishi 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, Mitsubishi should recalculate the agreement based on the known and assumed savings and income Mrs P received from the system over the original term of the loan, so Mrs P pays no more than that. To do that, I think it's important to consider the benefit Mrs P received by way of FIT payments as well as through energy savings. Mrs P will need to supply up to date details, where available, of all FIT benefits received, electricity bills and current meter readings to Mitsubishi. But Mitsubishi can use reasonable assumptions for periods where evidence of the actual benefits is not available.

Finally, I consider that Mitsubishi's failure to consider the fairness of its relationship with Mrs P when responding to her caused Mrs P some degree of trouble and upset. In recognition of this, Mitsubishi should also pay Mrs P additional compensation as set out below.

My final decision

For the reasons I have explained I uphold Mrs P's complaint.

To put things right, Mitsubishi HC Capital UK Plc trading as Hitachi Capital Consumer Finance must:

- Calculate the total payments (the deposit and monthly repayments) Mrs P has made towards the solar panel system up until the date of settlement – A
- Use Mrs P's bills and FIT statements, to work out the benefits she received up until the end of the original loan term* – B
- Use B to recalculate what Mrs P 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 interest to any overpayment from the date of overpayment until the date of settlement** – C
- Reimburse C to Mrs P
- Pay Mrs P £100 additional compensation

*Where Mrs P has not been able to provide all the details of her meter readings, electricity bills and/or FIT benefits, Mitsubishi HC Capital UK Plc trading as Hitachi Capital Consumer Finance should complete the calculation using known and reasonably assumed benefits.

** If Mitsubishi HC Capital UK Plc trading as Hitachi Capital Consumer Finance considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mrs P how much it's taken off. It should also give Mrs P 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 P to accept or reject my decision before 22 July 2024.

Phillip Lai-Fang
Ombudsman