DRN-4835550

The complaint

Mr B and Miss B have complained about Mitsubishi HC Capital UK Plc's ('Mitsubishi') response to a claim they 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 August 2013, Mr B bought a solar panel system ('the system'), from a company I'll call "M", using a seven-and-a-half-year fixed sum loan from Mitsubishi. Miss B was present during the sale but was not a signatory on the contract or credit agreement. So, I will just refer to Mr B – since only he has the right to make a claim under s.75 and only he had a relationship with Mitsubishi that would fall under the provisions of s.140A.

In November 2020, Mr B made a claim to Mitsubishi. He said that the system had been misrepresented to him, that M had breached the contract, that the loan was unaffordable, and that his relationship with Mitsubishi was unfair on him because of this.

Mr B says he was told by M that the financial benefits of the system would cover the cost of the loan repayments within three to five years, and certainly within the loan term. However, he says that hasn't happened, and that he's suffered a financial loss as a result. He also said that Mitsubishi didn't carry out a proper affordability assessment, and did not tell him about the commission it paid to M.

Mitsubishi responded to the claim to say that Mr B had brought his s.75 claim more than six years after the cause of action occurred under the Limitation Act ('LA'). So, this part of the claim (about misrepresentation and breach of contract) was made too late, and it had no liability. It went on to provide some information about the affordability assessment that it carried out, and that it paid a commission of £189.85 to M. It rejected the allegation that the system had been sold as self-funding in the way that Mr B alleged. In short, Mitsubishi rejected all parts of Mr B's claim.

Unhappy with Mitsubishi's response, Mr B asked the financial ombudsman service to look into what had happened. In essence expressing his dissatisfaction with Mitsubishi's response to his claim.

After this, Mitsubishi offered £300 compensation to Mr B, as it felt that its response may have caused some confusion and inconvenience – because it appeared to say the claim was made out of time but nevertheless went on to deal with some aspects of it anyway. This offer did not resolve the complaint.

Our Investigator considered Mr B's complaint and ultimately concluded that:

- The complaint was within our jurisdiction when looking at the time limits we must apply (the complaint being about the rejection of the s.75 claim and Mr B's allegedly unfair relationship with Mitsubishi, which ended less than six years prior to the complaint being referred to us).
- The s.75 claim appeared to have been made too late under the LA, so Mitsubishi's answer in that respect seemed fair.
- There was evidence that Mr B was told about the estimated financial benefits of the system, and that it was clear these would not cover the loan repayments.
- Mitsubishi had carried out proportionate checks to determine that Mr B could afford the lending and that its decision to lend was not unreasonable.
- The commission paid to M was not significant relative to the amount payable under the loan agreement and is unlikely to have caused Mr B's relationship with Mitsubishi to be unfair on him.

Mr B did not accept this, so I was asked to make a decision. I issued a provisional decision explaining that I was not planning to uphold the complaint. This gave Mitsubishi and Mr B an opportunity to respond before I finalised my decision. Mitsubishi did not respond by the deadline. Mr B's representative asked for some more time to get Mr B's comments, but despite being given more time has not provided anything more for me to consider. As such this final decision is in line with my provisional one.

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 not to uphold this complaint.

My findings on jurisdiction

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

<u>The s.75 complaint</u>

The event complained of here is Mitsubishi's alleged wrongful rejection of Mr B's s.75 claim on 18 February 2021. This relates to a regulated activity under our compulsory jurisdiction. Mr B brought his complaint about this to the ombudsman service on 9 March 2021. 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 Mitsubishi's participation, for so long as the credit relationship continues, in an allegedly unfair relationship with Mr B. Here the complaint was referred to the Financial Ombudsman Service within six years of the relationship ending (the loan being paid off). So, the complaint has been brought in time for the purposes of our jurisdiction.

My findings on the merits of Mr B's complaints

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 11 March 2014. Mr B brought his s.75 claim to Mitsubishi on 30 November 2020. That is more than six years after Mr B entered into the agreement with Mitsubishi. This is outside of the time limit mentioned in the LA. 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 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 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 M for which Mitsubishi were responsible under s.56 when considering whether it is likely Mitsubishi had acted fairly and reasonably towards Mr B.

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 and the reasons for my decision

Mr B has said that he was told by M's representative that the financial benefits of the solar panels would cover the cost of the loan repayments within three to five years, and certainly within the loan term.

Alongside Mr B's recollections about what happened, I've looked at the documents provided by Mr B, including when they were signed, in order to reach a view on what Mr B is likely to have been told and when. I have found that the following documents contained information about the benefits of the system:

1. Initial order form/contract (signed on 6 March 2014)
    a. Estimated electricity generation 3,376 kWh per year
    b. Estimated financial benefit in year one
        i. Generation tariff (14.9p per kWh) £503.02
        ii. Export tariff (4.64p per kWh) £78.32
        iii. Electricity savings (14.9p per kWh) £362.62
        iv. Total combined benefits £832.85

2. Loan agreement (signed on 11 March 2014)
    a. Cash price £8,594.00
    b. Deposit £1,000.00
    c. Credit £7,594.00
    d. Total charge for credit (interest) £1,871.12
    e. Total amount payable £10,465.12
        i. 84 monthly repayments of
        ii. £112.68 per month
        iii. First payment 6 September 2014

3. Final order form/contract (following full survey, signed on 16 March 2014)
    a. Estimated output 2,831 kWh per year
    b. Estimated financial benefit in year one
        i. Generation tariff (14.9p per kWh) £421.82
        ii. Export tariff (4.64p per kWh) £65.65
        iii. Electricity savings (14.9p per kWh) £210.83
        iv. Total combined benefits £698.30

The initial order form/contract clearly shows the total benefit in year one was expected to be £832.85. This is considerably less than the loan repayments Mr B agreed to pay five days later. So, on signing the loan agreement, Mr B had sufficient information to be aware that the benefits would not cover the loan repayments in the first year. In light of this it seems unlikely that M would've described the benefits as covering the loan repayments from the start.

However, Mr B says he was told the system would take 12-18 months before it was generating at full capacity. His allegation is that the system would pay for itself within 3-5 years, and certainly within the loan term. Given there is no written estimated benefits beyond the first year, it is likely that Mr B would've relied on what he was told.

But Mr B's recollection of what he was told is undermined by other aspects of what he has said. He recalls being told that the FIT generation rate would be around 17p per kWh, and after installation he signed a separate document where the FIT generation rate dropped to around 14p per kWh, with the annual benefit falling to £698.30. As you can see above, the FIT generation rate did not drop. Rather the estimated output of the system was lower following a full survey – reflecting what could actually be installed rather than what was assumed during the initial discussion.

In addition, this was not after the system was installed, which is what Mr B remembers. It was on 16 March 2014. According to the MCS certificate the system was commissioned (the installation completed) on 25 March 2014. So, when he signed the final order form/contract with the lower estimated benefits, Mr B was still in a position where he could've cancelled the purchase and the loan agreement (having a 14-day cooling off period in which to do so).

At that time, he had the loan agreement and the final estimated benefits available which he could compare. And this showed the benefits of the system to be much lower than the loan repayments.

So, neither of the documents show any estimated benefits that would lead to the benefits exceeding the loan repayments.

In order to get a picture of how M might have promoted solar panels, I've looked at M's archived website, the link to which I shared in my provisional decision.

This does not mention solar panel systems being fully self-funding within any loan term. It has some examples of finance options including longer-term loans of 5, 10 or 15 years, which it describes as being partially self-funding. All the examples shown use assumptions including a 5% annual increase in electricity prices and annual RPI inflation at 3.6%. I think these are reasonable assumptions and are likely to indicate the sort of assumptions M would've used when selling the system to Mr B and calculating any ongoing benefits he would receive.

Using those assumptions, I've calculated that it would take around 13 years for the financial benefits to exceed the total of £10,465.12 which was payable under the loan agreement. Again, I think this undermines the allegation that M would've said the system would've paid for itself within three to five years or within the seven-year loan term.

Overall, in light of the available evidence, I am not persuaded that M described the system to Mr B as paying for itself within three to five years, or within the loan term.

Affordability assessment

Mitsubishi has provided information about the affordability assessment that it carried out. I'm satisfied that the checks it made were proportionate and that its lending decision was not unreasonable – in that it appeared that Mr B could sustainably afford the loan repayments.

While there has been a suggestion the loan was not affordable, no evidence of this has been provided, and I am not aware that Mr B missed any loan repayments. So, it does not appear to me that Mitsubishi did anything wrong in this respect.

Undisclosed commission

Relative to the amount Mr B agreed to pay under the loan agreement, which was £10,465.12, the commission paid of £189.85 represented 1.8% of his total repayments. Even if Mitsubishi ought to have done more to make Mr B aware of the commission (and I make no finding on this), I do not think this would have changed Mr B's decision to take out the loan. I think he would still have proceeded.

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

I have found that it is unlikely that M, acting as Mitsubishi's agent, made misleading statements about the financial benefits of the system. That the affordability assessment Mitsubishi carried out and its decision to lend were not unreasonable. And that if Mr B had been aware of the commission payable to M he would still have agreed to take out the loan.

In summary, I have found no compelling reason to conclude that a court would find the relationship between Mitsubishi and Mr B was unfair on him.

My final decision

For the reasons I've explained, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss B and Mr B to accept or reject my decision before 3 July 2024.

Phillip Lai-Fang
Ombudsman