DRN-4985934

The complaint

Mr R has complained about Mitsubishi HC Capital UK Plc trading as Hitachi Personal Finance ('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 June 2014, Mr R bought a solar panel system ('the system'), from a company I'll call "Z", using a ten-year fixed sum loan from Mitsubishi.

In December 2021, Mr R made a claim to Mitsubishi through a claims management company ("CMC"). He said that he was told by Z that the reductions in energy bills and the funds generated through the feed in tariff ("FIT") would be sufficient to fund the cost of the credit agreement, meaning he would not be worse off financially each month. Mr R says that hasn't happened, and he's suffered a financial loss as a result. The letter of claim also said that what happened at the time of the sale created an unfair relationship between Mr R and Mitsubishi.

Mitsubishi responded to the complaint in December 2021. It said Mr R had brought his claim too late given the provisions of the Limitation Act.

Unhappy with Mitsubishi's response, Mr R referred the matter to the Financial Ombudsman Service, and we notified Mitsubishi of the complaint. Mitsubishi didn't issue a final response letter within eight weeks, so we proceeded to consider the matter.

Our Investigator looked at what had happened and said:

- Given the s.75 claim was likely to be time barred under the Limitation Act, Mitsubishi's answer in respect of that 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 R and Mitsubishi.

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

Mitsubishi disagreed. 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 R 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

As such, I've been asked to make a decision on this complaint. I issued a provisional decision explaining that I was planning to uphold this complaint and what Mitsubishi would have to do to put things right.

Mr R's representative said that he accepted my provisional decision.

Mitsubishi requested a copy of Mr R's Feed-In Tariff ("FIT") statements and MCS certificate. We forwarded the FIT data to Mitsubishi and let Mr R know how he can obtain the MCS certificate.

Having reviewed the complaint I'm satisfied that the MCS certificate is not required in order for me to make my final decision. The satisfaction note on file shows the expected annual generation of the system. However, Mitsubishi may require the MCS certificate in order verify the FIT information provided (since it is not in the form of FIT statements and does not show Mr R's name or address on it).

Since no additional comments or information has been provided for me to consider, my 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.

My findings on jurisdcition

I'm satisfied I have jurisdiction to consider Mr R'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 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 they have 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 21 December 2021 and this constituted the "event complained of".

Mr R complained to the Financial Ombudsman Service about this on 3 February 2022. We informed Mitsubishi of the complaint on 14 February 2022. Mitsubishi did not issue a final response letter within eight weeks of this, after which the Financial Ombudsman Service could consider the complaint in the absence of a final response letter from Mitsubishi. Given this, I'm satisfied Mr R's 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 is responsibility to correct unfairness in the relationship.

In this case, Mr R's relationship with Mitsubishi was ongoing when he contacted the Financial Ombudsman Service. So, Mitsubishi is responsible for the matters which made its relationship with Mr R unfair and for taking steps to retrospectively remove the source of that unfairness so that the relationship was no longer unfair. By relying in his complaint on the unfairness of the credit relationship between himself and Mitsubishi, Mr R is therefore complaining about an event which was ongoing in February 2022, when he contacted the Financial Ombudsman Service – namely that Mitsubishi participated in and perpetuated an unfair credit relationship with him.

Taking into account DISP 2.8.2R(2)(a), I am satisfied that Mr R is not prevented from bringing his 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 Mr R'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

For the reasons explained below (which match those in my provisional decision), I've decided to uphold this complaint.

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.

Section 56 ('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 Mr R.

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 R has said that he was told by Z's representative that the reductions in energy bills and the funds generated through the feed in tariff ("FIT") would be sufficient to fund the cost of the credit agreement, therefore not placing Mr R in a position where they would be financially worse off each month. Mr R has said he was cold called by Z about the system, and that he had no prior interest in purchasing solar panels.

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

The contract showed the purchase price of the system but had no information about how much electricity it was expected to generate (despite there being a section for this information which was not completed) or the income and savings that might be expected from this.

The credit agreement showed what Mr R had agreed to pay for the system – 120 monthly repayments of around £88, with a total amount payable of £10,676.40. It understandably had no information about the income and savings the system might provide.

So, Mr R had to rely on what he was told. Our investigator spoke to Mr R, who told us that initially he was quoted for a twelve-panel system, which he felt was too expensive. This was changed to a ten-panel system. Throughout the discussion it was always to be paid for using a loan, and Mr R felt more comfortable with the repayments for the ten-panel system. While he did still have some concerns he was persuaded by Z explaining that the system would pay for itself automatically. He said that he was never shown anything with the estimated benefits on it.

Mitsubishi hasn't provided evidence to dispute what Mr R's said happened. Yet with no prior interest Mr R agreed to an interest-bearing loan, with a monthly repayment of around £88, payable for ten years. Given his lack of prior interest and the financial burden he took on I find Mr R's account of what he was told by Z to be credible and persuasive. The loan is a costly long-term commitment, and I'm satisfied that Mr R agreed to the purchase because of the assurances he was given.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £1,067 per year, but his system has not produced this level of benefit. So, these statements were not true.

I think the Z's representative must reasonably have been aware that Mr R's system would not have produced benefits at this level. The satisfaction note shows it was expected to produce 2,011 kWh per year. Using reasonable assumptions from the time of sale, income and savings from this level of generation were unlikely to exceed £500 in the first year and not much more than £6,000 during the ten-year loan term. So, I think Z's representative would have known that Mr R's system would not produce enough benefits to cover the overall cost of the system either on a monthly basis or over the loan term.

Considering Mr R's account about what he was told, the documentation he was shown at the time of the sale, and that Mitsubishi hasn't disputed his recollection, I think it likely Z gave Mr R 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 Mr R 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 Mr R went into the transaction. Either way, I think Z's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr R's point of view.

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

Where Mitsubishi is to be treated as responsible for Z's negotiations with Mr R 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 R 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 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 R's s.75 complaint, or the additional points mentioned in the letter of claim. And this doesn't stop me from reaching a fair outcome in the circumstances.

Fault with the system

It appears that Mr R experienced a fault with the system which he discovered in August 2021. I understand he paid to have this fixed. Up until August 2020, the system had been functioning properly and, according to the FIT statements provided, generating more than the expected amount of electricity.

If Mr R thinks the fault should be covered by the supplier's warranty, he can contact Mitsubishi to see if he can claim a refund of the cost of repair. But that issue is beyond the scope of this decision.

Fair compensation

In all the circumstances I consider that fair compensation should aim to remedy the unfairness of Mr R 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 Mr R a sum that corresponds to the outcome he could reasonably have expected as a result of Z's assurances. That is that Mr R's loan repayments should amount to no more than the financial benefits he 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 Mr R's expectation of what he would receive. I consider Mr R 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 R.

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 R received from the system over the ten-year term of the loan, so Mr R pays no more than that. To do that, I think it's important to consider the benefit Mr R received by way of FIT payments as well as through energy savings.

Mr R will need to provide Mitsubishi with up-to-date details of his electricity generation meter reading and, where available, all relevant FIT statements and electricity bills (if he has not already done so). But Mitsubishi can use reasonable assumptions for periods where evidence of the actual benefits is not available.

He should also provide a copy of his MCS certificate if Mitsubishi requires it.

I also think that Mitsubishi's misinterpretation of our jurisdiction to look at this complaint caused Mr R some degree of trouble and upset. In recognition of this Mitsubishi should also pay Mr R additional compensation as set out below.

My final decision

For the reasons I have explained I uphold Mr R's complaint. To put things right Mitsubishi HC Capital UK Plc trading as Hitachi Personal Finance must:

- Calculate the total payments (including any advance payment/deposit and admin fees) Mr R has made or will make towards the solar panel system up until the end of the original loan term – A
- Use Mr R's bills and FIT statements (where available), to work out the benefits he received or will receive up until the end of the original loan term* – B
- Calculate the difference between what Mr R 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 R
- Pay Mr R £100 additional compensation

*Where Mr R has not been able to provide all of his electricity bills and/or FIT statements, Mitsubishi HC Capital UK Plc trading as Hitachi Personal Finance should complete the calculation using known and reasonably assumed benefits.

** If Mitsubishi HC Capital UK Plc trading as Hitachi Personal Finance considers that it's required by HM Revenue & Customs to deduct income tax from the interest, it should tell Mr R how much it's deducted. It should also give Mr R 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 R to accept or reject my decision before 24 September 2024.

Phillip Lai-Fang
Ombudsman