DRN-5040270

The complaint

Mr B has complained about the way Mitsubishi HC Capital UK Plc ("MHCC") responded to claims he'd made under the Consumer Credit Act 1974 (the "CCA").

Mr B has been represented in bringing his complaint but, to keep things simple, I'll refer to Mr B throughout.

What happened

In April 2014 Mr B entered into a fixed sum loan agreement with MHCC to pay for a £8,611 solar panel system ("the system") from a supplier I'll call "S". The total amount payable under the agreement was £12,843.60 and it was to be paid back with 120 monthly payments of £107.03.

There was a variation of contract signed on 7 May 2014 which indicated the system was going to be amended from 8 panels to 6 and would cost £7,578. This form said there would be an annual predicted energy performance and energy saving of 1,246kWh. It looks like the system was installed in June 2014 and the estimated annual generation was 1,689kWh. MHCC has said 8 panels were installed, and the fixed sum loan agreement wasn't changed, so I think the variation didn't go ahead.

Mr B put in a claim and complaint with MHCC in September 2020 saying S misled him that the system would cover cost of the finance agreement. Mr B said he wouldn't have entered into the agreement had S not misled him about the benefits of the system. He also said S breached various rules and guidance set out in the Financial Conduct Authority's (FCA) handbook.

MHCC responded to the complaint in November 2020 pursuant to sections 56, 75 and 140A of the CCA. It said the complaint was time-barred. But notwithstanding what it said about the time limits it said it couldn't properly respond to complaint because of its vagueness. It said the contract that was supplied wasn't correct. It said on request of the electricity statements it was told Mr B hadn't registered for Feed-in-Tariff (FIT) payments and that this had never been brought to its attention. It said it wasn't going to uphold the complaint. Mr B decided to refer it to the Financial Ombudsman.

After the complaint was referred to the Financial Ombudsman MHCC offered Mr B £370 for causing some confusion in its response to the complaint.

One of our investigators looked into things and said, in summary:

- Given the s.75 claim was more likely to be time barred under the Limitation Act 1980 (the "LA"), MHCC'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 B and MHCC.

Our investigator recommended MHCC recalculate the loan based on the known and assumed savings from the system over the term of the loan, so Mr B pays no more than that and he keeps the system. She also said MHCC should pay £100 compensation for the trouble and upset caused.

MHCC didn't accept the view. In summary, it said:

- The complaint was brought more than six years after the events complained of, so outside the time limits which apply to the jurisdiction of the Financial Ombudsman.
- Mr B only raised a claim under s75. Even if he'd included allegations of an unfair relationship under s.140A, those allegations don't relate to any events post-dating the sale of the system in April 2014.
- The end of a credit relationship may be the starting point for limitation purposes in civil litigation, but it isn't the starting point for the six-year period under DISP 2.8.2R(2)(a), where the unfair relationship itself would not constitute an event. It is the event(s) giving rise to an unfair relationship which are the "events complained of" for the purposes of that rule.
- Without prejudice to its position on jurisdiction it considers the approach to redress should be in accordance with the court decision in *Hodgson v Creation Consumer Finance Limited* [2021] EWHC 2167 (Comm) ("Hodgson*").*

MHCC reviewed the case further and said it reviewed S's website from around the time Mr B bought the system and said it didn't state the benefits of the system would cover the cost of the loan within the loan term. It said Mr B hadn't supplied point of sale documentation that supported his arguments. It said it was aware from previous complaints that S supplied lots of information to customers at the point of sale, including a quote and projections document. It said S would have sent details to Mr B to register for FIT, along with a handover pack that included a cancellation form. It said it didn't agree Mr B wasn't supplied documentation. And it noted no evidence had been provided for why Mr B didn't contact S to discuss not receiving FIT payments.

I issued a provisional decision and set out the reasons the complaint was within our jurisdiction. Neither party objected to what I said, so I'm not going to set it out again. For the merits of the complaint, my provisional decision said:

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 MHCC 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 MHCC was responsible under s.56 when considering whether it is likely MHCC had acted fairly and reasonably towards Mr B.

But in doing so, I should take into account all the circumstances and consider whether a court would likely find the relationship with MHCC was unfair under s.140A.

What happened?

Mr B says he was verbally misled that the system would effectively pay for itself. So I've taken account of what Mr B says he was told. I've also reviewed the documentation that I've been supplied.

The fixed sum loan agreement sets out the amount being borrowed; the interest charged; the total amount payable; the term; and the contractual monthly loan repayments. I think this was set out clearly enough for Mr B to be able to understand what was required to be repaid towards the agreement. But it doesn't set out any of the estimated benefits of the system.

Mr B has only been able to supply limited documentation from the point of sale. He's supplied a variation of contract that I think was signed a week or so after he signed the fixed sum loan. But it doesn't seem as though the amendment to the contract actually went through. Mr B supplied a satisfaction note that was signed around the date S installed the system. But I've not seen any documents that were supplied that set out the estimated benefits of the system. I've not seen there was an easy way for Mr B to be able to compare his total costs against the benefit of the system based on the documentation he's supplied. It's also curious the system went from an 8 panel system, to a 6 panel system and then back to an 8 panel system.

I've reviewed S's website from around the time Mr B bought the system. I can see statements on the website included:

> *If you were told that every time you used electricity in your home or business you could be paid for it, you would probably think that was ridiculous.*
>
> *But under a new government scheme your electricity provider will pay you back for the green energy you produce. Solar panels are an even more viable alternative to the environmentally damaging and expensive fossil fuels presently used.*
> *…*
> *A government "feed-in tariff" scheme pays you for the electricity you produce – an estimated £900 a year for your solar energy – in addition to your electricity bill savings.*
> *…*
> *If your solar panels produce more electricity than you use, it goes back into the national grid for other people and you get paid for this, too. This is tax free and rises with inflation.*
>
> *You'll receive a serious return on your investment as the savings and energy cashback will eventually cover the installation – and more. Your installed energy meter will tell you just how much you are saving.*

The flyer Mr B supplied from S sets out, amongst other things:

- *Make huge savings on your electricity bill*
- *Receive a great return on your investment*
- *Earn hundreds of pounds in income p/a*

I think it follows that if the website and flyer emphasise the benefits of a solar panel system, it's likely this would have been a central part of S's conversation when selling the product.

And, in line with what the website said, if Mr B was led to believe by S he'd make savings on his electricity bills along with earning around £900 a year from FIT payments, I think it's reasonable he may have thought the system would be self-funding within the loan term.

It's curious it doesn't look like Mr B has registered for FIT payments. If that is not right, he can let us know in response to this provisional decision. However, if he's not been registered for FIT, I've not been able to establish this was because of something S did wrong.

However, even had Mr B been receiving FIT payments, based on reasonably known calculations for a system yielding around 1,689kWh annually, it's not even clear the system would have paid for itself within 25 years, which is around the lifespan of the panels. So it would be difficult to understand why this would have seemed like an appealing purchase for Mr B. And I think it makes it less fair to describe Mr B's system as one that would give a serious or great return on his investment if it's unlikely to have paid for itself over 25 years.

I've not seen anything to indicate Mr B had an interest in purchasing solar panels before S contacted him. Mr B has said he only agreed to the purchase because S told him the system would be self-funding. The loan is a costly and long-term commitment. I'm mindful it would be difficult to understand why, in this particular case, Mr B would have agreed to the installation if his monthly outgoings would increase significantly, and if he wasn't going to receive a return in line with what I've set out above.

Taking into account the circumstances I've set out above, I think Mr B's allegations seem plausible and convincing.

For the solar panels to be self-funding, they'd need to produce a combined savings and FIT income of over £1,250 per year. But I've not seen anything to suggest Mr B achieved the benefits required to make the system self-funding within the term of the agreement (even had he been receiving FIT payments). I therefore find the representations that were likely made weren't true. Whilst there are elements of the calculations that had to be estimated, the amount of sunlight as an example, I think the salesperson ought to have known this and made it clear the system wouldn't have produced enough benefits to cover the overall cost of the fixed sum loan agreement.

Considering Mr B's account about what he was told, the estimated cost and benefit highlighted above, and the information on S's website, I think it likely S gave Mr B a false and misleading impression of the self-funding nature of the system.

I consider S's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Mr B 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 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 B went into the transaction. Either way, I think S's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr B's point of view.

Would the court be likely to make a finding of unfairness under s.140A

Where MHCC is to be treated as responsible for S's negotiations with Mr B 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 B and MHCC 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 MHCC has benefitted from the interest paid on a loan he would otherwise have not taken out.

The s.75 complaint and additional s.140A complaint points

Given my findings above I'm not proposing to provide a detailed analysis of Mr B's s.75 complaint and also his other s.140A complaint points.

This doesn't stop me from reaching a fair outcome in the circumstances, and I'm mindful the purpose of my decision is to provide a fair outcome quickly with minimal formality.

Fair compensation

In all the circumstances I consider that fair compensation should aim to remedy the unfairness of Mr B and MHCC's relationship arising out of S's misleading and false assurances as to the self-funding nature of the solar panel system. MHCC should repay Mr B a sum that corresponds to the outcome he could reasonably have expected as a result of S's assurances. That is, that Mr B's loan repayments should amount to no more than the financial benefits he received for the duration of the loan agreement. Given I've not been able to determine Mr B has not received FIT payments as a result of something S did wrong, I think it's fair for MHCC to use the expected benefits Mr B was likely to have received.

MHCC told us that it considers our approach to redress should be in accordance with the court's decision in 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 B's expectation of what he would receive. I consider Mr B has lost out, and has suffered unfairness in his relationship with MHCC, to the extent that his loan repayments to MHCC exceed the benefits from the solar panels. On that basis, I believe my determination results in fair compensation for Mr B.

MHCC 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, MHCC should recalculate the agreement based on the known and/or assumed savings and income Mr B received (or ought to have received) from the solar panel system over the 10-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 B received (or ought to have received) by way of FIT payments as well as through energy savings. If required, Mr B will need to supply up to date details, where available, of all FIT benefits received, electricity bills and current meter readings to MHCC.

Seeing as though I understand Mr B now should have repaid the agreement, I think there's only one viable option for redress.

Finally, our investigator recommended £100 compensation, but as I think MHCC offered £370 for not fully responding to the claim I'm not proposing it needs to do that. But, to the extent it's not done so already, it should pay Mr B £370.

I can't see either party has submitted anything materially new for me to consider.

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.

Seeing as though I've not received anything new to consider, I see no reason to depart from the conclusions I reached in my provisional decision.

My final decision

For the reasons I have explained, my final decision is that I uphold Mr B's complaint and direct Mitsubishi HC Capital UK Plc to

- Calculate the total payments Mr B has made towards the solar panel system – A
- Use Mr B's bills and FIT statements (if applicable) to work out the benefits he received from the start date of the loan, up until the end of the term* – B
- Use B to recalculate what Mr B should have paid each month towards the loan over that period and calculate the difference, between what he actually paid (A), and what he should have paid, applying 8% simple annual interest to any overpayment from the date of payment until the date of settlement** – C
- Reimburse C to Mr B
- Pay Mr B £370, to the extent it's not done so already.

*If Mr B has not received FIT benefits, I am satisfied MHCC can complete the calculation I have directed it to follow in the circumstances for part B using known and reasonably assumed benefits taking into account the estimated yield of the system (1,689kWh annually).

**If MHCC considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr B how much it's taken off. It should also give Mr B 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 B to accept or reject my decision before 22 October 2024.

Simon Wingfield
Ombudsman