

The complaint

Mr L has complained about the way Mitsubishi HC Capital UK Plc (“MHCC”) responded to claims he’d made under section 75 (“s.75”) of the Consumer Credit Act 1974 (the “CCA”) and in relation to allegations of an unfair relationship taking in to account section 140A (“s.140A”) of the CCA.

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

What happened

In June 2013 Mr L entered into a fixed sum loan agreement with MHCC to pay for a £12,229 solar panel system (“the system”) from a supplier I’ll call “H”. From what I’ve seen, the supplier used an installer I’ll call “H2” to install the system. The agreement set out the duration was 96 months and that he was due to pay 84 instalments of £287.23 (including £11,898.32 interest) commencing on 16 June 2014 but if he paid off the agreement before the deferred first payment date, he’d only pay the cash price plus a £29 administration fee.

I understand Mr L decided to pay off the agreement before the deferred first payment date in June 2014, so he paid no interest.

From what I’ve seen, Mr L put in a claim with MHCC on 11 May 2020. He said H told him the system would be fully self-funding within 6 years of the installation. He said he was told the system wouldn’t require maintenance and that he’d make a profit. He requested redress of around £8,000, which included costs for replacing the inverter of around £1,200. He also said that he thought actions at the point of sale created an unfair relationship between himself and MHCC.

MHCC sent a response to the claim on 30 July 2020 to say, in summary, that the claim under s.75 was made out of time. It also said it was clear Mr L was benefitting from the system by receiving income through feed in tariff (FIT) payments and that he was also making savings on energy costs that he’d continue to receive for the life of the system. It didn’t think a misrepresentation or breach of contract had occurred, so it didn’t uphold the claim or complaint.

Unhappy with the response, Mr L referred his complaint to the ombudsman service on 29 January 2021.

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 L and MHCC.

Our investigator recommended MHCC recalculate the loan based on the known and assumed savings from the system over the 96-month term of the loan, so he pays no more than that and he keeps the system. He didn't think MHCC needed to cover the cost of a replacement inverter. He also said MHCC should pay £100 compensation for the impact of not considering Mr L's claim under s.140A.

Mr L agreed with the assessment, but MHCC didn't. 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 L's allegations of an unfair relationship don't relate to any events post-dating the sale of the system in June 2013.
- 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.
- Mr L had not brought a complaint about MHCC's handling of his s.75 claim and it did not issue a final response letter in relation to one.
- The investigator conflates the jurisdiction rules on the Financial Ombudsman's time limits for bringing complaints under DISP 2.8.2R(2)(a) and DISP 2.8.2R(1). It considers the approach allows any complainant to bring an otherwise time-barred claim in time by complaining about the decision not to uphold the complaint.
- 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").

I issued a provisional decision setting out why the complaint was within our jurisdiction. Neither party has disagreed, so I won't set it out again. For the merits of the complaint, my provisional decision said:

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 alleged breach cause of action arose when an agreement was entered into in June 2013. Mr L brought his s.75 claim to MHCC in May 2020. That is more than six years after he entered into an agreement with it. Given this I think it was fair and reasonable for MHCC 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 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 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 H for which MHCC was responsible under s.56 when considering whether it is likely MHCC had acted fairly and reasonably towards Mr L.

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 L says he was verbally misled that the system would effectively pay for itself. I've taken account of what Mr L says he was told, and I've 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 L to be able to understand what was required to be repaid towards the agreement. I note H2 is named on the credit agreement as the supplier/intermediary, so I asked Mr L about this. He said H was the supplier and the firm he dealt with during the sale. He said H wrote to him to let him know H2 would be carrying out the installation. So I think the agreement incorrectly sets out H2 as the supplier, but I don't think that changes the nature of the relationship between the parties i.e., H was the supplier/intermediary. If that's not right, MHCC can let me know in response to this provisional decision.

We've not been supplied point of sale documentation that sets out the estimated benefits of the system. I've not seen there was an easy way for Mr L to be able to compare his costs against the likely benefits he'd receive through those sorts of documents. So I've thought about Mr L's testimony.

Mr L supplied a witness statement setting out his age and occupation. He said he first came across H when it cold called him. He said H told him he could save significant sums on his electricity bills which convinced him to have a meeting. He said the meeting in June 2013 lasted between 1 and 2 hours. Mr L said he recalled several promises were made by H's salesperson. He said he particularly remembers being told the system would save him money on his bills and that he'd received FIT payments every three months. He said the emphasis was put on the returns from the system being so great he'd receive a guaranteed return on his investment. He said he also particularly recalls being told the system would pay for itself within 6 years. He said H showed him lots of graphs and diagrams that supported this position. He said with no maintenance or upkeep costs it seemed an ideal investment. He said the salesperson told him it was a no-lose offer. He said he trusted the salesperson so agreed to the purchase.

I've also looked at H's website from around the time Mr L bought the system. Like our investigator found, I note the website highlights "investment without risk" and well as setting out the lucrative incentives that are available and "highest returns on your investment". The website also sets out "enjoy tax free income and electricity savings of over £1,000 per year".

I think it follows that if the website emphasises the benefits of the system and the financial incentive for buying one it's likely this would have been a central part of H's conversation when selling the product. If the website says customers could expect benefits of over £1,000 per year, I think it's reasonable to assume this was in line with the conversations between

Mr L and H. It also ties up with Mr L's testimony that I've highlighted. I therefore think Mr L's account of what he was told has been consistent and credible.

I've not seen anything to indicate Mr L had an interest in purchasing solar panels before H contacted him. Mr L has said he only agreed to the purchase because of the benefits H told him he could expect. The loan is a costly and long-term commitment. I'm mindful it would be difficult to understand why, in this particular case, Mr L would have agreed to the installation for such a high upfront cost if he wasn't going to recoup that money within the time stated.

For the solar panels to be self-funding within the time stated, they'd need to produce a combined savings and FIT income significantly more than what Mr L has received. I've not seen anything to indicate there's a problem with the system. Based on the generation readings I've seen it looks like it's slightly overperformed. But I've also not seen anything to suggest Mr L achieved the benefits required to make the system self-funding within the time Mr L said H stated. 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 within the times stated.

Considering Mr L's account about what he was told, the website, and that MHCC hasn't disputed these facts, I think it likely H gave Mr L a false and misleading impression of the self-funding nature of the system.

I consider H's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Mr L 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 system would have the capacity to fund the cost before the end of the loan term. But, even if they did not have that effect, they nonetheless represented the basis upon which Mr L went into the transaction. Either way, I think H's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr L'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 H's negotiations with Mr L 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 L and MHCC was unfair.

Because of this shortfall between his costs and the actual benefits, he has had to pay more than he expected to cover the difference between his solar benefits and the cost of the system. While Mr L has only paid an administration fee to MHCC as opposed to interest, he's still lost out through the unfairness of the relationship.

Fair compensation

In all the circumstances I consider that fair compensation should aim to remedy the unfairness of Mr L and MHCC's relationship arising out of H's misleading and false assurances as to the self-funding nature of the solar panel system. MHCC should repay Mr L a sum that corresponds to the outcome he could reasonably have expected as a result of H's assurances. That is, that Mr L's loan repayments should amount to no more than the financial benefits he received for the 96-month term of the loan. While Mr L said H told him the system would be paid over 6 years, I think calculating over the 96-month

original term of the loan seems like a fair compromise. And Mr L agreed to our investigator's assessment setting out the same.

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 L's expectation of what he would receive. I consider Mr L 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 L.

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 assumed savings and income Mr L received from the solar panel system over the 96-month term of the loan, so he pays no more than that. To do that, I think it's important to consider the benefit Mr L received by way of FIT payments as well as through energy savings. Mr L will need to supply up to date details, where available, of all FIT benefits received, electricity bills and current meter readings to MHCC.

I note Mr L originally claimed for a cost of an inverter, but as that cost hasn't materialised yet I'm not proposing to include it within the directions. If a cost for the inverter arises in the future, Mr L will need to decide whether to take that up with MHCC. Finally, our investigator recommended £100 compensation for the impact of not fully looking into the claim when it was raised. I think that seems broadly fair in the circumstances.

Mr L accepted the provisional decision. MHCC had nothing further to add.

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 neither party has submitted anything materially new for me 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 L's complaint and direct Mitsubishi HC Capital UK Plc to

- Calculate the total payments Mr L has made towards the system – A
- Use Mr L's bills and FIT statements 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 L 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 L
- Pay Mr L £100

*Where Mr L has not been able to provide all the details of his meter readings, electricity bills and/or FIT benefits, I am satisfied he has provided sufficient information in order for MHCC to complete the calculation I have directed it to follow in the circumstances using known and reasonably assumed benefits.

**If MHCC considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr L how much it's taken off. It should also give Mr L 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 L to accept or reject my decision before 31 October 2024.

Simon Wingfield
Ombudsman