

The complaint

Mr P 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

In November 2013, Mr P bought a solar panel system (‘the system’), from a company I’ll call “A”, using an eight-year fixed sum loan from Mitsubishi.

In June 2020, Mr P complained to Mitsubishi through a claims management company (“CMC”), he said that he was told by A that the total benefit would cover the overall costs associated with the system within a few years of installation. He says that hasn’t happened, and he’s suffered a financial loss as a result. Mr P 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 of 3 September 2020. It said Mr P had brought his claim more than six years after the cause of action occurred and was out of time to do so bearing in mind the provisions of the Limitation Act. So, it said Mitsubishi had no liability. However, it went on to consider the substance of the claim and complaint and rejected it.

Unhappy with Mitsubishi’s response, Mr P referred his complaint to our service.

On 28 January 2021 Mitsubishi told us that it would pay Mr P £300 in recognition of any confusion caused by its final response, as its intention was to rely on the time limits under the Limitation Act to reject the claim and complaint.

Our Investigator considered Mr P’s complaint, they ultimately thought 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 P and Mitsubishi.
- £300 was fair compensation for any confusion and inconvenience caused.

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

Mr P 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 P 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.
- A would've provided clear information about the benefits of the system in writing on page two of the contract (samples of which it provided to illustrate this).

As the complaint has not been resolved, I've been asked to make a decision. I issued a provisional decision explaining why the complaint was within the jurisdiction of the Financial Ombudsman Service and why I was planning to uphold the complaint.

Mitsubishi responded to say it would not challenge my provisional decision. Mr P did not respond by the deadline I gave. So, because our jurisdiction in this complaint is no longer being challenged, this final decision deals only with the merits of the complaint. And because I've been provided with nothing further to consider, its outcome is in line with that set out 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 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 P.

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

Mr P expanded on this through his CMC who said:

"Our client advises he [first] became aware of [A] when he found a leaflet that had been put through his letterbox. He advises that when he read it he said to his wife he had seen Solar Panels advertised on tv and it might be worth looking into. He rang the number on the leaflet and arranged an appointment for a salesman to come out and see them.

The Salesman attended and spent around 1 hour at the property. Our client advises that during this time he explained the benefits of the solar panels and he wrote down on a notepad the figures for the electricity savings and FIT savings. Our client advises whilst all these figures were written down by the salesman he did not leave [a copy of this] with him. When the salesman eventually told our client the cost of the system our client advises he told him he could not afford it and then the salesman advised him of the finance option and the cost of same.

Our client advises he was concerned about entering into finance as he was 75 years old at the time and only had [income from] his pensions. He advises that he told the salesman this but he says that the salesman said if you look at the savings the system will make there will be more than enough to cover the cost of the finance. Our client advises that the salesman was very convincing and he decided to proceed."

So, it appears that Mr P was persuaded to proceed on the basis of what he was told. I've looked at the documents provided by Mr P to see if there was anything contained within it that made it clear that the solar panel system wouldn't be self-funding or otherwise contradicted what he recalls being told.

The loan agreement sets out Mr P's responsibilities for repaying the loan 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 P's name to solely purchase the system sold by A. But the loan agreement understandably contains no mention of the income or savings that may be generated. Neither does the one-page contract provided by Mr P.

The contract Mr P has provided shows the purchase price of the system but does not provide any information on its benefits.

So, there was no way for Mr P to compare, using the loan agreement and contract, his total costs against the financial benefits he was allegedly being promised. Given this, when making his decision to go ahead with the purchase, Mr P would have looked to A's representative to help him understand how much the panels would cost and how that would compare to the benefits of the system.

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 P has sent to us, I can see that it is a completely different document. I'm also mindful that the examples Mitsubishi provided show the information was input in an inconsistent manner and in one instance the electricity savings were unrealistically high. So, I don't think the sample documents sent to us by Mitsubishi are particularly relevant to this complaint or indicate that Mr P would've received a document clearly showing the system benefits which would not cover the costs of purchasing the system.

I have seen no definitive evidence that the benefits were accurately explained to Mr P in any documentation from the time of the sale. So, I still think that Mr P would have looked to A's representative to help him understand how much the panels would cost, what they would bring in and how much he would benefit from the system in order for him to make a decision.

And 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. It's not clear when those issues were resolved. Mr P purchased his system about 8 months after the disciplinary hearing.

Whilst 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 P's complaint some months before he was sold his system. So, it appears that Mr P left the sales meeting having agreed to an interest-bearing loan, with a monthly repayment of around £129, 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 P'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 reassurances he's said he received from A.

I have noted that our investigator thought that Mr P's testimony seemed persuasive and explained why they thought that in their assessment and 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 £1,548 per year. Mr P's system has generated more electricity than expected but was never likely to and has not produced that level of benefit..

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

Considering Mr P'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 P a false and misleading impression of the self-funding nature of the solar panel system. On balance, I find Mr P'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 P 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 P went into the transaction. Either way, I think A's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr P'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 P 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 P 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.

The s.75 complaint

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 P's s.75 complaint. Furthermore, this doesn't stop me from reaching a fair outcome in the circumstances.

Fair compensation

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

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 P received from the solar panel system over the eight-year term of the loan, so he pays no more than that. To do that, I think it's important to consider the benefit Mr P received by way of FIT payments as well as through energy savings. Mr P may need to supply up to date details to help Mitsubishi make that calculation. But Mitsubishi can and should use assumptions when that information is not available.

Normally, by recalculating the loan this way, Mr P'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 P 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.

Mitsubishi said it would pay Mr P £300 in recognition of the confusion and inconvenience caused by its final response to the claim/complaint. I think this is fair and reasonable. So it should make this payment if it hasn't already done so.

My final decision

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

- Calculate the total payments (including any advance payment/deposit and admin fees) Mr P has made towards the solar panel system up until the date of settlement – A
- Use Mr P's meter readings and (where available) bills and FIT statements, to work out the benefits he received up until the end of the original loan term* – B
- Calculate the difference between what Mr P actually paid (A), and what he should have paid (B), adding 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 P
- If it hasn't already done so, pay Mr P £300 additional compensation in recognition of the confusion and inconvenience caused by its final response to the claim/complaint.

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

** If Mitsubishi HC Capital UK Plc trading as Hitachi Capital Consumer Finance considers that it's required by HM Revenue & Customs to deduct income tax from the interest, it should tell Mr P how much it's deducted. It should also give Mr P 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 P to accept or reject my decision before 14 October 2024.

Phillip Lai-Fang
Ombudsman