DRN-5087992

The complaint

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

What happened

In April 2014, Mr H bought a solar panel system ('the system') from a company I'll call "Z" using a 10-year fixed sum loan from Mitsubishi. I have seen no copy of the loan agreement which has a date on it. But I note the contract for the system seems to be dated 3 April 2014. And the installation guarantee was dated 8 May 2014 which suggests that was the date roughly for the installation. So, in this case it seems likely the loan was signed for at the time the item the loan was paying for was ordered. So, I will be referring to the loan agreement having been entered into in April 2014.

What is clear is that the loan agreement sets out the amount of credit is £7,500, the monthly payments are £96.97 for 120 months, and the total amount payable is £11,636.40.

Mr H complained to Mitsubishi on 9 July 2021, explaining he thought the system was mis-sold, in summary Mr H 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
- Told him that the system was maintenance free with a 40-year life expectancy.

Mr H 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 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 12 October 2021, Mitsubishi responded to the claim for compensation and declined it. Mitsubishi considered Mr H'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 H responsibly

- It didn't think the conduct of Z's representative was capable of giving rise to an unfair relationship between itself and Mr H, particularly when considering that -
    - The documents provided clearly set out the cost and financial information relating to the purchase of the system
    - Mr H's right to cancel was clearly set out in the documents provided
    - Mr H had used the system for a number of years already and had received and would continue to receive FIT payments and energy savings for the full life span of the system

Unhappy with the response, Mr H brought his complaint to this service on 22 March 2022.

Mr H's complaint was considered by an Investigator who issued an assessment on 6 March 2023. In summary they thought that:

- 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 H and Mitsubishi.
- Given that, we didn't need to give an opinion about our jurisdiction to consider the s.75 claim.

Our investigator recommended that Mr H 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 H accepted those findings. Mitsubishi responded on 20 March 2023. In summary it said:

- Our service didn't have jurisdiction to look at the s.140A complaint because, in regard to both, the event being complained of was more than 6 years ago.
- 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 2 October 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 H'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 H'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 12 October 2021, this constituted the "event complained of". Furthermore, in its letter treated Mr H as having brought a complaint which he was entitled to refer to our service.

Here Mr H brought his complaint to the ombudsman service on 22 March 2022. 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 H's relationship with Mitsubishi was still running, as the loan was still running, at the time Mr H raised his complaint. So, Mitsubishi is responsible for the matters which made its relationship with Mr H 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 H 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 H referred his complaint to the ombudsman service on 22 March 20222, 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 H'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 H.

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 H has said that he was told he could have solar panels at no cost to him. Mr H 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 H has said the system has not generated savings sufficient to do that.

I've considered Mr H'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 H 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 H 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 H 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 H have provided any documents which showed to Mr H at the time he made his decision to go ahead, what the likely benefits of his system would be.

Mr H 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 H's testimony seemed persuasive and explained why they thought that in their assessment.

Whilst Mr H had thought about solar energy, he had no firm plans to act on that until Z cold called him. Mr H told us that at the time of the sale he was 58 on a modest income and that his partner was retired. Yet with those modest economic circumstances and limited prior interest, Mr H left the meeting having agreed to an interest-bearing loan, with a monthly repayment of £96.97, payable for 10 years. Given his limited prior interest and the financial burden he took on, I find Mr H'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 £1,163 per year. I have not seen anything to indicate Mr H's system was not performing as expected but Mr H'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 H'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 H's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to Mr H.

Considering Mr H'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 H 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 H'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 H 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 H went into the transaction. Either way, I think Z's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr H's point of view

Mitsubishi has recently provided a copy of an 'Estimated Return Form' from a different case. We look at each case on its own merits and there is no such document available in this case.

In any event, the Estimated Return Form that Mitsubishi has shared with us, does have a space for the representative to provide to the consumer potential benefits of the solar panels over one, ten and twenty years. But just because a form has a space for such important information, doesn't mean that the form would always be completed. And in saying that I must point out that the form that Mitsubishi has sent us in support of its position is a form in which that part of the form was left blank by the system supplier's representative.

In the same way, we have a copy of the contract in this case. It has a space on it for the supplier's representative to have provided figures for the potential performance of the solar array system expressed as the SAP figure. Apart from entering the number of solar panels to be used, the rest of that section was left blank.

But even had that section been completed, neither it nor the loan agreement, contain information about the potential financial benefits that the solar panels might produce. And neither would have shown Mr H what he could have expected to receive in terms of his benefits. And so, I don't think it would be reasonable to expect Mr H to look at the SAP figures provided, had they been provided that is, and to work out that the panels would not be self-funding.

And in the absence of documentation that clearly explained the likely financial benefits of the system, it seems to me that Mr H would have had to rely on the representatives of Z and the claims they were making.

Mitsubishi also rely on the terms and conditions that applied to suggest that Mr H should have realised there was a problem and complained sooner, as Z were trading for four

years before they ceased to trade. Mitsubishi's argument isn't entirely clear to me, but it seems they are suggesting that the complaint may have been brought outside of the three year part of the rules that define our jurisdiction. It is also not clear to me from Mr H's testimony, when he became aware that the solar panels were not going to repay the loan as he said he was told they would.

However, for reasons I have already given earlier in this decision, I believe the complaint has been made within the time limits I must have regard for. That being so, 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 H's complaint has been brought in time for the purposes of the alternative three-year rule under DISP 2.8.2R(2)(b).

I have fully considered all the submissions made in this case. Having done so, I have seen insufficient argument or evidence to make me think that Mr H was provided sufficient information to know that the solar panels wouldn't be self-funding.

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

Where Mitsubishi is to be treated as responsible for Z's negotiations with Mr H 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 H 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 H's s.75 complaint on 26 November 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 H 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 H a sum that corresponds to the outcome he could reasonably have expected as a result of Z's assurances. That is, that Mr H'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 H's expectation of what he would receive. I consider Mr H 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 H.

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 H 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 H received by way of FIT payments as well as through energy savings. Mr H 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 is still running. So, I intend to tell Mitsubishi to:

- *Calculate the total payments (monthly repayments and final lump sum) Mr H has made towards the solar panel system up until the early date of settlement – A*
- *Use Mr H'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 H 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 H.*

**Where Mr H 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 H how much tax it's taken off. It should also give Mr H 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 16 October 2024. Neither party has acknowledged the provisional findings, provided a further submission or asked for an extension to do so.

I consider that both parties have had time sufficient to have made a further submission had they wished to. So, 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.

Given that there's no 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 for upholding Mr H's complaint, I have nothing further to add.

So, having looked again at all the submissions made in this complaint, I am upholding Mr H'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 H'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 H to accept or reject my decision before 14 November 2024.

Douglas Sayers
Ombudsman