

The complaint

Mr M has complained about Mitsubishi HC Capital UK Plc ('Mitsubishi')'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 March 2014, Mr M bought a solar panel system ('the system'), from a company I'll call "S", using a ten-year fixed sum loan from Mitsubishi.

In November 2021, Mr M complained to Mitsubishi through a professional representative. He said that he was told by S that the benefits of the system from electricity savings and Feed-In Tariff ("FIT") income would cover the loan repayments, making the system self-funding. . However, Mr M says that hasn't happened, and he's suffered a financial loss as a result. Mr M also believed that what happened at the time of the sale created an unfair relationship between him and Mitsubishi.

Mitsubishi responded to the complaint to say that Mr M had brought his s.75 claim more than six years after the cause of action occurred under the Limitation Act, so it had no liability. It also said that its relationship with Mr M was not unfair.

Unhappy with Mitsubishi's response, Mr M contacted us, through his professional representative, to complain about what had happened.

Mitsubishi issued a final response letter in February 2022. Mr M remained unhappy and asked us to investigate the complaint.

Our Investigator considered Mr M's complaint, they ultimately thought that:

- Given the s.75 claim was likely to be time barred under the Limitation Act, 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 Mr M and Mitsubishi.

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

Mr M accepted the investigator's view.

Mitsubishi responded on 13 December 2021. 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.
- Mr M hadn't complained about the handling of his s.75 claim, however even if he 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 Creation Consumer Finance Limited* [2021] EWHC 2167 (Comm) ('Hodgson') as an appropriate mechanism for calculating redress.

So, the case was progressed to the next stage of our process, an Ombudsman's decision. I issued a provisional decision explaining why I was planning to uphold the complaint.

Mr M said he accepted my provisional decision.

Mitsubishi responded to say it disagreed. It said, in summary, that:

- The format of the credit agreement does not allow for additional information to be added, such as the benefits of the system.
- S is still trading, so why has Mr M not been in touch with it to question why it is not performing as promised – particularly when he was not receiving FIT income. It was his responsibility to apply for the FIT but S could've helped him do so.
- S always provided a system performance projection which included a comparison between the cost and benefits. While this has not been provided in this case Mitsubishi pointed to some examples in other complaints the Financial Ombudsman Service has recently dealt with.
- No FIT and electricity statements have been provided to allow a review of the system performance.
- An alternative method of redress would be more appropriate, but under which no redress would be due to Mr M.

I've taken on board the additional comments and information provided when reaching 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.

I'm satisfied I have jurisdiction to consider Mr M'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.

My findings on our jurisdiction to consider this complaint

My findings on jurisdiction match what I said in my provisional decision. Neither Mr M nor Mitsubishi commented on this in their responses.

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 s.75.

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 Service'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 dated 13 December 2021. As such, this is the "event complained of".

Here Mr C brought his complaint to the Financial Ombudsman Service before the above letter was issued, however since Mitsubishi issued its final response on 16 February 2022, Mr C has remained unhappy. Given this, I'm satisfied 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

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 ongoing, 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 its responsibility to correct unfairness in the relationship.

In this case Mitsubishi has said Mr M's relationship was ongoing as of February 2022, although it has now most likely ended as the original loan term has concluded. So, Mitsubishi is responsible for the matters which made its relationship with Mr 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 his complaint on the unfairness of the credit relationship between himself and Mitsubishi, Mr M is therefore complaining about an event which ended on in 2024, namely that Mitsubishi participated in and perpetuated an unfair credit relationship with him. Mr M asked the Financial Ombudsman Service to investigate the complaint in 2022. So, taking into account DISP 2.8.2R(2)(a), I am satisfied that he is not prevented from bringing his complaint to the Financial 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 Mr M's complaint has been brought in time for the purposes of the alternative three-year rule under DISP 2.8.2R(2)(b).

My findings on the merits of the complaint

I have decided to uphold this complaint. I have included below my findings in respect of the additional points Mitsubishi made in response to my provisional decision.

The unfair relationship under s.140A complaint

When considering whether representations and contractual promises by S 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 S 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 S for which Mitsubishi were responsible under s.56 when

considering whether it is likely Mitsubishi had acted fairly and reasonably towards Mr 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.

What happened

Mr M has said that he was told by S's representative that the benefits of the system from electricity savings and Feed-In Tariff ("FIT") income would cover the monthly loan repayments. I haven't seen any evidence that Mr M had any prior interest in purchasing solar panels.

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

The credit agreement provided the following information:

- Purchase price £8,033.00
- Amount of credit £8,033.00
- Total cost of credit £3,476.20
- Total amount payable £11,509.20
- By 120 repayments of £95.91 per month

It understandably did not provide any information about the benefits of the system. But made clear what Mr M was agreeing to pay.

The order form provided the following information about the system:

- Purchase price £8,033.00
- 12 x 3kW solar panels would be fitted
- Annual electrical generation would be 2,934 kWh

The order form did not set out any information about the savings and income that the system would provide.

However, it did say next to where it showed the expected annual electrical generation, "Please see enclosed Predicted Performance for PV Installations". In the two examples given by Mitsubishi the same order form was used, and the "Predicted Performance for PV Installations" was another document that provided information on the expected benefits of the system. In those two examples one complaint was resolved by one of our Investigators, who concluded that the consumer was not told the system was self-funding on a monthly basis, as the document made clear there was a shortfall between the benefits and the loan repayments. In the second, an ombudsman provisionally upheld the complaint because the document showed the benefits would exceed the total loan repayments by the end of the loan term.

In this case, it is not clear that the document referred to was provided to Mr M nor what it would've showed. Mr M provided the order form to us but does not have any further sales documents. I don't know if that is because the "Predicted Performance for PV Installations" document was not provided to him or if it was, but he has since lost it.

In other cases where there is a document that makes clear a system is not self-funding, I have sometimes not upheld complaints, because I've concluded it is unlikely that a salesperson would provide that information in writing whilst simultaneously telling the customer the system was self-funding.

But in this case, there might have been a document with information on the benefits and a comparison with the costs, but we don't know if there was, if it was provided to Mr M or what it would've showed. So, I just don't think there is enough evidence for me to say that Mr M's recollection of what he was told is not sufficiently plausible or persuasive such that I should not uphold this complaint. Here it seems that Mr M's recollection of what he was told about the benefits is all we have that is specific to this complaint and, on balance, I think it is the best evidence available to show what he was told about the benefits of the system and how they would relate to its cost. So, Mitsubishi's comments on this point have not persuaded me to change my provisional decision.

Mitsubishi also questioned why Mr M had not been in touch with S to question the performance of the system and ask about FIT payments, which he was not receiving. I asked Mr M about this, and he said that when he realised he was not getting FIT payments in 2015, he did enquire about this, but was told it was already too late to apply. So, he did not pursue it further. He didn't realise he had any further recourse about this matter until shortly before making his complaint, when he saw information on the internet about making such claims.

Overall, I think that Mr M would've been reliant on what he was told by S verbally. Mr M's recollection is that he was told the income and savings would cover the loan repayments, meaning the system would be self-funding.

With no prior interest in solar panels, Mr M agreed to an interest-bearing loan with a monthly repayment of around £95, payable for ten years. Given the available evidence, I find Mr M's account of what he was told by S to be credible and persuasive.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £1,150 per year. Mr M provided a meter reading which indicates his system has generated electricity in line with what is shown on the contract (albeit slightly less than stated, still within a reasonable margin). But the benefits have not been sufficient to make the system self-funding within the loan term, not least because he has not received any income from the FIT. So, these statements were not true.

Mitsubishi has said that it was Mr M's responsibility to apply for FIT payments. But Mr M understood this would happen automatically. And by the time he realised that wasn't the case, he was told it was too late. It seems clear to me that S did not make clear to Mr M how the application process worked, which resulted in him not receiving FIT payments.

I think S's representative must reasonably have been aware that Mr M's system would not produce benefits at this level, particularly if he did not receive FIT payments. From what I know about the system, a reasonable estimate at the time of sale would've been that the system would provide benefits of around £710 in the first year and that there would be a shortfall between the benefits over ten years and the total loan payments Mr M was agreeing to.

Considering Mr M's account about what he was told, the documentation I know he was shown at the time of the sale, I think it is likely that S gave Mr M a false and misleading impression of the self-funding nature of the solar panel system.

I consider S's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Mr M was expected to receive by agreeing to the installation of the system. I consider that S's assurances in this regard likely amounted to a contractual promise that the solar panel system would have the capacity to cover the loan repayments. But, even if they did not have that effect, they nonetheless represented the basis upon which Mr M went into the transaction. Either way, I think S's assurances were

seriously misleading and false, undermining the purpose of the transaction from Mr M'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 S's negotiations with Mr 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 Mr M and Mitsubishi 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 Mitsubishi has benefitted from the interest paid on a loan he would not otherwise have taken out.

The s.75 complaint and additional complaint points

Given my above conclusions and bearing in mind the purpose of my decision is to provide a fair outcome quickly with minimal formality, I don't think I need to provide a detailed analysis of Mr M's s.75 complaint, or the other points made in Mr M's claim. Furthermore, this doesn't stop me from reaching a fair outcome in the circumstances.

Fair compensation

In all the circumstances I consider that fair compensation should aim to remedy the unfairness of Mr M and Mitsubishi's relationship arising out of S's misleading and false assurances as to the self-funding nature of the solar panel system. Mitsubishi should repay Mr M a sum that corresponds to the outcome he could reasonably have expected as a result of S's assurances. That is, that Mr M's loan repayments should amount to no more than the financial benefits he received for the original term 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'). It's suggested redress methodology in response to my provisional decision appears to be in line with this, and would result in no redress being paid to Mr M.

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 Mr M's expectation of what he would receive. I consider Mr M has lost out and has suffered unfairness in his relationship with Mitsubishi, to the extent that his loan repayments to Mitsubishi exceed the benefits from the solar panels. On that basis, I believe my determination results in fair compensation for Mr 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 Mr M received from the system over the ten-year term of the loan, so Mr M pays no more than that. To do that, I think it's important to consider the benefit Mr M received through energy savings.

Mr M will need to provide Mitsubishi with up-to-date details of his electricity generation meter reading and, where available, relevant electricity bills. But Mitsubishi can use reasonable assumptions for periods where evidence of the actual benefits is not available.

I've decided not to award any additional compensation. Albeit I disagree with the outcome it reached, Mitsubishi responded to the claim within a reasonable time and to the complaint once it became aware of it. In doing so it considered all of the complaint points that were made. As such, I do not think that Mitsubishi caused any unnecessary distress or inconvenience to Mr M by the way it responded to the claim.

My final decision

For the reasons I have explained I uphold Mr M's complaint. To put things right Mitsubishi HC Capital UK Plc must:

- Calculate the total payments Mr M has made towards the solar panel system up until the date of settlement – A
- Use Mr M's meter reading and, where available, electricity bills to work out the benefits he received up until the end of the original loan term* – B
- Calculate the difference between what Mr M actually paid (A), and what he should have paid (B), applying 8% simple interest per year to any overpayment from the date of overpayment until the date of settlement of the complaint** – C
- Pay C to Mr M

*Where Mr M has not been able to provide all the details of his meter readings and electricity bills, Mitsubishi HC Capital UK Plc should complete the calculation using known and reasonably assumed benefits.

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 16 September 2024.

Phillip Lai-Fang
Ombudsman