DRN-4948875

The complaint

Mrs M has complained about Hitachi Capital (UK) Plc, now trading as Mitsubishi HC Capital UK Plc'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 140.A ('s.140A') of the CCA.

Mrs M has been represented in bringing her complaint but, to keep things simple, I'll refer to Mrs M throughout.

What happened

Mitsubishi told us that, on 19 February 2014, Mrs M bought a solar panel system ('the system') from a company I'll call "Z" using a fixed sum loan from Mitsubishi. I can't see we know the date the agreement was signed by Mrs M; however, I can see the loan agreement was signed by Mitsubishi on 3 March 2014 and the purchase order from Z was dated 6 March 2014. So, it is not clear when Mrs M agreed to fund the purchase with credit.

However, the loan agreement sets out the amount of credit is £9,500, the total charge for the credit is £2,224.28 and the total amount payable is £11,724.28. The loan agreement shows the duration of the agreement is 90 months, which includes a deferral period of up to six months followed by 84 monthly payments of £133.92. Mitsubishi told us that the deferral period ended on 19 August 2014 which was also the date of the first monthly repayment. Mrs M's loan ran to term and the last monthly payment was made on 19 July 2021.

Mrs M complained to Mitsubishi in an email dated 20 February 2020. That email was acknowledged by Mitsubishi on the same day. on 25 February 2020, Mrs M thought the system was mis-sold, in summary Mrs M said that Z:

- Told her that the system would pay for itself within the term of the loan, and cost her nothing
- Told her that the Feed in Tariff ('FIT') payments and savings she would receive would cover her monthly finance payments
- Conducted a high-pressure sale
- Failed to provide Mrs M with information about a cooling off period
- Did not tell Mrs M that the system's performance would degrade over time.

Mrs M said she had a like claim against Mitsubishi for misrepresentation and breach of contract under s.75. She said that the misrepresentations made by Z were on behalf of Mitsubishi under section 56 ("s.56") of the CCA. And that because of the misrepresentations, the breach of contract and matters that amounted to unfair trading practices the relationship between Mitsubishi and herself was unfair under s.140A.

When she had not had a final response about her complaint, Mrs M referred her complaint to our service on 24 March 2021.

On 31 March 2021, given more than 8 weeks had passed since Mrs M had raised her complaint with Mitsubishi, we wrote to it to say our service would be looking at the complaint.

Mitsubishi responded to the complaint on 28 April 2021 in its final response. It considered Mrs M's complaint was time barred under the Limitation Act ('LA'). However, for the sake of completeness Mitsubishi provided a full response to the complaint, in summary it said:

- The documentation provided didn't show that the system had been misrepresented
- It lent to Mrs M responsibly
- It was unable to respond to other complaint points as Mrs M had not provided them with copies of important documentation from the time of the sale.

On 22 October 2021, Mitsubishi let this service know that whilst it maintained Mrs M's complaint was time barred under the LA, it may have caused some confusion and inconvenience responding to the complaint points, so had arranged for £300 to be issued to Mrs M by cheque as a gesture of goodwill.

Mrs M's complaint was considered by an Investigator, in summary he 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 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 Mrs M and Mitsubishi.

He recommended that Mrs M keep the system and Mitsubishi take into account what she had paid so far, along with the benefits she received, making sure the system was effectively self-funding over the original loan term.

I can't see we received a response from Mrs M or Mitsubishi, in the timescales the investigator gave so, the case was progressed to the next stage of our process on 3 February 2023, an Ombudsman's decision.

Mitsubishi responded on 15 February 2023, in summary it said:

- Our service didn't have jurisdiction to look at the s.75 or s.140A complaint because, in regard to both, the event being complained of was more than 6 years ago.
- Mrs M hadn't complained about the handling of her s.75 claim, however even if she had and Mitsubishi issued a response, the Financial Ombudsman Service wouldn't have jurisdiction under DISP 2.8.1R(1) to consider it.
- Events can give rise to an unfair relationship, but an unfair relationship is not an event in itself – the end of the relationship may be the starting point for limitation purposes in civil litigation but is not the starting point for the Ombudsman's jurisdiction under DISP 2.8.2R. The event being considered should be the event that gave rise to the unfair relationship.
- Our service should be adopting the High Court's approach in Hodgson v Mitsubishi Consumer Finance Limited [2021] EWHC 2167 (Comm) ('Hodgson') as an appropriate mechanism for calculating redress

I issued my provisional decision on 19 July 2024, a section of which is included below, and forms part of, this decision. In my provisional decision, I set out the reasons why it was my intention to uphold Mrs M's complaint. I set out an extract below:

"I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

My provisional findings

Jurisdiction

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

The s.75 complaint

The ombudsman service's jurisdiction over complaints that a business is liable under s.75 is based upon the lender's failure to honour its liability when the borrower makes a valid claim under that section.

When a borrower under a regulated credit agreement seeks payment from the lender of the damages, he or she has suffered under a connected transaction because of something done or said by the supplier, the lender may or may not have a liability to the borrower under s.75.

But if the borrower's claim is valid, the lender should honour its liability – and its failure to do so is a matter to which the Financial Ombudsman's jurisdiction extends. That is because it is part of the lender's regulated activities to exercise its duties under a regulated credit agreement – and a complaint about a firm's acts or omissions in carrying on a regulated activity (or any ancillary activity carried on by the firm in connection with a regulated activity) come with our jurisdiction under DISP 2.3.1R.

Mitsubishi argues that the event complained of when the matter is brought to our service occurred as and when the supplier caused the alleged s.75 liability to arise in the first place. I disagree: the lender's s.75 liability in damages doesn't arise as a result of any act or omission of the lender in performing a regulated activity – it is simply a claim given by statute to the borrower against the lender. And it arises from the acts or omissions of a third party, the supplier. Only when and if that claim is presented by the borrower to the lender must the lender do anything about it, which is to honour its statutory liability by paying the claim if it is a valid one. Until then, the lender's acts and omissions are simply to have lent money to the borrower at the borrower's request, and that is not the matter complained about.

So, when a borrower brings a complaint to our service alleging that they were due money under s.75 which the lender has refused to pay, the "event complained of" in such circumstances isn't the supplier's conduct; it is the lender's refusal or failure to honour its alleged statutory liability when the borrower made the claim.

Mitsubishi did not accept the s.75 claim in its letter on 28 April 2021, this constituted the "event complained of". Furthermore, in its letter it treated Mrs M as having brought a complaint which she was entitled to refer to our service.

Here Mrs M brought her complaint to the ombudsman service before the above letter was issued, however since Mitsubishi issued its final response on 28 April 2021, Mrs M has remained unhappy. Given this I'm satisfied 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

I am also satisfied the complaint about an unfair relationship under s.140A was brought in time so that the ombudsman service had jurisdiction. Section 140A doesn't impose a liability to pay a sum of money in the same way as s.75. Rather, it sets out the basis for treating relationships between creditors and debtors as unfair. Under s.140A a court can find a debtor-creditor relationship is unfair because of the terms of the credit agreement and any related agreement, how the creditor exercised or enforced their rights under these agreements, and anything done or not done by the creditor or the supplier on the creditor's behalf before or after the making of the credit agreement or any related agreement. A Court must make its determination under s.140A with regard to all matters it thinks relevant, including matters relating to the creditor and matters relating to the debtor.

The Courts have established that determining whether the relationship complained of was unfair has to be made having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination. The time for making determination in the case of an existing relationship is the date of trial, if the credit relationship is still alive at trial, or otherwise the date when the credit relationship ended.

The Courts have also determined that throughout the period of the credit agreement, a creditor should conduct its relationship with the borrower fairly, including by taking corrective measures. In particular, the creditor should take the steps which would be reasonable to expect it to take in the interest of fairness to reverse the consequences of unfairness, so that the relationship can no longer be regarded as unfair. Whether that has, or has not, been done by the creditor is a consideration in whether such an unfair relationship was in existence for the purposes of s.140A when the relationship ended. In other words, determining whether there is or was an unfair credit relationship isn't just a question of deciding whether a credit relationship was unfair when it started. The question is whether it was still unfair when it ended; or, if the relationship is still on foot, whether it is still unfair at the time of considering its fairness. That requires paying regard to the whole relationship and matters relevant to it right up to that point, including the extent to which the creditor has fulfilled is responsibility to correct unfairness in the relationship.

In this case Mitsubishi has said Mrs M's relationship ended with it on 19 July 2021, so Mitsubishi is responsible for the matters which made its relationship with Mrs M unfair and for taking steps to retrospectively remove the source of that unfairness so that the relationship is no longer unfair. By relying in her complaint on the unfairness of the credit relationship between herself and Mitsubishi, Mrs M is therefore complaining about an event which ended on 19 July 2021, namely that Mitsubishi participated in and perpetuated an unfair credit relationship with her. Mrs M referred her complaint to the ombudsman service on 24 March 2021, so, taking into account DISP 2.8.2R(2)(a), I am satisfied that she is not prevented from bringing her complaint to the ombudsman service by the 'six-year' rule. I am otherwise satisfied the complaint is within the ombudsman service's jurisdiction to consider. In these circumstances, I don't consider it necessary to make findings about whether Mrs M's complaint has been brought in time for the purposes of the alternative three-year rule under DISP 2.8.2R(2)(b).

Merits

The unfair relationship under s.140A complaint

When considering whether representations and contractual promises by Z 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.

S.56 of the CCA has the effect of deeming Z 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 Z for which Mitsubishi were responsible under s.56 when considering whether it is likely Mitsubishi had acted fairly and reasonably towards Mrs M.

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.

<u>What happened?</u>

Mrs M has said that she was cold called by Z and told she could have solar panels at no cost to her. When visited by a representative of Z, Mrs M said that she was told that the cost of the system would be fully paid for by the FIT payments and electricity savings she would receive. I haven't seen any evidence Mrs M had prior interest in purchasing Solar Panels.

I've considered Mrs M's loan agreement I'm satisfied it clearly sets out, amongst other things, the amount being borrowed, the interest to be charged, total amount payable, the term of the loan and the contractual monthly loan repayments.

Mrs M has also provided a copy of a document titled 'Variables'. The document is undated but seems to have been provided at the time of the sale. I say that because it uses assumptions of what the solar panels could provide Mrs M and what that might mean in terms of the income they could provide her. But by 7 March 2014 Mrs M had the MCS certificate which undermines the figures in the Variables document.

The Variables document sets out some potential savings based on an estimation that Mrs M's panels will produce 4,800 kwh. Given the MCS certificate lists the estimated annual generation as 2,815 kwh, the figure used for the estimate seems quite high. And this also suggests that it predates the MCS certificate of 7 March 2014. So, whilst this Variables document isn't dated, I'm satisfied it was filled out at the time of sale and relied upon by Mrs M when deciding to purchase the system.

I can see that the FIT income and export listed are based on the FIT tariffs applicable at that time and appear to have been calculated using the high 4,800 kwh generation.

The document then goes on to calculate that Mrs M's total savings were likely to be in the region of £1,670.40. The annual cost of the loan Mrs M took out to pay for the panels would cost £1,607.04 (£133.92 x 12). So, it seems most likely that the Variables document

was produced by Z to show Mrs M that the savings she would receive from the system would cover her loan repayments.

As I've stated It's not clear on what basis all these figures were calculated, however I think it can be argued that some were overinflated. In any regard having considered Mrs M's account about what happened when she spoke to Z, specifically that the cost of the system would be fully paid for by the FIT payments and electricity savings she would receive, I find this evidence credible and persuasive and supported by the above document.

Mitsubishi hasn't provided evidence to dispute what Mrs M said happened. Yet with no prior interest, Mrs M left the meeting having agreed to an interest-bearing loan, with a monthly repayment of £133.92, repayable over 84 months. Given her lack of prior interest and the financial burden she took on, I find Mrs M's account of what she was told by Z, credible and persuasive. The loan is a costly long-term commitment, and I can't see why she would have seen this purchase as appealing had she not been given the reassurances she's said she received from Z.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £1,607.04 per year. I have not seen anything to indicate Mrs M's system was not performing as expected but Mrs M's system has not produced this as the system has not made enough per year to fully cover this within the term of the loan.

So, these statements were not true. I think Z's representative must reasonably have been aware that Mrs M'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 Z's representative would have known that Mrs M's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to Mrs M.

Considering Mrs M's account about what she was told, and the documentation she was shown at the time of the sale, and in the absence of any other evidence from Mitsubishi to the contrary, I think it likely Z gave Mrs M a false and misleading impression of the self-funding nature of the solar panel system.

I consider Z's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Mrs M was expected to receive by agreeing to the installation of the system. I consider that Z'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 Mrs M went into the transaction. Either way, I think Z's assurances were seriously misleading and false, undermining the purpose of the transaction from Mrs M's point of view

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

Where Mitsubishi is to be treated as responsible for Z's negotiations with Mrs M 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 M 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 otherwise have not taken out.

The s.75 complaint and additional s.140A complaint points

It's clear from the evidence provided that Mitsubishi received Mrs M's s.75 complaint on 20 February 2020. What is not clear is when the loan agreement was signed by Mrs M. But given my findings above, I'm not proposing to provide a detailed analysis of her s.75 complaint and also her other s.140A complaint points.

This doesn't stop me from reaching a fair outcome in the circumstances, and I'm mindful the purpose of my decision is to provide a fair outcome quickly with minimal formality.

Fair compensation

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

Mitsubishi told us that it considers our approach to redress should be in accordance with the Court's decision in Hodgson. I have considered this 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 M's expectation of what she would receive. I consider Mrs M has lost out, and has suffered unfairness in her relationship with Mitsubishi, to the extent that her loan repayments to it exceed the benefits from the solar panels. On that basis, I believe my determination results in fair compensation for Mrs M.

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 M received from the solar panel system over the 84-month term of the loan, so she pays no more than that. To do that, I think it's important to consider the benefit Mrs M received by way of FIT payments as well as through energy savings. Mrs M will need to supply up to date details, where available, of all FIT benefits received, electricity bills and current meter readings to Mitsubishi. Mitsubishi have told us that Mrs M started making her monthly repayments on 19 August 2014 and she repaid her loan on 19 July 2021.

I intend to tell Mitsubishi to:

- *Calculate the total payments Mrs M has made towards the solar panel system up until the date of settlement – A*
- *Use Mrs M's bills and FIT statements, to work out the benefits she received up until the original loan term* – B*

- *Calculate the difference, between what Mrs M actually paid (A), and what she should have paid (B), applying 8% simple interest to any overpayment from the date of payment until the date of settlement of the complaint** – C*
- *Reimburse C to Mrs M*

I think Mitsubishi's final response letter may have caused some confusion. However, Mitsubishi itself admitted this, apologised and to account for any inconvenience or confusion arranged for £300 to be issued to Mrs M by cheque in November 2021, I think this amount fairly compensates Mrs M in the circumstances. To the extent Mitsubishi has not done so already, it should pay Mrs M £300.

**Where Mrs M is not able to provide all the details of her meter readings, electricity bills and/or FIT benefits, I am satisfied she has currently provided sufficient information in order for Mitsubishi to complete the calculation I intend to tell it to follow in the circumstances using known and reasonably assumed benefits.*

*** If Mitsubishi considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mrs M how much tax it's taken off. It should also give Mrs M a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate."*

I asked the parties to the complaint to let me have any further representations that they wished me to consider by 2 August 2024. Mrs M has accepted the provisional findings. At the time of writing, Mitsubishi has not acknowledged receiving the provisional decision, made any further submissions or asked for an extension to do so. I consider that both parties have had sufficient time to make a further submission had they wished to do so. So, I'm proceeding to my final 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.

Given that there's no new information for me to consider following my provisional decision, I have no reason to depart from those findings. And as I've already set out my full reasons for upholding Mrs M's complaint, I have nothing further to add.

Putting things right

I require Hitachi Capital (UK) Plc, now trading as Mitsubishi HC Capital UK Plc to calculate and pay the fair compensation as detailed above.

My final decision

For the reasons set out, I'm upholding Mrs M's complaint about Hitachi Capital (UK) Plc, now trading as Mitsubishi HC Capital UK Plc. I require Hitachi Capital (UK) Plc, now trading as Mitsubishi HC Capital UK Plc to calculate and pay the fair compensation as detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 2 September 2024.

Douglas Sayers
Ombudsman