DRN-4961305

The complaint

Ms 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.

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

What happened

On 29 August 2014, Ms M bought a solar panel system ('the system') from a company I'll call "Z" using a fixed sum loan from Mitsubishi. The loan agreement sets out the amount of credit is £6,611, the total charge for the credit is £3,249.40 and the total amount payable is £9,860.40. The loan agreement shows the duration of the agreement is 120 months and the monthly payments are £82.17. I have not been told that the loan was settled early. So, it seems likely that Ms M's loan is due to run to term shortly.

Ms M raised her complaint to Mitsubishi on 16 September 2021. Ms M's complaint is that she thought the system was mis-sold. In summary Ms 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.
- Failed to provide Ms M with information about a cooling off period.
- Conducted a high-pressure sale.
- Told Ms M that the system would be maintenance free for 40 years.

Ms M said she had a like claim against Mitsubishi for misrepresentation and breach of contract under s.140A of the CCA. Ms M told us that the relationship between Mitsubishi and herself was unfair under s.140A because of the misrepresentations, the breach of contract and matters that amounted to unfair trading practices.

Mitsubishi responded to the complaint on 19 October 2021 in its final response. It considered Ms 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 Ms M responsibly.

Unhappy with that response Ms M referred her complaint to our service on 2 November 2021.

Ms M's complaint was considered by an Investigator, in summary she 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 Ms M and Mitsubishi.

She recommended that Ms 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.

Because we had not heard from Mitsubishi within the timelines, the case was progressed to the next stage of our process on 2 March 2023, an Ombudsman's decision.

Mitsubishi responded on 4 April 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.
- Ms 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 Creation Consumer Finance Limited [2021] EWHC 2167 (Comm) ('Hodgson') as an appropriate mechanism for calculating redress.

I issued my provisional decision on 26 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 T'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 Ms 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 9 March 2023, this constituted the "event complained of". Furthermore, in its letter it treated Ms M as having brought a complaint which she was entitled to refer to our service.

Here Ms M brought her complaint to the ombudsman service on 2 November 2021, before the above letter was issued. However, since Mitsubishi issued its final response on 19 October 2021, Ms 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.

<u>The unfair relationship under s.140A complaint</u>

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 it seems that Ms M's relationship with Mitsubishi has not yet ended, as the loan is still running. So, Mitsubishi is responsible for the matters which made its relationship with Ms 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, Ms M is therefore complaining about an event which has yet to end, namely that Mitsubishi participated in and perpetuated an unfair credit relationship with her. Ms M referred her complaint to the ombudsman service on 2 November 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 Ms 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

<u>The unfair relationship under s.140A complaint</u>

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 Ms 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?

Ms M has said that she was told she could have solar panels at no cost to her. When visited by a representative of Z, Ms 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 Ms M had prior interest in purchasing Solar Panels.

I've considered Ms 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.

Ms M has also provided a copy of some handwritten documents from the sales meeting, which contain information about the potential financial benefits that the solar panels might produce. They seem to show that the loan would be self-financing within the first 10 years of the loan. They also show that over a period of time Ms M should enjoy a net profit of £34,739.

The documentation available seems to support the testimony that Ms M gave us about the representative of Z and the claims they were making; that she was told that the loan would be self-funding and that she would receive financial benefits from having the system installed.

I have also looked at Z's website from around the time of the sale. The cache of the website I have seen is from June 2014 (two months before the agreement was signed). I am satisfied on this occasion it is reasonable to take this content into account when considering what's more likely than not to have been said to Ms M.

On the page that deals with solar power, it says:

"A government 'feed-in-tariff' scheme pays you for the electricity you produce – an estimated £900 a year for your solar energy – in addition to your electricity bill savings…

You'll receive a serious return on your investment as the savings and energy cashback will eventually cover the installation – and more."

It seems to me most likely that the sales representative Ms M dealt with would've said similar things to those Z produced in its promotional literature. I note that there were little or no words of caution about the likely performance of solar panels on M's website from around the time of the sale.

Taking all of the promotional material into account, the evidence suggests to me that it supports the testimony provided by Ms M. She told us she was told that the solar panels would provide a significant income and the details I have seen suggest that the loan would be repaid from the financial benefits of the solar panels.

As mentioned above, Ms M told us that Z told her the income from the solar panel system would pay off the cost of the loan. I have noted that our investigator thought that Ms M's testimony seemed persuasive and explained why they thought that in their assessment. I have noted that Creation has not responded to that part of the assessment.

Mitsubishi hasn't provided evidence to dispute what Ms M said happened. And the available evidence supports Ms M's testimony. And with no prior interest, Ms M left the meeting having agreed to an interest-bearing loan, with a monthly repayment of £82.17 for 120 months. Given her lack of prior interest and the financial burden she took on, I find Ms 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 Ms M 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 £986.04 per year. I have not seen anything to indicate Ms M's system was not performing as expected but Ms 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 Ms 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 Ms M's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to Ms M.

Considering Ms 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 Ms 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 Ms 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 Ms M went into the transaction. Either way, I think Z's assurances were seriously misleading and false, undermining the purpose of the transaction from Ms 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 Ms 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 Ms 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

The loan agreement was signed by Ms M on 29 August 2014. Mitsubishi received Ms M's complaint letter on 16 September 2021. But given my findings above, I'm not proposing to provide a detailed analysis of Ms M's 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 Ms 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 Ms M a sum that corresponds to the outcome she could reasonably have expected as a result of Z's assurances. That is, that Ms 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 Ms M's expectation of what she would receive. I consider Ms 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 Ms 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 Ms M received from the solar panel system over the 10-year term of the loan, so she pays no more than that. To do that, I think it's important to consider the benefit Ms M received by way of FIT payments as well as through energy savings. Ms M will need to supply up to date details, where available, of all FIT benefits received, electricity bills and current meter readings to Mitsubishi.

I intend to tell Mitsubishi to:

- *Calculate the total payments (monthly repayments and final lump sum) Ms M has made towards the solar panel system up until the early date of settlement – A*
- *Use Ms 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 Ms 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 Ms M*

Our investigator thought that Mitsubishi's failure to consider the claim under s140A has also caused Ms M some further inconvenience. And I think the £100 compensation recommended by our investigator is broadly a fair way to recognise that.

**Where Ms 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 Ms M how much tax it's taken off. It should also give Ms 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 9 August 2024. Both parties have accepted my provisional findings. 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, and as both parties have agreed with my provisional findings, I have no reason to depart from those findings. And as I've already set out my full reasons for upholding Ms M's complaint, I have nothing further to add.

Putting things right

I require 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 Ms M's complaint about Mitsubishi HC Capital UK Plc. I require 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 Ms M to accept or reject my decision before 9 September 2024.

Douglas Sayers
Ombudsman