DRN-5007241

The complaint

Mr and Mrs C have complained about Mitsubishi HC Capital UK Plc's ('Mitsubishi') 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 in to account Section 140A ('s.140A') of the CCA.

Mr and Mrs C have both complained, but the credit agreement was between Mitsubishi and Mr C only. So, I mostly just refer to Mr C in this decision.

What happened

In August 2014, Mr C bought a solar panel system ('the system') from a company I'll call "S", using a ten-year fixed sum loan from Mitsubishi.

In June 2020, Mr C complained to S. He said that he purchased the system on the understanding that he would make energy savings of £417 in the first year and that this would increase in subsequent years. However, Mr C says his energy bills have not reduced and he sought to rescind the contract and get a full refund of what he'd paid.

S responded to say there had been a change during the sales process. The original quote was for a system with 16 solar panels, but only 12 would fit on the roof. So, the original quote overestimated the savings. To put things right S offered to fit a device to divert excess power to heating Mr C's hot water, which would increase the savings. Mr C wasn't happy with this, so he contacted the Financial Ombudsman Service to see if we could help.

On 17 August 2021, we contacted Mitsubishi on Mr C's behalf to start the claim process, since under s.75 Mitsubishi would have liability if there had been a misrepresentation or breach of contract by S when selling the system to Mr C.

Mitsubishi responded on 17 September 2021 to the claim (and also treated this as a complaint by providing its final response letter) to say that Mr C had brought his claim more than six years after the cause of action occurred. So, considering the provisions of the Limitation Act ('LA') Mitsubishi had no liability under s.75 as the claim had been made too late.

Mr C told us he remained unhappy, so our investigator looked at what had happened. Our investigator said that:

- Given the s.75 claim was more likely to be time barred under the LA, Mitsubishi's answer seemed fair.
- We could look at a complaint about a potential unfair relationship considering s.140A and this 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 C and Mitsubishi.

Our investigator recommended that Mr C keep the system and Mitsubishi refund the difference between the quoted energy savings and the actual energy savings Mr C has realised to the date of settlement, and the same proportionate difference between the quoted and expected future savings should be refunded up until the end of the loan term.

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 C 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

Since the complaint hasn't been resolved, I've been asked to make a decision. I issued a provisional decision explaining why I thought the Financial Ombudsman Service had jurisdiction to consider this complaint, and why I was planning to uphold it.

Mr and Mrs C responded to say they had nothing more for me to take into account. Mitsubishi responded to ask for copies of some correspondence between Mr and Mrs C and S. Mr and Mrs C provided this to us and we forwarded it to Mitsubishi. Mitsubishi has now confirmed it is not challenging my provisional decision and provided nothing more for me to consider.

So, this final decision is in line with my provisional one. It just covers the merits of the complaint bearing in mind that Mitsubishi is no longer challenging our jurisdiction to consider this.

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.

The s.75 complaint

Given my findings below and bearing in mind the purpose of my decision is to provide a fair outcome quickly and with minimal formality, I don't think I need to provide a detailed analysis of Miss B's s.75 complaint. This doesn't stop me from reaching a fair outcome in the circumstances.

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 C.

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 C has said that he was told by S's representative that he would make a fuel saving of £417 in the first year and that this would increase in subsequent years. This matches the written quote given to him by S at the time of sale. So, I think his recollection can be relied upon.

Mr C has provided electricity bills, from which I can see that after installation of the system, between 4 November 2014 and 3 November 2015, Mr C used 1,191 kWh of electricity for which he paid £150.05. This compares to 2,624 kWh of electricity used pre-installation between 11 April 2013 and 8 April 2014, for which Mr C paid £345.18. This is a saving of 1,433 kWh or £199.92.

This is significantly less than he was quoted when he purchased the system. I think there was a clear error in the calculations – it appears the savings were based on 100% of the generated electricity being used within the home, as opposed to 50% which was the industry standard at the time. Either that, or an unreasonably high electricity unit rate was assumed in the calculation. Either way, the information provided to Mr C was seriously misleading, and S ought to have realised it was incorrect.

I consider S's misleading information went to an important aspect of the transaction for the system, namely the savings which Mr C 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 save the amounts shown in the quote. But, even if they did not have that effect, they nonetheless represented the basis upon which Mr C went into the transaction. Either way, I think S's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr C'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 C in respect of its misleading and false assurances as to the energy savings the system would produce, I'm

persuaded a court would likely conclude that because of this the relationship between Mr C and Mitsubishi was unfair.

Because of this misleading quote of the savings he would make, each month Mr C 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.

Fair compensation

In all the circumstances I consider that fair compensation should aim to remedy the unfairness of Mr C and Mitsubishi's relationship arising out of S's misleading and false assurances as to the savings the system would provide. Mitsubishi should repay Mr C a sum that corresponds to the outcome he could reasonably have expected as a result of S's assurances. That is, that Mr C's savings would be as shown in the quote.

Mitsubishi told us that it considers our approach to redress should be in accordance with the Court's decision in *Hodgson v Creation 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 C's expectation of what he would receive. I think Mr C 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 C.

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 known savings Mr C received from the system to the date of settlement and assumed savings he will make until the end of the loan term. In effect, this will compensate Mr C for the difference between the savings he was told to expect from the system within the loan term and the savings the system has and will produce in that time.

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

My final decision

For the reasons I have explained, my provisional decision is that I uphold Mr C's complaint.

To put things right Mitsubishi HC Capital UK Plc must:

A. Calculate the difference between what Mr C has actually saved and the savings shown in the quote.

B. Add 8% simple interest* per year for the time Mr C is without that money to A and pay the total amount to Mr C, to compensate for losses experienced so far.

Where the credit agreement is ongoing, to ensure that Mr C doesn't lose out going forward, Mitsubishi should also:

C. Calculate the average annual underperformance percentage so far and assume that the savings will be this much lower through to the conclusion of the credit agreement.

D. Recalculate the electricity savings in the quote for any remaining time until the conclusion of the credit agreement, having applied the percentage reduction identified in C above.

E. Pay Mr C the difference between the revised amounts calculated in D above and the corresponding savings set out in the sales paperwork.

* If Mitsubishi HC Capital UK Plc considers that it's required by HM Revenue & Customs to deduct income tax from the interest, it should tell Mr C how much it's taken off. It should also give Mr C 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 Mrs C and Mr C to accept or reject my decision before 4 October 2024.

Phillip Lai-Fang
Ombudsman