DRN-5051727

The complaint

Mr R 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 2012, Mr R agreed to purchase a solar panel system ('the system'), from a company I'll call "A", using an eight-year fixed sum loan from Mitsubishi. The system was installed in January 2013. Mr R finished paying off the loan in February 2021.

In August 2021, Mr R complained to Mitsubishi through a claims management company ("CMC"). Mr R said that he was told by A that his relationship with Mitsubishi was unfair because A had told him the system would pay for itself in seven years and the monthly income and savings would cover the monthly loan repayments. However, that hasn't happened, and as a result he's suffered a financial loss. While this was a claim under s.75, he also said that for various reasons, including what happened at the time of sale, his relationship was unfair taking into account s.140A.

Mitsubishi responded to the complaint in its final response dated 11 October 2021. Mitsubishi rejected the claim and complaint, saying the s.75 claim had been made too late and that its relationship with Mr R was not unfair.

Unhappy with Mitsubishi's response, Mr R referred his complaint to the Financial Ombudsman Service.

Our Investigator contacted Mr R to get further information because the contract showed the system was expected to provide benefits of around £460 per year, which contradicted what was said in the letter of claim. He told the investigator that he didn't really remember much about what was said regarding the cost vs benefit, other than there'd be about £460 benefit per year. And he was given the impression that this would cover a good deal of his electricity bill and be beneficial overall.

Our investigator ultimately thought that an unfair relationship had been created between Mitsubishi and Mr R because:

- The s.140A complaint was one we could look at under our rules and that it had been referred in time.
- Allegations of misrepresentations and breaches of contract could be considered under s.140A, so the Investigator didn't need to consider whether any s.75 claim had been made in time.
- A court would likely find an unfair relationship had been created between Mr R and Mitsubishi because the estimated benefits of the system were based on annual generation of 1,931 kWh but this did not take into account any shading of the solar panels. The MCS certificate showed the installed system was expected to generate

only 1,643 kWh per year, but Mr R's generation meter showed it had actually generated much less than this, around 1,200 kWh per year.

Our Investigator recommended that Mr R keep the system and Mitsubishi should pay Mr R compensation based on the difference between the benefits he was told the system would generate and what it actually generated for the lifetime of the system (25 years), plus £100 compensation for the trouble and upset caused.

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 the complaint has not been resolved, I've been asked to make a decision on the complaint. I issued a provisional decision explaining why I think this complaint is within the jurisdiction of the Financial Ombudsman Service and that it should be upheld.

Mitsubishi responded to say it had nothing further to add. Neither Mr R nor the CMC responded by the deadline. So, my final decision 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.

For the reasons set out in my provisional decision, which I repeat below, I uphold this complaint.

My findings on jurisdiction

I'm satisfied I have jurisdiction to consider Mr R's complaint, both in respect of the refusal by Mitsubishi to accept and pay his s.75 claim and the allegations of an unfair relationship under s.140A.

<u>The s.75 complaint</u>

The ombudsman service's jurisdiction over complaints that a business is liable under s.75 is based upon the lender's failure to honour its liability when the borrower makes a valid claim under that section.

When a borrower under a regulated credit agreement seeks payment from the lender of the damages they have suffered under a connected transaction because of something done or said by the supplier, the lender may or may not have a liability to the borrower under s.75.

But if the borrower's claim is valid, the lender should honour its liability – and its failure to do so is a matter to which the Financial Ombudsman's jurisdiction extends. That is because it is part of the lender's regulated activities to exercise its duties under a regulated credit agreement – and a complaint about a firm's acts or omissions in carrying on a regulated activity (or any ancillary activity carried on by the firm in connection with a regulated activity) come with our jurisdiction under DISP 2.3.1R.

Mitsubishi 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 our service 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 or failure to honour its alleged statutory liability when the borrower made the claim.

Mitsubishi did not accept the s.75 claim in its letter on 11 October 2021, this constituted the "event complained of". Furthermore, in its letter treated Mr R as having brought a complaint which he was entitled to refer to our service.

Here Mr R brought his complaint to the ombudsman service on 25 October 2021. Given this, I'm satisfied his complaint in relation to the s.75 claim was brought in time for the purposes of our jurisdiction.

The unfair relationship under s.140A complaint

I am also satisfied the complaint about an unfair relationship under s.140A was brought in time so that the ombudsman service had jurisdiction. Section 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 creditor or the supplier on the creditor's behalf before or after the making of the 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 Courts have 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.

The Courts have also determined that 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 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. 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 this case Mitsubishi has said Mr R's relationship ended with it on 15 February 2021, so Mitsubishi is responsible for the matters which made its relationship with Mr R unfair and for taking steps to retrospectively remove the source of that unfairness so that the relationship is no longer unfair. By relying in his complaint on the unfairness of the credit relationship between himself and Mitsubishi, Mr R is therefore complaining about an event which ended on 15 February 2021, namely that Mitsubishi participated in and perpetuated an unfair credit relationship with him.

Mr R referred his complaint to the ombudsman service on 25 October 2021, so, taking into account DISP 2.8.2R(2)(a), I am satisfied that he is not prevented from bringing his complaint to the ombudsman service by the 'six-year' rule. I am otherwise satisfied the complaint is within the ombudsman service's jurisdiction to consider.

In these circumstances, I don't consider it necessary to make findings about whether Mr R's complaint has been brought in time for the purposes of the alternative three-year rule under DISP 2.8.2R(2)(b).

My findings on the merits 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 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

I have decided to uphold this complaint because the contract shows that Mr R agreed to purchase a solar panel system capable of generating 1,931.4 kWh per year, with estimated benefits in the first year of around £460 through income and savings. But the MCS certificate shows the system that was actually installed was expected to generate only 1,643.4 kWh That is significantly less.

Sometimes an installed system will be different to the one on the contract due to technical issues with the installation, such as there not being enough space for the number of solar panels quoted. But I can see from publicly available satellite images of Mr R's home that the same number of solar panels were installed as was shown on the contract.

Where the expected output of a system changes from what's shown on the contract, there is usually a contract amendment and updated estimated benefits that is agreed by the customer – usually through a signed contract amendment form. I asked Mr R about this, but he says this wasn't discussed with him, the contract was not amended, he received no updated benefit estimates and no refund in light of the changes. On the face of it, that suggests that the system installed is not the one Mr R agreed to purchase.

In any case, the system has actually generated much less electricity than shown on the MCS certificate as well. So, even if I was satisfied that there was most likely a contract amendment and Mr R ought reasonably to have been aware of the change, he still didn't receive a system capable of generating even 1,643.4 kWh per year.

The MCS certificate confirms the system was commissioned on 21 January 2013 – meaning the installation was completed and it started generating electricity that day. Mr R's FIT statements show that by 31 January 2019 the system had generated 6,412 kWh. This is an average over six years of just 1,063 kWh per year.

Mr R says that in 2020 the system was updated to improve its performance. But between 31 January 2022 and 31 January 2024, the system has generated 2,522 kWh, an average over two years of 1,220 kWh per year.

This means that the system has generated only 55% of the expected electricity compared to the amount shown on the contract and 64% of the expected electricity compared to the figure on the MCS certificate. I would expect a system to generate at least 90% of the MCS figure if nothing had gone wrong, and in many cases systems generate more than 100% of the MCS figure. Clearly something has gone wrong here.

Mr R had the system updated in 2020, so I'm satisfied that the issue is not that there is a fault with the system that is ongoing. But a problem with what he was told at the time of sale and the calculations in relation to the generating capacity of the system. That may relate to the effect of shading – the panels being installed on the single storey flat roof adjacent and to the east of the main house which is two storeys. This means that in the afternoon the house will cast a shadow over some of the solar panels, significantly reducing the electricity they will generate. The contract had a space for this to be factored into the calculations, but nothing is written there.

Whatever the cause of the difference between the contract figures and the MCS figure, and what the system has actually generated, I think it likely that A gave Mr R a false and misleading impression of the generating capacity of the system. The calculations of the benefit it would provide in income and savings are derived from the generation figure, so will also be false and misleading.

Mr R says he was told, as it shows on the contract, that he'd benefit by about £460 per year (although it would be more accurate to view this as the first-year benefit, which you'd expect

to increase due to inflation which increases FIT and electricity unit rates), which was a good deal of his electricity bill, and the system would be beneficial overall. And I'm satisfied this was an important factor in him agreeing to the purchase using the loan agreement.

I consider A's misleading presentation went to an important aspect of the transaction for the system, namely the generating capacity, 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 generate the expected amount of electricity and income and savings shown on the contract. 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 a 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 system's capacity to generate the expected amount of electricity and income and savings shown on the contract, 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 expected benefits and the actual benefits, each month Mr R has had to pay more than he expected to cover the difference between his benefits and the loan repayments. So, Mitsubishi has benefitted from the interest paid on a loan that Mr R would not otherwise have 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 R's s.75 complaint. Furthermore, this doesn't stop me from reaching a fair outcome in the circumstances.

Fair compensation

In all the circumstances of this complaint, I consider that 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 think a fair resolution would be for Mitsubishi to compensate Mr R based on the difference between the benefits in income and savings the system was expected to provide and what it actually provided for the duration of the loan term. This is because the unfair relationship ended when the loan was paid off, so I don't think it would be fair to expect Mitsubishi to provide compensation for any losses incurred beyond that point. Mr R will continue to benefits through income for the 20-year FIT payment period and savings on his bills for as long as the system generates electricity.

When thinking about this I have considered what Mr R could reasonably have expected the system to generate in terms of electricity – and whether that is what was shown on the contract or what was shown on the MCS certificate.

I know Mr R saw and signed the contract. And he was provided with the MCS certificate, so ought reasonably to have been aware of what it showed. However, I think it would have been reasonable for A to provide clear information to Mr R about the change from what was

on the contract to what was on the MCS certificate. Mr R says it didn't do that – in fact that A did not point out that anything had changed at all. This implies that Mr R's expectation matches what was shown on the contract.

I'm mindful that the letter of claim and Mr R's recollection of what he was told at the time of sale are different. Mr R told me that he was not aware of this until I pointed it out. But the allegation on the letter of claim does not match Mr R's recollection of what happened, and he ought reasonably to have been aware of that, and to have made sure the letter of claim was accurate in line with his recollection of the sale, given the CMC was making the claim on his behalf. With this in mind, it does give me pause for thought as to what evidential weight I can put on what Mr R has said about the lack of a contract amendment and discussion of the lower generation figure on the MCS certificate.

But, in contrast to this, I'm aware that the Renewable Energy Consumer Code took disciplinary action against A in May 2013. This included a finding that A had failed to provide accurate performance information and predictions and sufficient pre-contract information to a number of customers. So, given those problems with A's sales practices around the time Mr R purchased the system, it is plausible that A may not have been clear with Mr R about the change to the expected generation capacity of the system installed.

I find it hard to conclude that I should use either the contract generation figure or the MCS figure when directing Mitsubishi to calculate the compensation, as either approach feels unfair on one side or the other. In light of this, and in trying to be fair to both Mr R and Mitsubishi, I have concluded that the best way forward is to split the difference – and tell Mitsubishi to base its calculation of the benefits the system was expected to provide on a figure of 1,787.4 kWh in the first year.

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 generating capacity and subsequent benefits 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 there was a larger difference than he expected between his loan repayments to Mitsubishi and the benefits he received from the solar panel system. 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 Financial Ombudsman Service scheme as being one which is intended to be fair, quick, and informal.

Therefore, to resolve the complaint, Mitsubishi should compensate Mr R for the difference between the benefits in income and savings the system was expected to provide (using a figure of 1,787.4 kWh in the first year and using the self-consumption, FIT and electricity unit rates shown on the contract) and the benefits it actually provided for the duration of the loan term. When calculating the expected benefit, Mitsubishi should make reasonable assumptions about how FIT and electricity unit rates would've changed each year based on

what was known at the time of sale (since A would've had to do this if it had provided a year-by-year projection of the benefits).

To help with calculating the actual benefits provided by the system, Mr R will need to provide Mitsubishi with all relevant FIT statements and electricity bills for the period in question (where available). But Mitsubishi can use reasonable assumptions for periods where evidence of the actual benefits is not available.

Mitsubishi's response to the claim covered both the s.75 claim and s140A complaint. While I'm not in agreement with the outcome reached, I'm not persuaded that its response caused any unnecessary trouble and upset such that an award of additional compensation is warranted in this case.

My final decision

For the reasons I have explained I uphold Mr R's complaint. To put things right Mitsubishi HC Capital UK Plc must:

A. Calculate the expected benefits of the system based on a generation figure of 1,784.4 kWh in the first year and the following figures from the contract, plus reasonable assumptions of FIT and electricity unit rate inflation:
    - FIT generation rate of 15.44p per kWh
    - FIT export rate of 4.5p per kWh
    - electricity unit rate of 12p per kWh
    - self-consumption rate of 50%

B. Using (where available[1]) Mr R's FIT statements and electricity bills, calculate the total benefits Mr R received from the solar panel system during the original eight-year loan term – B

C. Pay Mr R a sum equal to: A minus B, plus 8% simple interest per year on that amount calculated from the date the credit agreement ended to the date of settlement of the complaint[2].

D. Upon request, provide Mr R with a copy of its calculations.

[1] For periods where FIT statements and electricity bills are not available, Mitsubishi should make reasonable assumptions in its calculations.

[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 R how much tax it's deducted. It should also give him a tax deduction certificate if he requests 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 4 November 2024.

Phillip Lai-Fang
Ombudsman