DRN-5022347

The complaint

Mr R has complained about Mitsubishi HC Capital UK Plc trading as Hitachi Capital ("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 2013, Mr R bought a solar panel system ('the system'), from a company I'll call "A", using an eight-year fixed sum loan from Mitsubishi.

In March 2020, Mr R complained to Mitsubishi through a claims management company ("CMC"). He said that he was told by A that the benefits of the system through Feed-In Tariff ("FIT") income and electricity savings would cover the overall costs of the system within four years of installation, however that hasn't happened, and he's suffered a financial loss as a result. He also believed that what happened at the time of the sale created an unfair relationship between him and Mitsubishi.

Mitsubishi responded to the complaint in its final response. It said Mr R had brought his claim more than six years after the cause of action occurred so was out of time considering the provisions of the Limitation Act. But went on to respond to his complaint points, rejecting the complaint.

Unhappy with Mitsubishi's response, Mr R referred his complaint to our service. During the course of us considering the complaint, Mitsubishi told us that in responding to the complaint points while also seeking to rely on a limitation defence, it had caused some confusion and inconvenience, and said it would arrange for £300 to be sent to Mr R via cheque as a gesture of goodwill.

Our Investigator considered Mr R's complaint, and ultimately said 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 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, as well as paying him the £300 already offered.

Mr R didn't respond to the investigator's view. 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.

Because our investigator could not resolve the complaint, I've been asked to make a decision. I issued a provisional decision explaining why the Financial Ombudsman Service had jurisdiction to consider the merits of this complaint, and why I was planning to uphold it.

Mitsubishi responded to say it was not challenging my provisional decision. Mr R did not respond by the deadline given.

Because Mitsubishi is no longer challenging our jurisdiction in this case, my final decision just deals with the merits of the complaint and 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.

Unfair relationship under s.140A

When considering whether representations and contractual promises by A 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 A 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 A 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 A's representative that the benefits of the system through FIT income and electricity savings would cover the overall costs of the system within four years of installation. I have been shown no evidence that Mr R had already decided to take out solar panels before he was visited by A's representative.

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

The loan agreement sets out Mr R's responsibilities for repaying the loan amount and the monthly cost of that. Looking at the loan agreement it specifies that the goods being purchased were solar panels. So, I'm satisfied the loan was taken in Mr R's name to solely purchase the system sold by A.

But understandably the loan agreement contains no mention of the income or savings that may be generated by the system. So, there was no way for Mr R to compare his total costs against the financial benefits he was allegedly being promised from that document.

Mr R has told us that he has no other documents from the time of sale, although the CMC provided an extract of a sales brochure that A was known to have used. I understand that it did this to highlight the sort of promises A was making to consumer – rather than that this document was an important part of the sales process in Mr R's specific case.

Given the loan agreement is the only document that Mr R retained, and it doesn't contain information about the benefits, it seems that Mr R would have looked to A's representative to help him understand what benefits the system would provide relative to the costs, in order for him to make a decision.

Mitsubishi has sent in sample documents of a sales contract from A, which it says Mr R would've been provided with. Mitsubishi describes the purchase order form and a separate page as a two-page document. To keep things simple, I will refer to them as page one and page two.

The purchase order is on page one. Page two is titled 'QUOTATION AND SYSTEM LAYOUT'. Page two contains a space for a diagram of the system to be fitted and underneath it for the representative to provide details of likely performance and possible financial benefits. From copies of these forms from other cases, Mitsubishi thinks that A's customers were provided with the benefits of the system in a clear way that was not inflated.

Mitsubishi has not provided a copy of Mr R's actual two-page document, just samples from other customer sales with personal information removed. We sent Mr R a copy of the samples Mitsubishi has provided and asked Mr R for his copy the document and his reflection on what happened at the time of the sale. Mr R told us that he was not left with any calculations by A, nor does he recall seeing the document at all. And the CMC also said:

> *"It is bizarre to say the least that the bank at this stage would provide such documents and not notice that on the last set of calculations you sent me the figures are actually inflated ie instead of using 50% of the FIT Tariff to calculate the electricity savings they use the full tariff. I believe this is one of many issues the merchant was reprimanded by their governing body the RECC for."*

I have considered this aspect of the complaint along with all the other submissions that have been made to me in this case. I have considered that we do not have the actual document that pertained to Mr R's sale. That could mean Mr R was shown a completed document including calculations but chose not to keep it or was shown a completed document and kept it but chose not to share it, or Mr R was not shown a completed document and therefore had no reason to keep it, or that Mr R was not shown or given such a document at all.

I think it is likely that Mr R signed a contract with A for the purchase of the system. It seems likely that page one of the document would've been used, as it appears A was using this purchase order form around that time. But I cannot conclude that this document was left with Mr R or that "page two", assuming it was part of the same document, was completed accurately.

Mitsubishi thinks the second page would always have been completed. But I have seen insufficient evidence to be able to safely make that finding. In considering the wider context of the sale, I note that page two contains no signature box. Mr R did not need to interact with page two at all in order to complete the order of the system. So, that lessens the weight I have placed on this being a two-page document. And I think it does reduce the weight I must place on the importance to the sales process of what Mitsubishi describes as "page two".

I have also noted that in the three pieces of sample evidence of what Mitsubishi calls page two, the benefits information has not been completed in a uniform manner on all three forms. Two have used the designated printed area to capture that information, whilst the third form has a more free-form approach in a space designed to show the system layout.

It seems to me that A relied on its representatives to use their initiative as to how this page was used – if at all. In any event, it seems that this page was not as tightly controlled a part of the sales process as Mitsubishi has suggested.

I have looked at the calculations of electricity cost savings on the samples. Having done so I have noted that one of the calculations seems to have inflated the likely savings. I say that because the calculation suggests that consumer would use 100% of the energy produced by the system. This is high given the standard assessment procedure ("SAP") calculator and FIT scheme at that time were based on 50% self-consumption.

So, in forwarding these sample forms in support of its position Mitsubishi has shown that the consumer didn't need to interact with the second page to make their order, the forms weren't always completed in a consistent manner for each sale and that one of the sample documents seems to show the representative inflating the potential benefits of the system.

I cannot ignore that no such document has been provided for the sale to Mr R. Having considered all of the evidence supplied in this case, including the sample documentation that Mitsubishi has forwarded in its defence, I have seen no definitive evidence that the benefits were accurately explained to Mr R in any documentation from the time of sale.

So, I still think that Mr R would have looked to A's representative to help him understand what benefits the system would provide relative to the costs, in order for him to make a decision.

When thinking about all of the above, I'm mindful of the actions taken by the Renewable Energy Consumer Code ('RECC') against A. My understanding is that the RECC administers the Renewable Energy Consumer Code and ensures that its members comply with the Code.

The RECC investigated A's conduct. In May 2013, it determined that A was in breach of a number of sections of the code. The panel felt the evidence suggested that A showed a "persistent pattern of non-compliance" with the code. In particular, the panel found that A had:

- Complaints upheld about the quality of its advertisements by the advertising standards agency.

- Representatives who had provided financial inducements at meetings that put consumers under pressure to sign up.
- Failed to provide accurate performance information and predictions before the contract was signed.
- Failed to provide key documents, including little or no contractual information.

The findings were deemed to have placed consumers at risk and were thought to be serious enough that the company's membership of the RECC was put on probation whilst remedial actions were implemented.

I accept that the above are findings based on cases that the RECC were looking at, and different to this case. Yet the findings do suggest that there were conduct concerns in the areas that relate to Mr R's complaint just a few months before he was sold his system. It is not clear from RECC's published findings when those issues were resolved.

Mitsubishi has claimed that the whole document including page two would always have been completed and provided to the consumer. But Mr R told us he had no recollection of that and thought he had never been shown the document or any calculations of the benefit. And even if he had been shown a completed page two, the samples include an example of a representative inflating the potential benefits of the system.

When I consider that, I must also consider that A admitted to the RECC during its disciplinary meeting that sometimes key documents hadn't been provided to consumers. Neither the sample documentation provided by Mitsubishi, nor A's recorded admittance to the RECC undermine Mr R's testimony that in this case, he did not see or receive the sample documentation provided by Mitsubishi, nor any evidence that the system would be anything other than self-funding.

Mr R left the meeting having agreed to an interest-bearing loan, with a monthly repayment of around £130, payable for eight years. Given the financial burden he took on, and in the absence of any evidence from Mitsubishi to the contrary, I find Mr R's account of what he was told by A to be credible and persuasive. The loan is a costly long-term commitment, and I can't see why he would have seen this purchase as appealing had he not been given the assurances he's said he received from A. Particularly given his age at the time of sale.

I have noted that our investigator thought that Mr R's testimony seemed persuasive and explained why they thought that in their assessment. I have noted that Mitsubishi has not responded to that part of the assessment.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £1,560 per year. I have not seen anything to indicate Mr R's system was not performing as expected. But Mr R's testimony is that the system failed to generate benefits anywhere close to that. And Mitsubishi referred to his FIT statements in its response to the claim and complaint which appear to back up what he has said.

So, it appears that these statements were not true. I think the salesman from A must reasonably have been aware that Mr R's system would not have produced benefits at this level. I think the salesman would have known that Mr R's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to Mr R.

Considering Mr R's account of what he was told, and the documentation I can be certain he 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 A gave Mr R a false and misleading impression of the self-funding nature of the solar panel system. On balance, I find Mr R's account to be plausible and convincing.

I consider A'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 A'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 A's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr R'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 A'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 otherwise have not taken out.

Fair compensation

In all the circumstances I consider that the fair compensation should aim to remedy the unfairness of Mr R and Mitsubishi's relationship arising out of A's misleading and false assurances as to the self-funding nature of the solar panel system. I require Mitsubishi to repay Mr R a sum that corresponds to the outcome he could reasonably have expected as a result of A's assurances. That is, that Mr R's loan repayments should amount to no more than the financial benefits he receives 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 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 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 original eight-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.

If he hasn't already done so, Mr R will need to provide Mitsubishi with his MCS certificate, up-to-date details of his electricity generation meter reading and, where available, all relevant FIT statements and electricity bills. But Mitsubishi should use reasonable assumptions for periods where evidence of the actual benefits is not available.

Finally, Mitsubishi has accepted that its response to the claim and complaint caused Mr R some confusion and inconvenience and offered to pay him £300 in recognition of this. If it has not already done so Mitsubishi should make that payment.

My final decision

For the reasons I have explained I intend to uphold Mr R's complaint. I intend to direct Mitsubishi HC Capital UK Plc to:

- Calculate the total payments (including any advance payment/deposit and admin fees) Mr R has made towards the solar panel system up until the date of settlement – A

- Use Mr R's bills and FIT statements (where available), to work out the benefits he received 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

- If it has not already done so, pay Mr R £300 compensation in respect of the confusion and inconvenience caused

*Where Mr R has not been able to provide all of his electricity bills and/or FIT benefits, 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 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 27 June 2024.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 11 October 2024.

Phillip Lai-Fang
Ombudsman