DRN-5072167

The complaint

Mr M has complained about Hitachi Capital (UK) Plc, now trading as Mitsubishi HC Capital UK Plc's ('Mitsubishi') 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 in to account Section 140.A ('s.140A') of the CCA.

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

What happened

In November 2014, Mr M bought a solar panel system ('the system') from a company I'll call "Z" using a 10-year fixed sum loan from Mitsubishi. The loan agreement is signed and dated 3 November 2014. The agreement sets out the amount of credit is £7,450, the monthly payments are £96.32, the total charge for credit is £4,108.40, and the total amount payable is £11,558.40.

Mr M complained to Mitsubishi on 23 August 2021, explaining he thought the system was mis-sold, in summary Mr M said that Z:

- Told him that the system would pay for itself within the term of the loan, and cost him nothing
- Told him that the Feed in Tariff ('FIT') payments and savings he would receive would cover his monthly finance payments
- Conducted a high-pressure sale
- Told him that the system was maintenance free with a 40-year life expectancy.

Mr M said he had a like claim against Mitsubishi for misrepresentation and breach of contract under s.75. He said that the misrepresentations made by Z were on behalf of Mitsubishi under section 56 ("s.56") of the CCA. And that because of the misrepresentations, the breach of contract and matters that amounted to unfair trading practices the relationship between Mitsubishi and himself was unfair under s.140A.

On 24 June 2022, Mitsubishi responded to the claim for compensation and declined it. Mitsubishi considered Mr M's complaint was time barred under the Limitation Act ('LA'). However, for the sake of completeness Mitsubishi provided a full response to the complaint, in summary it said:

- The documentation provided didn't show that the system had been misrepresented
- It lent to Mr M responsibly
- It didn't think the conduct of Z's representative was capable of giving rise to an unfair relationship between itself and Mr M, particularly when considering that -
    - The documents provided clearly set out the cost and financial information relating to the purchase of the system
    - Mr M's right to cancel was clearly set out in the documents provided

- Mr M had used the system for more than 6 years and had received and would continue to receive FIT payments and energy savings for the full life span of the system

Unhappy with the wait for Mitsubishi's final response, Mr M had already referred the complaint to this service on 3 January 2022. Unhappy with Mitsubishi's final response, Mr M asked us to investigate his complaint.

Mr M's complaint was considered by an Investigator who issued an assessment on 24 May 2023. In summary they thought that:

- Given the s.75 claim was more likely to be time barred under the LA, 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 M and Mitsubishi.

They recommended that Mr M keep the system and Mitsubishi take into account what he had paid so far, along with the benefits he received, making sure the system was effectively self-funding over the original loan term.

Mr M accepted those findings. Mitsubishi responded on 7 June 2023, 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 M 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 Mitsubishi Consumer Finance Limited [2021] EWHC 2167 (Comm) ('Hodgson') as an appropriate mechanism for calculating redress.

As there was no agreement, the case was progressed to the next stage of our process, an Ombudsman's decision.

I issued my provisional decision in respect of this complaint on 23 September 2024, a section of which is included below, and forms part of, this decision. In my provisional decision, I set out the reasons why it was my intention to uphold Mr M's complaint. I set out an extract below:

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

My provisional findings

Jurisdiction

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

The s.75 complaint

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, he or she has 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 24 June 2022, this constituted the "event complained of". Furthermore, in its letter treated Mr M as having brought a complaint which he was entitled to refer to our service.

Here Mr M had brought his complaint to the ombudsman service already by then. 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 on foot, 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 it seems that Mr M's relationship with Mitsubishi has not yet ended, as the loan is still running. So, Mitsubishi is responsible for the matters which made its relationship with Mr M 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 M is therefore complaining about an event which has yet to end, namely that Mitsubishi participated in and perpetuated an unfair credit relationship with him. Mr M referred his complaint to the ombudsman service on 3 January 2022, 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 M's complaint has been brought in time for the purposes of the alternative three-year rule under DISP 2.8.2R(2)(b).

Merits

<u>The unfair relationship under s.140A complaint</u>

When considering whether representations and contractual promises by Z 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.

S.56 of the CCA has the effect of deeming Z 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 Z for which Mitsubishi were responsible under s.56 when considering whether it is likely Mitsubishi had acted fairly and reasonably towards Mr M.

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 M has said that he was told he could have solar panels at no cost to him. Mr M has said that he was told by Z's representative that the cost of the system would be fully paid for by the FIT payments and electricity savings he would receive. Mr M has said the system has not generated savings sufficient to do that.

I've considered Mr M's loan agreement I'm satisfied it clearly sets out, amongst other things, the amount being borrowed, the interest to be charged, total amount payable, the term of the loan and the contractual monthly loan repayments. I think this was set out clearly enough for Mr M to be able to understand what was required to be repaid towards the agreement.

But the loan agreement contains no mention of the income or savings that may be generated. So, there was no way for Mr M to compare his total costs against the financial benefits he was allegedly being promised from that document. Given the contract doesn't contain information about the benefits, Mr M would have looked to Z'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.

We've asked if there was other documentation from the point of sale, but neither Mitsubishi nor Mr M have provided any. Mr M said he's supplied everything he had.

I've looked at Z's website from around the time of the sale. The nearest cache of the website before the sale is 18 May 2014. I am satisfied, it is reasonable to take this content into account when considering what's more likely than not to have been said to Mr M.

On the page with details about funding it says:

*"Solar Panel Funding**

…At Z we are not only dedicated to the use of green energy saving products, we are also aware that they are costly and have the ultimate solution. We have calculated a Pay As You Go plan to suit each and every client, so that all the savings and tariffs pay for your new products, this ensures you benefit and protect yourselves from rising energy prices for decades to come."

Taking all of this promotional material into account, it seems that consumers were supposed to understand that the solar panels would most likely be self-funding. And it seems to me most likely that the sales representative Mr M dealt with would've used similar lines to those Z produced in its promotional literature on its website at the time of

the sale. So, this evidence supports Mr M's testimony that Z told him the scheme would be self-funding.

Mr M told us that Z told him the income from the solar panel system would pay off the agreement. I have noted that our investigator thought that Mr M's testimony seemed persuasive and explained why they thought that in their assessment. I have noted that Mitsubishi has not responded to that part of the assessment.

Mitsubishi hasn't provided evidence to dispute what Mr M said happened. I'm not aware that Mr M had any firm plans to get solar panels before he was approached by Z. Yet Mr M left the meeting having agreed to an interest-bearing loan, with a monthly repayment of £96.32, payable for 10 years. Given the financial burden he took on, I find Mr M's account of what he was told by Z, 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 Z.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £1,155 per year. I have not seen anything to indicate Mr M's system was not performing as expected but Mr M's system has not produced this. I therefore find the statements that were likely made as to the self-funding nature of the system weren't true.

So, these statements were not true. I think Z's representative must reasonably have been aware that Mr M's system would not have produced benefits at the level required to be self-funding. Whilst there are elements of the calculations that had to be estimated, the amount of sunlight as an example, I think Z's representative would have known that Mr M's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to Mr M.

Considering Mr M's account about what he was told, and the documentation he was shown at the time of the sale, that Mitsubishi hasn't disputed what's been said and in the absence of any other evidence from Mitsubishi to the contrary, I think it likely Z gave Mr M a false and misleading impression of the self-funding nature of the solar panel system.

Having considered all the submissions made to me in this case, I find Mr M's account of what he was told by Z credible and persuasive.

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

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

Where Mitsubishi is to be treated as responsible for Z's negotiations with Mr M 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 M 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 and additional s.140A complaint points

Mitsubishi received Mr M's s.75 complaint on 23 August 2021. Given my findings above I'm not proposing to provide a detailed analysis of his 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 M and Mitsubishi's relationship arising out of Z's misleading and false assurances as to the self-funding nature of the solar panel system. Mitsubishi should repay Mr M a sum that corresponds to the outcome he could reasonably have expected as a result of Z's assurances. That is, that Mr M's loan repayments should amount to no more than the financial benefits he received for the duration of the original loan term.

Mitsubishi 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 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 M's expectation of what he would receive. I consider Mr M has lost out, and has suffered unfairness in his relationship with Mitsubishi, to the extent that his loan repayments to it exceed the benefits from the solar panels. On that basis, I believe my determination results in fair compensation for Mr M.

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 M 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 M received by way of FIT payments as well as through energy savings. Mr M will need to supply up to date details, where available, of all FIT benefits received, electricity bills and current meter readings to Mitsubishi.

I have been shown no evidence that the loan isn't still running. So, I intend to tell Mitsubishi to:

- *Calculate the total payments (monthly repayments and final lump sum) Mr M has made towards the solar panel system up until the early date of settlement – A*
- *Use Mr M's bills and FIT statements, to work out the benefits he received up until the original loan term* – B*
- *Calculate the difference, between what Mr M actually paid (A), and what he should have paid (B), applying 8% simple interest to any overpayment from the date of payment until the date of settlement of the complaint** – C*

- *Reimburse C to Mr M.*

**Where Mr M is not able to provide all the details of his meter readings, electricity bills and/or FIT benefits, I am satisfied he has currently provided sufficient information in order for Mitsubishi to complete the calculation I intend to tell it to follow in the circumstances using known and reasonably assumed benefits.*

*** If Mitsubishi considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr M how much tax it's taken off. It should also give Mr M a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate."*

I asked the parties to the complaint to let me have any further representations that they wished me to consider by 7 October 2024. Mr M has accepted my provisional findings. Mitsubishi has provided a further submission disagreeing with my provisional findings.

So, as both parties have responded to the provisional findings, I am proceeding to my final 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.

To reiterate, in my provisional decision I quoted from Z's website about the funding of the solar panels. It said,

*"Solar Panel Funding**

…At Z we are not only dedicated to the use of green energy saving products, we are also aware that they are costly and have the ultimate solution. We have calculated a Pay As You Go plan to suit each and every client, so that all the savings and tariffs pay for your new products, this ensures you benefit and protect yourselves from rising energy prices for decades to come."

Mitsubishi has provided no new evidence in this case. But they have argued about my interpretation of the above. I have redacted Mr M's name, but Mitsubishi told me,

"We note your comments around the suppliers (sic) website at the time of sale stating that the solar panels are sold as self-funding, however nowhere on the sales material does it say that the panels will be self-funding over the loan period, rather that they will be self-funding over the life of the solar panels.

As Mr M has not provided any feed in tariff statements we cannot categorically confirm that the panels will be self-funding over the 20 year life of the panels however based on the figure in the MCS certificate we calculate that after 20 years he should receive in the region of £11,945.54 when the total cost of the finance is £11,558.40, therefore the panels are self-funding."

I shared Mitsubishi's argument with Mr M. He said,

"I confirm that the sales representatives assured me that the solar panels would be self-funding within the period of my loan agreement from savings from the panels."

Mr M's representative went further and said,

"It is clear that the comments 'we have calculated a Pay As You Go plan...so that all the savings and tariffs pay for your new products' would bring a reasonable person to understand that the solar panels would be self-funding from the onset of the loan agreement…

Our client has confirmed in his own words that the solar panels were sold as self-funding within the period of the loan agreement."

I have revisited the website and note that it also says,

"Our top quality systems can be fully funded with no deposit. The government FIT scheme and the savings from your bills become yours to help pay for the system."

The website wording says that the financial benefits would help pay for the system. But it also says that the systems would be "fully funded". I don't pretend that these matters are straightforward. But, taking all the promotional material into account, it remains my view that the consumer was supposed to understand that the financial benefits would pay for the system within the lifetime of the loan.

In any event, even if I had no website information in this case, considering Mr M's testimony, the documentation that was provided at the time of the sale and that I have seen no evidence that significantly undermines Mr M's testimony, and that neither party has provided any new information for me to consider following my provisional decision, I have no reason to depart from those findings. And as I've already set out my full reasons (above) for upholding Mr M's complaint, I have nothing further to add.

So, having looked again at all the submissions made in this complaint, I am upholding Mr M's complaint and require Mitsubishi to calculate and pay the fair compensation detailed above.

Putting things right

I require Mitsubishi to calculate and pay the fair compensation detailed above.

My final decision

For the reasons set out, I'm upholding Mr M's complaint about Mitsubishi HC Capital UK Plc. I require Mitsubishi HC Capital UK Plc to calculate and pay the fair compensation as detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 6 November 2024.

Douglas Sayers
Ombudsman