DRN-5100391

The complaint

Mr H and Mrs H have complained about Hitachi Capital (UK) Plc, now trading as Mitsubishi HC Capital UK Plc's ('Mitsubishi') response to a claim they 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 and Mrs H have been represented in bringing their complaint but, to keep things simple, I'll refer to Mr H and Mrs H throughout.

What happened

In March 2015, Mr H and Mrs H 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 sets out the purchase price was £6,850 and the monthly payments were £81.79 for 120 months.

Mr H and Mrs H complained to Mitsubishi in a letter Mitsubishi said it received on 28 April 2022, explaining they thought the system was mis-sold, in summary Mr H and Mrs H said that Z:

- Told them that the system would pay for itself within the term of the loan, and cost them nothing
- Told them that the Feed in Tariff ('FIT') payments and savings they would receive would cover their monthly finance payments.

Mr H and Mrs H said they had a like claim against Mitsubishi for misrepresentation and breach of contract under s.75. They 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 themself was unfair under s.140A.

Unhappy with not getting a response, Mr H and Mrs H brought their complaint to this service on 2 October 2022.

On 8 February 2023, Mitsubishi responded to the claim for compensation and declined it. Mitsubishi considered Mr H and Mrs 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 and Mrs 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 and Mrs 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 and Mrs H's right to cancel was clearly set out in the documents provided
    - Mr H and Mrs 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

Mr H and Mrs H 's complaint was considered by an Investigator who issued an assessment on 11 April 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 Mrs 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 and Mrs H keep the system and Mitsubishi take into account what they had paid so far, along with the benefits they received, making sure the system was effectively self-funding over the original loan term. And our investigator thought it fair that Mitsubishi should pay Mr H and Mrs H an additional £100 in compensation for the further inconvenience caused to Mr H and Mrs H by Mitsubishi's refusal to consider the claim.

Mr H and Mrs H accepted those findings. Mitsubishi responded on 25 April 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 on 16 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 Mrs 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 H and Mrs H's complaint, both in respect of the refusal by Mitsubishi to accept and pay their 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 8 February 2023, this constituted the "event complained of". Furthermore, in its letter Mitsubishi treated Mr H and Mrs H as having brought a complaint which they were entitled to refer to our service.

Here Mr H and Mrs H had already brought their complaint to the ombudsman service on 2 October 2022. Given this, I'm satisfied their 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 and Mrs H's relationship with Mitsubishi was still in place, as the loan was still running, at the time Mr H and Mrs H raised their complaint. So, Mitsubishi is responsible for the matters which made its relationship with Mr H and Mrs 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 their complaint on the unfairness of the credit relationship between themself and Mitsubishi, Mr H and Mrs H are therefore complaining about an event which had yet to end, namely that Mitsubishi participated in and perpetuated an unfair credit relationship with them. Mr H and Mrs H referred their complaint to the ombudsman service on 2 October 2022, the loan was still running, so, taking into account DISP 2.8.2R(2)(a), I am satisfied that they are not prevented from bringing their 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 and Mrs 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 and Mrs 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 and Mrs H have said that they were told they could have solar panels at no cost to them. Mr H and Mrs H have said that they were told by Z's representative that the cost of the system would be fully paid for by the FIT payments and electricity savings they would receive. Mr H and Mrs H have said the system has not generated savings sufficient to do that.

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

But the loan agreement contains no mention of the income or savings that may be generated. So, there was no way for Mr H and Mrs H to compare their total costs against the financial benefits they were allegedly being promised from that document. Given the contract doesn't contain information about the benefits, Mr H and Mrs H would have looked to Z's representative to help them understand how much the panels would cost, what they would bring in and how much they would benefit from the system in order for them to make a decision.

We've asked if there was other documentation from the point of sale, but neither Mitsubishi nor Mr H and Mrs H have provided any documents which showed to Mr H and Mrs H at the time they made their decision to go ahead, what the likely benefits of their system would be. So, I have seen no evidence in this case that undermines the testimony that Mr H and Mrs H have provided. Mr H and Mrs H told us that Z told them that the income from the solar panel system would pay off the agreement. I have noted that our investigator thought that Mr H and Mrs H's testimony seemed persuasive and explained why they thought that in their assessment.

Mr H and Mrs H told us they had no thoughts of getting solar panels until Z cold-called them. Yet with no prior interest, Mr H and Mrs H left the meeting having agreed to an interest-bearing loan, with a monthly repayment of £81.79, payable for 10 years. Given their lack of prior interest and the financial burden they took on, I find Mr H and Mrs H's account of what they were told by Z to be credible and persuasive. The loan is a costly long-term commitment, and I can't see why they would have seen this purchase as appealing had they not been given the reassurances they've said they received from Z.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £981 per year. I have not seen anything to indicate Mr H and Mrs H's system was not performing as expected but Mr H and Mrs 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 and Mrs 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 and Mrs H's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to Mr H and Mrs H.

Considering Mr H and Mrs H's account about what they were told, and the documentation they were shown at the time of the sale and in the absence of any other evidence from Mitsubishi to the contrary, I think it likely Z gave Mr H and Mrs 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 and Mrs H's account of what they were 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 and Mrs H were 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 and Mrs 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 and Mrs H's point of view

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 and Mrs H were 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 and Mrs 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 Mrs H and Mitsubishi was unfair.

Because of this shortfall between their costs and the actual benefits, each month they have had to pay more than they expected to cover the difference between their solar benefits and the cost of the loan. So, clearly Mitsubishi has benefitted from the interest paid on a loan they would otherwise have not taken out.

The s.75 complaint and additional s.140A complaint points

Mitsubishi received Mr H and Mrs H's s.75 complaint on 28 April 2022. Given my findings above, I'm not proposing to provide a detailed analysis of their s.75 complaint and also their 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 Mrs 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 and Mrs H a sum that corresponds to the outcome they could reasonably have expected as a result of Z's assurances. That is, that Mr H and Mrs H's loan repayments should amount to no more than the financial benefits they 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 and Mrs H's expectation of what they would receive. I consider Mr H and Mrs H have lost out, and have suffered unfairness in their relationship with Mitsubishi, to the extent that their 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 and Mrs 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 and Mrs H received from the solar panel system over the 10-year term of the loan, so they pay no more than that. To do that, I think it's important to consider the benefit Mr H and Mrs H received by way of FIT payments as well as through energy savings. Mr H and Mrs 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 also find Mitsubishi's refusal to consider the claim has also caused Mr H and Mrs H some further inconvenience. And I think the £100 compensation recommended by our investigator is broadly a fair way to recognise that.

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 and Mrs H has made towards the solar panel system up until the early date of settlement – A*
- *Use Mr H and Mrs H 's bills and FIT statements, to work out the benefits they received up until the original loan term* – B*
- *Calculate the difference, between what Mr H and Mrs H actually paid (A), and what they 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 and Mrs H*
- *Pay Mr H and Mrs H an additional £100 compensation.*

**Where Mr H and Mrs H are not able to provide all the details of their meter readings, electricity bills and/or FIT benefits, I am satisfied they have 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 and Mrs H how much tax it's taken off. It should also give Mr H and Mrs H a tax deduction certificate if they ask for one, so they 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 30 October 2024. Mr H and Mrs H have accepted my provisional findings. Mitsubishi told us that whilst they did not agree with our investigator's assessment, they had nothing they wanted to add to it or my provisional decision. In these circumstances, I'm 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 and Mrs H's complaint, I have nothing further to add.

Putting things right

I require Mitsubishi HC Capital UK Plc to calculate and pay the fair compensation as detailed above.

My final decision

For the reasons set out, I'm upholding Mr H and Mrs 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 and Mrs H to accept or reject my decision before 20 November 2024.

Douglas Sayers
Ombudsman