DRN-5045501

The complaint

Mrs P has complained about the way Mitsubishi HC Capital UK Plc ("Hitachi") dealt with her claim she'd made in relation to misrepresentation, breach of contract, and an alleged unfair relationship taking into account section 140A ("s.140A") of the Consumer Credit Act 1974 (the "CCA").

Mrs P has been represented in bringing her complaint but, to keep things simple, I'll refer to Mrs P throughout.

What happened

In September 2013, Mrs P entered into a fixed sum loan agreement with Hitachi to pay for a £9,400 solar panel system ("the system") from a supplier I'll call "H". The total amount payable under the agreement was £13,901.60 and it was due to be paid back with 120 monthly repayments of £112.23. This included the £434 deposit that Mrs P paid. The most recent update from Hitachi in March 2023, is that Mrs P still owed a balance, although it's now likely the loan has been repaid.

In November 2021 Mrs P sent a letter of claim to Hitachi explaining the system had been mis-sold to her due to misrepresentation by H.

Mrs P said H told her she'd be paid for the electricity the system generated through the government's Feed in Tariff (FIT) payments and that the system would be self-funding. She said H told her the system would be maintenance free with a 40-year life expectancy and her energy bills and household overheads would go down.

Finally, Mrs P said the system was misrepresented and believed the statements and several other actions at the time of the sale created an unfair relationship between herself and Hitachi.

Hitachi sent its first final response letter in January 2022 to say it wasn't going to uphold the complaint because it conducted adequate affordability checks before lending to Mrs P. It also said that it wouldn't be considering the complaint about Section 75 (s.75) because it was made too late and so falls outside of the Limitations Act (LA). It also disagreed with Mrs P's claim about s.140.

Unhappy with Hitachi's response, Mrs P decided to refer her complaint to the Financial Ombudsman in March 2022.

Hitachi then issued a second final response letter in February 2023, saying it couldn't help Mrs P in relation to the s.75 complaint and it wouldn't take it forward as the claim expired six years after the event – so in 2019 and this is in line with the LA.

One of our investigators looked into things. Firstly, they considered the Financial Ombudsman had jurisdiction to consider the complaint and they concluded the relationship was unfair considering s.140A and it was still ongoing when the complaint was made and so the complaint was made within the relevant time limits. They then went on to consider the

merits. The investigator also didn't make a finding about Mrs P's complaint about her claim under s.75 because they were satisfied the claim could be considered under s.140A.

The investigator concluded Mrs P was likely told the system was self-funding over the course of the loan term, and so they thought H had misrepresented it. They thought a court would likely find the relationship between Mrs P and Hitachi was unfair and that she'd suffered a loss through entering into the agreement.

In order to put things right, they thought Hitachi should recalculate the loan based on known and assumed savings and income over the course of the loan so that Mrs P pays no more than that, and she keeps the system.

Mrs P accepted the view, but Hitachi didn't. In summary, Hitachi said:

- The complaint was brought more than six years after the events complained about, so outside the time limits which apply to the jurisdiction of the Financial Ombudsman.
- It therefore follows that as the events complained about more than six years before the complaint was made the Financial Ombudsman should decline to deal with the complaint.
- Mrs P's allegations of an unfair relationship don't relate to any events post-dating the sale of the system in September 2013.
- 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").

These comments didn't change the investigator's mind about the outcome, and as no agreement could be reached the complaint was passed to me to decide. I then issued my provisional decision explaining the reasons why I was intending to uphold Mrs P's complaint. Both parties were given an opportunity to provide any further submissions.

Mrs P's representative responded to say they agreed with the provisional decision. Hitachi initially didn't agree with the provisional decision saying in summary that Mrs P's recollection of what happened at the time of sale were generic and not specific.

Following, a review of Hitachi's comments, further information was sought and received from Mrs P about her situation at the time as well as what she was told by H. This testimony was then presented to Hitachi – at which point it said that it agreed with the provisional decision that I had made.

A copy of the provisional findings follows this in smaller font and forms part of this final decision. The provisional decision should be read in conjunction with findings section below.

What I said in my provisional decision:

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

My findings on jurisdiction

I'm satisfied I have jurisdiction to consider Mrs P's complaint, both in respect of the refusal by Hitachi to accept and pay her s.75 claim and the allegations of an unfair relationship under s.140A.

I appreciate the investigator didn't review the s.75 claim as part of their assessment, but for completeness, I have considered it as part of this complaint because it did fall part of Mrs P's original complaint.

The s.75 complaint

Where Hitachi exercises its right and duties as a creditor under a credit agreement it is carrying out a regulated activity within scope of our compulsory jurisdiction under Article 60B(2) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the "RAO"). In undertaking that activity, the creditor must honour liabilities to the debtor. So, if a debtor advances a valid s.75 claim in respect of the credit agreement, the creditor has to honour that liability and failing or refusing to do so comes under our compulsory jurisdiction. Hitachi argues that the event complained of when the matter is brought to our service occurred as and when the supplier caused the alleged s.75 liability to arise in the first place.

I disagree: the lender's s.75 liability in damages doesn't arise as a result of any act or omission of the lender in performing a regulated activity – it is simply a claim given by statute to the borrower against the lender. And it arises from the acts or omissions of a third party, the supplier. Only when and if that claim is presented by the borrower to the lender must the lender do anything about it, which is to honour its statutory liability by paying the claim if it is a valid one. Until then, the lender's acts and omissions are simply to have lent money to the borrower at the borrower's request, and that is not the matter complained about.

So, when a borrower brings a complaint to the Financial Ombudsman alleging that they were due money under s.75 which the lender has refused to pay, the "event complained of" in such circumstances isn't the supplier's conduct; it is the lender's refusal to honour its alleged statutory liability when the borrower made the claim.

In this case, Hitachi rolled up its consideration of Mrs P's claim into a letter that both explained why it would not be paying the claim and treated Mrs P as having brought a complaint which she was entitled to refer to our service. So, its refusal to accept and pay the s.75 claim was contained in a final response letter in January 2022, in which it told Mrs P she could refer his complaint to our service within 6 months.

In those circumstances, because Hitachi's letter dated January 2022 rejected Mrs P's claim under s.75 (which Mrs P says is valid) it constituted "the event complained of". It also set out Hitachi's response to any complaint that flowed from this and invited Mrs P to refer that complaint to our service if she was dissatisfied with the outcome. Hitachi could have separated those stages, waited for Mrs P to complain that the s.75 claim had not been accepted and honoured, and only then issued its final response letter. Instead, it followed the same practice that many other lenders adopt by allowing Mrs P to refer the matter directly to the ombudsman service, by way of treating it as a complaint.

It was Hitachi's choice to roll the answer to the s.75 claim into a final response letter in the way that I've described. That was a reasonable and pragmatic way of proceeding, because the issues between the parties on this part of Mrs P's complaint were whether it was fair and reasonable for Hitachi to reject Mrs P's s.75 claim, as they remain to this day.

The unfair relationship under s.140A complaint

I have also considered Hitachi's arguments in its response on our jurisdiction over the complaint about an unfair relationship under s.140A. I am satisfied this aspect of the complaint was brought in time so that the Financial Ombudsman has jurisdiction.

Mrs P is able to make a complaint about an unfair relationship between herself and Hitachi per s.140A. The event complained of for the purposes of DISP 2.8.2R(2)(a) is Hitachi's participation, for so long as the credit relationship continued, in an allegedly unfair relationship with her. This accords with the court's approach to assessing unfair relationships – the assessment is performed as at the date when the credit relationship ended: Smith v Royal Bank of Scotland plc [2023] UKSC 34.

S.140A doesn't impose a liability to pay a sum of money in the same way as s.75. Rather, it sets out the basis for treating relationships between creditors and debtors as unfair. Under

s.140A a court can find a debtor-creditor relationship is unfair, because of the terms of the credit agreement and any related agreement, how the creditor exercised or enforced their rights under these agreements, and anything done or not done by the supplier on the creditor's behalf before or after the making of a credit agreement or any related agreement. A court must make its determination under s.140A with regard to all matters it thinks relevant, including matters relating to the creditor and matters relating to the debtor.

The High Court's judgment in Patel v Patel [2009] EWHC 3264 QB established that determining whether the relationship complained of was unfair has to be made "having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination". The time for making determination in the case of an existing relationship is the date of trial, if the credit relationship is still alive at trial, or otherwise the date when the credit relationship ended. This judgment has recently been approved by the Supreme Court in Smith v Royal Bank of Scotland Plc [2023] UKSC 34 ('Smith').

Throughout the period of the credit agreement, a creditor should conduct its relationship with the borrower fairly, including by taking corrective measures. In particular, the creditor should take the steps which it would be reasonable to expect it to take in the interest of fairness to reverse the consequences of unfairness, so that the relationship can no longer be regarded as unfair: see Smith at [27]-[29] and [66]. Whether that has, or has not, been done by the creditor is a consideration in whether such an unfair relationship was in existence for the purposes of s.140A when the relationship ended.

In other words, determining whether there is or was an unfair credit relationship isn't just a question of deciding whether a credit relationship was unfair when it started. The question is whether it was still unfair when it ended; or, if the relationship is still ongoing, whether it is still unfair at the time of considering its fairness. That requires paying regard to the whole relationship and matters relevant to it right up to that point, including the extent to which the creditor has fulfilled is responsibility to correct unfairness in the relationship.

In Mrs P's case the relationship was ongoing when she referred the complaint to the Financial Ombudsman. At the time, Hitachi was responsible for the matters which made its relationship with Mrs P unfair and for taking steps to remove the source of that unfairness or mitigate its consequences so that the relationship was no longer unfair. By relying in her complaint on the unfairness of the credit relationship between herself and Hitachi, Mrs P therefore complained about an event that was ongoing at the time she referred his complaint to the Financial Ombudsman.

Therefore, taking into account DISP 2.8.2R(2)(a), I am satisfied it has been brought in time. I am otherwise satisfied the complaint is within the Financial Ombudsman's jurisdiction to consider and it's not necessary to consider whether Mrs P's complaint has been brought in time for the purposes of the alternative three-year rule under DISP 2.8.2R(2)(b).

Merits

The unfair relationship under s.140A complaint

When considering whether representations and contractual promises by H 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 H to be the agent of Hitachi 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 H for which Hitachi was responsible under s.56 when considering whether it is likely Hitachi had acted fairly and reasonably towards Mrs P. But in doing so, I should take into account all the circumstances and consider whether a court would likely find the relationship with Hitachi was unfair under s.140A.

What happened

Mrs P says she was verbally misled that the system would effectively pay for itself because she was told he would get free electricity in the day and even if Mrs P had used all the power generated she would also receive money from her energy supplier. I've taken account of what Mrs P says she was told, and I've reviewed all the documentation that I've been supplied.

The fixed sum loan agreement which has been provided 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 Mrs P to be able to understand what was required to be repaid towards the agreement. However, this agreement doesn't provide Mrs P with any information about the performance of the system or the savings she may be able to receive.

I haven't seen any evidence Mrs P had any prior interest in purchasing solar panels before H sold her the system.

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

We've asked if there was other documentation from the point of sale, and Mrs P has provided everything that she has – which isn't a lot. The only documentation she's provided apart from a copy of the loan agreement is a contract between herself and H. The document isn't entirely legible but I can see that the system was made up of 14 panels and had a "SAP Calculation" of 2524kWh.

But this SAP calculation on its own is meaningless and doesn't give Mrs P any information as to the value of the payments she may receive through the FIT scheme or what her energy saving maybe. There isn't enough information in this document to have enabled Mrs P to compare the total costs against the financial benefits she was allegedly being promised. Given the original contract doesn't contain information about the benefits, Mrs P would have looked to H's representative to help her understand how much the panels would cost, what they would bring in and how much she would benefit from the system.

However, with no prior interest in solar panels Mrs P, who was working at the time left the meetings with H having agreed to enter a significant commitment with Hitachi with a monthly repayment of £112.23, payable for 10 years.

Given her lack of prior interest and the financial burden she took on, I find Mrs P's account of what she was told by H, credible and persuasive. The loan is a long-term commitment, I can't see why she would have seen this purchase appealing had she not been given the reassurances she's said she received from H. Also, Hitachi hasn't provided evidence to dispute what Mrs P's said happened.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £1,346.76 per year.

I have not seen anything to indicate Mrs P's system was not performing as expected but based on the information provided by Mrs P the system doesn't appear to have produced this. So, these statements were not true. I think H's representative must reasonably have been aware that Mrs P's system would not have produced benefits at this level. Whilst there are elements of the calculations that had to be estimated, the amount of sunlight as an

example, I think H's representative would have known that Mrs P's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to Mrs P.

Considering Mrs P's account about what she was told, the documentation she was shown at the time of the sale, and the fact Hitachi hasn't disputed these facts, I think it's likely H gave Mrs P a false and misleading impression of the self-funding nature of the solar panel system.

I consider H's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Mrs P was expected to receive by agreeing to the installation of the system. I consider that H'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 Mrs P went into the transaction. Either way, I think H's assurances were seriously misleading and false, undermining the purpose of the transaction from Mrs P's point of view.

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

Where Hitachi is to be treated as responsible for H's negotiations with Mrs 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 Mrs P and Hitachi was unfair.

Because of this shortfall between his costs and the actual benefits, each month she has had to pay more than he expected to cover the difference between the solar benefits and the cost of the loan. So, clearly Hitachi has benefitted from the interest paid on a loan she 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 Mrs 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 fair compensation should aim to remedy the unfairness of Mrs P and Hitachi's relationship arising out of H's misleading and false assurances as to the self-funding nature of the solar panel system. Hitachi should repay Mrs P a sum that corresponds to the outcome she could reasonably have expected as a result of H's assurances. That is, that Mrs P's loan repayments should amount to no more than the financial benefits she received for the duration of the loan agreement.

Hitachi told us that it considers our approach to redress should be in accordance with the Court's decision in Hodgson. I have considered this 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 system. And even if I am wrong about that I am satisfied the assurances were such that fair compensation should be based on Mrs P's expectation of what she would receive. I consider Mrs P has lost out, and has suffered unfairness in her relationship with Hitachi, to the extent that her loan repayments to it exceed the benefits from the solar panels. On that basis, I believe my determination results in fair compensation for Mrs P.

Hitachi 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, Hitachi should recalculate the agreement based on the known and assumed savings and income Mrs P received from the system over the 10-year term of the loan, so she pays no more than that. To do that, I think it's important to consider the benefit Mrs P received by way of FIT payments as well as through energy savings. Mrs P will need to supply up to date details of all FIT benefits received, electricity bills and current meter readings to Hitachi.

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.

Mrs P accepted the findings that I outlined in the provisional decision, and which can be found above. Hitachi, having received and considered Mrs P's further testimony has now accepted the findings I made in the provisional decision.

As both parties have accepted the findings, I see no reason to depart from them and I still think Mrs P's complaint should be upheld for the reasons given in my provisional decision which can be found above. I uphold Mrs P's complaint.

I've set out below what Hitachi needs to do, and what it has agreed to do in order to put things right for Mrs P.

Putting things right

For the reasons I have explained, I uphold Mrs P's complaint and direct Mitsubishi HC Capital UK Plc

- Calculate the total payments (the deposit and monthly repayments) Mrs P has made towards the solar panel system up until the end of the loan term – A
- Use Mrs P's bills and FIT statements to work out the benefits she received up until the end of the loan term* – B
- Use B to recalculate what Mrs P should have paid each month towards the loan over that period and calculate the difference, between what she actually paid (A), and what she should have paid, applying 8% simple annual interest to any overpayment from the date of each payment until the date of settlement** – C
- Reimburse C to Mrs P

*Where Mrs P has not been able to provide all the details of her meter readings, electricity bills and/or FIT benefits, I am satisfied she has provided sufficient information in order for Hitachi to complete the calculation I have directed it follow in the circumstances 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 that interest, it should tell Mrs P how much it's taken off. It should also give Mrs P a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

My final decision

For the reasons I've explained above and in the provisional decision, I'm upholding Mrs P's complaint.

Mitsubishi HC Capital UK Plc should put things right for Mrs P as directed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs P to accept or reject my decision before 20 February 2025.

Robert Walker
Ombudsman