DRN-5023436

The complaint

Mr H has complained about Mitsubishi HC Capital UK Plc trading as Hitachi Capital Consumer 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

On 10 June 2013, Mr H bought a solar panel system ('the system') alongside an air source heat pump, from a company I'll call "A", using an eight-year fixed sum loan from Mitsubishi.

On 3 June 2019, Mr H complained to Mitsubishi through a claims management company ("CMC"). The CMC said that Mr H was told by A that the total benefit he would receive would cover the overall costs associated with the system within a few years of installation. However, that hasn't happened, and he's suffered a financial loss as a result. Mr H 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 considered Mr H had brought his claim more than six years after the cause of action occurred and so was out of time to do so bearing in mind the provisions of the Limitation Act.

Unhappy with Mitsubishi's response, Mr H referred his complaint to our service.

On 16 December 2021, Mitsubishi told us that it would pay Mr H £300 compensation in recognition of the confusion and inconvenience caused by its final response letter not making clear that it was primarily relying on a limitation defence to reject the claim and complaint.

Our Investigator considered Mr H'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 H and Mitsubishi.

Our Investigator recommended that Mr H keep the system and Mitsubishi take into account what Mr H had paid so far, along with the benefits he received, making sure the system was effectively self-funding. And that Mitsubishi's offer of £300 compensation was fair and reasonable in respect of the confusion and inconvenience caused.

Mr H 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 H 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
- When selling the system, A would've provided clear information on the benefits of the system in the contract (samples of which Mitsubishi provided to us).

As the complaint has not been resolved, I've been asked to make a decision on the complaint.

I issued a provisional decision explaining why the complaint is within the jurisdiction of the Financial Ombudsman Service and why I was planning to uphold it.

Mitsubishi responded to say it would not be challenging my provisional decision. Mr H did not respond by the deadline I gave.

Since jurisdiction in this case is no longer being challenged, and no one has provided anything further for me to consider, this final decision deals only with the merits of the complaint and the outcome is in line with that in my provisional 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.

The s.75 complaint

The law imposes a six-year limitation period on claims for misrepresentation and breach of contract, after which they become time barred.

In this case the alleged misrepresentation and cause of action arose when an agreement was entered into on 27 June 2013. Mr H brought his s.75 claim to Mitsubishi on 3 June 2019 as part of its complaint letter. That is less than six years after he entered into an agreement with it but notifying Mitsubishi of the claim does not stop time for limitation purposes. The only way to do that is to submit a claim to the courts, by mutual agreement of both parties, or by Mitsubishi waiving the time limit in writing. None of those things happened by the time Mitsubishi responded to the claim in its final response dated 3 September 2020.

Given this, I think it was fair and reasonable for Mitsubishi to have not accepted the s.75 claim. So, I do not uphold this aspect of the complaint.

The unfair relationship under s.140A complaint

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 H.

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 H has said that he was told by A's representative that the total benefit he would receive would cover the overall costs associated with the system within a few years of installation.

Mr H later elaborated on this, saying through his representative that:

> *"Our client and his wife met with the Sales Rep and the meeting lasted about an hour. He advises the Sales Rep initially spoke to them about the [solar] panels and an Air Source Heat Pump. He advised that the Sales Rep informed him of the Electricity savings and the money they would get from the Feed in Tariff and how purchasing the panels would be a very good investment.*
>
> *Our client advises that whilst the Salesman had a folder from which he referred to leaflets from time to time the majority of what he was telling our client was verbal. During the Sales Pitch our client advises that the Sales Rep mentioned there was finance available from Hitachi. Our client advises that when he was aware Hitachi was backing the product it gave more legitimacy to the promised savings made by the Sales Rep which he advises gave him more confidence to proceed.*
>
> *Our client advises that whilst their backgrounds were in Environmental Science and they saw the benefit of helping the planet they had no savings at the time and did not wish to get into any debt. Therefore our client advises that the promises that the returns from the electricity savings and the FIT payments would be more than enough to cover the cost of the loan was extremely important. Our client cleared the loan in October 2015."*

I've looked at the documents provided by Mr H 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 H'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. However, from the sales contract it is clear that the loan covered the combined purchase price of both the solar panels and the air source heat pump. There is an invoice which appears to set out that the purchase price of the solar panels alone was £13,902.00, or 49.83% of the combined price of £27,902.

That the goods being purchased were not stated correctly on the loan agreement does suggest that A's sales representative may not have taken care to fully complete the necessary documents.

The combined purchase price of the solar panels and the heat pump was paid in full using the loan. So, I'm satisfied that 49.83% of the loan repayments (and any associated interest) were in relation to the solar panel system – which equates to £193.96 per month or £2,327.45 per year.

So, the contract makes clear the overall purchase price of the solar panels and heat pump combined. The invoice, which makes clear the purchase price of the solar panels, is dated two weeks later. So, based on the contract, it is not clear to me that Mr H would've been aware of the purchase price of the solar panels alone when he agreed to the purchase. It does not appear that the documents would've made clear to Mr H what he had agreed to pay for the solar panels.

The loan agreement understandably contains no mention of the income or savings that may be generated from the solar panel system. But neither does the contract or any other document Mr H has provided to us. So, it seems there was no way for Mr H to compare, from the documents he was given, the total cost of the solar panel system with the financial benefits he was allegedly promised.

Given none of the documents contain information about the benefits, Mr H would have looked to A's representative to help him understand how much the panels would cost and how much he would benefit from the system in order for him to make a decision.

Mitsubishi has sent in samples of a sales contract from A which it said would've been used in the sale and includes a second page with space for the benefits of the solar panel system to be written in. But, comparing this document to the sales contract Mr H has sent to us, I can see that it is a completely different document. So, I don't think the sample documents sent to us by Mitsubishi are relevant to this complaint.

When thinking about all of the above, I'm mindful of the actions taken by the Renewable Energy Consumer Code ('RECC') against A.

RECC investigated A's conduct and In May 2013 determined that A was in breach of a number of sections of the code. The RECC disciplinary 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.

Whilst I accept that the above are findings based on cases that the RECC were looking at, and different to this case, the findings do suggest that there were conduct concerns in the areas that relate to Mr H's complaint around the time that he was sold his system. And A

admitted during its disciplinary meeting that sometimes key documents hadn't been provided to consumers.

Mr H left the sales meeting having agreed to an interest-bearing loan, with a monthly repayment of around £389 payable for eight years (albeit around £194 of that was for the solar panel system, although the loan agreement did not state this). Given the financial burden he took on, and the evidence available in this case, which does not contradict what he has said, I find Mr H'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.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £2,327 per year. Mr H's system was performing as expected. But it has not and was never likely to produce that level of benefit. So, these statements were not true.

I think the salesman from A must reasonably have been aware that Mr H's system would not have produced benefits at this level – given its expected annual generation and FIT and electricity unit rates at that time. So, the salesman ought to have known that Mr H's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to Mr H.

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

I consider A's misleading representations went to an important aspect of the transaction for the system, namely the benefits and savings which Mr H 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 H went into the transaction. Either way, I think A's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr H'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 H 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 H 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 H 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 H a sum that corresponds to the outcome he could reasonably have expected as a result of A's assurances. That is, that Mr H's loan repayments (in respect of the portion of the loan that was for the solar panel system) 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 H's expectation of what he would receive. I consider Mr H 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 H.

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 H received from the solar panel system over the eight-year term of the loan, so he pays no more than that for the solar panel system.

To do that, I think it's important to consider the benefit Mr H received by way of FIT payments as well as through energy savings. Mr H may need to supply up to date details to help Mitsubishi make that calculation. But Mitsubishi can and should use assumptions when information is not available.

Normally, by recalculating the loan this way, Mr H's monthly repayments would reduce, meaning that he would've paid more each month than he should've done resulting in an overpayment balance. And as Mr H would have been deprived of the monthly overpayment, I would expect Mitsubishi to add 8% simple interest from the date of the overpayment to the date of settlement.

I'm mindful that Mr H paid off the loan early, so he paid much less for the system than if the loan had run to its full term. If the calculations show that no refund is due to Mr H then Mitsubishi will just need to confirm this in writing to Mr H along with a copy and explanation of its calculations.

My final decision

For the reasons I've explained, I uphold this complaint. To put things right, Mitsubishi must:

- Calculate what Mr H paid for the solar panel system – being 49.83% of the total loan repayments he made in paying off the loan – A
- Using meter readings and (where available[1]) FIT statements and electricity bills, calculate the total benefits Mr H received from the solar panel system during the original eight-year loan term – B
- Recalculate what Mr H's overall monthly loan repayments would've been if the total

payable for the solar panel system portion of the loan was B
- Where Mr H paid more per month than B, calculate interest on the overpayments at 8% simple per year from the date of overpayment to the date of settlement of the complaint – C
- Pay Mr H a sum equal to: A minus B plus C [2]
- If it hasn't already done so, pay Mr H £300 compensation to recognise the confusion and inconvenience caused

[1] Where FIT statements and electricity bills are not available, Mitsubishi should make reasonable assumptions to calculate the benefits Mr H would have received.

[2] If Mitsubishi considers that it's required by HM Revenue & Customs to deduct income tax from the interest portion of the payment, it should tell Mr H how much tax it's deducted. It should also give Mr H a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

by taking the actions set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 14 October 2024.

Phillip Lai-Fang
Ombudsman