DRN-5128071

The complaint and what happened

Mr W has complained about Mitsubishi HC Capital UK Plc, trading as Hitachi Capital Consumer Finance's ("Mitsubishi's") response to a claim he made under Section 75 ('s.75') of the Consumer Credit Act 1974 (the 'CCA') and in relation to allegations of an unfair relationship taking in to account Section 140A ('s.140A') of the CCA.

I've included relevant sections of my provisional decision from October 2024, which form part of this final decision. In my provisional decision I set out the reasons why I was planning to uphold this complaint. In brief that was because I thought that Mr W was induced into buying the solar panel system at the heart of this dispute by misrepresentations, which resulted in there being an unfair relationship between him and Mitsubishi.

I asked both parties to let me have any more information they wanted me to consider. Mr W accepted my findings and, despite having been granted extra time to consider the case, Mitsubishi has not responded to my findings. It has been provided with an updated meter reading for Mr W's home.

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.

Having done so, I'm upholding it, and I'll reiterate why, but first I've included here the relevant sections of my provisional decision:

> *"What happened*
>
> *In May 2014, Mr W bought a solar panel system ('the system') from a company I'll call "C" using a 10-year fixed sum loan from Mitsubishi.*
>
> *Mr W complained to Mitsubishi, he said that he was told by two salespeople from C that the 'feed in tariff' ('FIT') payments and electricity savings he would make would cover the cost of the loan repayments, however that hasn't happened, and he's suffered a financial loss. He also believed that what happened at the time of the sale created an unfair relationship between himself and Mitsubishi.*
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> *Mitsubishi responded to the complaint in its final response, it considered Mr W had brought his claim more than six years after the cause of action occurred under the Limitation Act ('LA').*
>
> *Unhappy with Mitsubishi's response, Mr W referred his complaint to our service.*
>
> *After a colleague had previously upheld Mr W's complaint, the most recent investigator ultimately thought that there was a lack of evidence in this case to lead her to uphold the complaint. She particularly noted that there was limited documentation from the time of the sale to show what C set out in writing for Mr W.*
>
> *Mr W's representative did not accept that, underlining Mr W's direct testimony about the sale. So, the case was progressed to the next stage of our process, an Ombudsman's decision.*

What I've provisionally 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.

My provisional findings on jurisdiction

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

The s.75 complaint

The event complained of here is Mitsubishi's alleged wrongful rejection of Mr W's s.75 claim on 2 November 2021, this relates to a regulated activity under our compulsory jurisdiction. Mr W brought his complaint about this to the ombudsman service on 17 November 2021. So, 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 have also considered Mitsubishi's arguments in its response on our jurisdiction over the complaint about an unfair relationship under s.140A. I am satisfied this aspect of the complaint was brought in time so that the Financial Ombudsman has jurisdiction.

Mr W is able to make a complaint about an unfair relationship between himself and Mitsubishi per s.140A. The event complained of for the purposes of DISP 2.8.2R(2)(a) is Mitsubishi's participation, for so long as the credit relationship continued, in an allegedly unfair relationship with his. This accords with the court's approach to assessing unfair relationships – the assessment is performed as at the date when the credit relationship ended: Smith v Royal Bank of Scotland plc [2023] UKSC 34.

S.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 supplier on the creditor's behalf before or after the making of a 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 High Court's judgment in Patel v Patel [2009] EWHC 3264 QB 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. This judgment has recently been approved by the Supreme Court in Smith v Royal Bank of Scotland Plc [2023] UKSC 34 ('Smith').

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 it 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: see Smith at [27]-[29] and [66]. 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 ongoing, whether it is still unfair at the time of considering its fairness. That requires paying regard to the whole relationship and matters relevant to it right up to that point, including the extent to which the creditor has fulfilled is responsibility to correct unfairness in the relationship.

In Mr W's case the relationship was ongoing when he referred his complaint to the Financial Ombudsman. At the time, Mitsubishi was responsible for the matters which made its relationship with Mr W unfair and for taking steps to remove the source of that unfairness or mitigate its consequences so that the relationship was no longer unfair. By relying in his complaint on the unfairness of the credit relationship between himself and Mitsubishi, Mr W therefore complained about an event that was ongoing at the time he referred his complaint to the Financial Ombudsman.

Therefore, taking into account DISP 2.8.2R(2)(a), I am satisfied it has been brought in time. I am otherwise satisfied the complaint is within the ombudsman service's jurisdiction to consider and it's not necessary to consider whether Mr W'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 C 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 C 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 C for which Mitsubishi were responsible under s.56 when considering whether it is likely Mitsubishi had acted fairly and reasonably towards Mr W.

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.

<u>What happened?</u>

Our investigator had a lengthy telephone conversation with Mr W, of which I have listened to the call recording. He is clear in repeatedly saying that he was told by C's representatives that the cost of the system would be paid for by the FIT payments he would receive and the savings he would make on his electricity charges. I haven't seen any evidence he had any prior interest in purchasing solar panels, although he did also mention feeling pleased if he were able to do something good for the planet by having solar panels.

I've looked at the documents provided by Mr W to see if there was anything contained within them that made it clear that the solar panel system wouldn't be self-funding. Whilst possibly not all the point-of-sale documentation is still available, unsurprising given how long ago this happened, there is still some.

Firstly, I have a copy of the loan agreement, which shows that both the total amount payable, and the monthly cost of the loan were clear to Mr W. And indeed in his recent testimony, he accurately remembered those details. However, there is no mention on the agreement of the potential benefits of the panels.

Other point of sale documentation provided by Mr W includes a handwritten contract; installer declaration form; further documentation about the credit agreement (such as pre-contract credit information); manufacturer's and installer's guarantees; and a "Multi Array SAP Calculator".

Mitsubishi has provided a range of sample documentation that it apparently understands C typically provided to customers. It asserts that this suggests, "…that [C] did provided [sic] an estimated performance of his system." I can see that Mr W's actual contract (dated April 2014, a month prior to the installation and inception of the credit agreement) contained a section called, "Calculating a SAP Calculation", which was left empty, but I can read some faint text saying that it was, "to be completed by…" someone illegible. That leads me to conclude that Mr W was given a contract to sign which contained no written information about the system's estimated performance.

I can only assume that the "Multi Array SAP Calculator" document was completed at some point in the month following Mr W's signing of the contract. And indeed, that does provide an estimated performance of Mr W's system, just as Mitsubishi asserted. However, that estimation is only provided as a figure representing "kWh per year", being 2088. There is nothing on the documentation to assist Mr W in understanding what that kWh per year might mean financially. And certainly it would not lead him to question whether the system would indeed be self-funding.

None of the sample documentation provided by Mitsubishi in relation to this complaint would, in fact, clearly set out the financial performance of the system in such a way that it would be clear to the reader that any particular system may not be self-funding. Mitsubishi also asked me to take a look at a document provided by it on a separate complaint with this service, which I have done. It appears to contain a section in which C would be able to set out the financial benefits of a system. However, ironically, in the separate complaint, C failed to complete that section. I also note that it is dated 2015 – the year after this sale – which may mean it wasn't in use, and so isn't available in/relevant to this complaint that I am considering. Therefore I am unable to place any significant weight on a sample document from a different sale which also doesn't contain the pivotal information. Mitsubishi's submissions have in no way at all supported a logical conclusion that it was more likely than not that C did provide clear documentation to Mr W to ensure he understood that his system would not be self-funding.

Returning to Mr W's recent testimony, again, I am struck by the consistency and clarity of it. He speaks in very straightforward terms about the sale, and about how two representatives of C came to his home and showed him information on a computer about the system. He says they didn't give him much on paper, but that whatever they did give him he has provided to this service. He says that he lacked the necessary expertise in electronics to be able to realise that what they were telling him about the system wasn't going to be true. He says they told him the system had, "all the bells and whistles" and would be self-funding for the £90 a month repayment. He says until this, he had thought himself to be a fairly savvy person – a "Jack the lad" – but that he was completely taken in by what the salesmen told him and now feels a bit naive. He says it took him a long time to realise that what they'd said wasn't the case, as a pattern of low returns was needed to demonstrate that.

I find what Mr W has said to be believable. Given the credit agreement doesn't contain information about the benefits, Mr W would have looked to C's representative to help him understand what the panels would bring in and how much he would benefit from the system. As mentioned, I've seen no evidence of any clear motivation other than a financial one on Mr W's part to agree to the panel installation. The fact that he has mentioned in passing being happy if he could do something good for the planet does not lead me to conclude that his motivation was environmental. I'm of the opinion that money would be a key reason to

purchase the system and his savings on his electricity bills and income from the FIT scheme would have been a central part of the conversation with a salesperson. In saying that, I've also taken into account some albeit limited information from the sale about Mr W's financial situation in 2014. Whilst it would seem that he did not have either a mortgage or rent to pay on his home, his income was very modest. And he appears to have always had a pre-payment electricity meter, which tends to be in place to assist those on a low income manage money. On balance, I think it is more likely than not that Mr W would not have agreed to the installation of the panels if C had made it clear that it would leave him out of pocket.

Yet with no prior interest, Mr W left the meeting having agreed to an interest-bearing loan, with a monthly repayment of around £90, payable for 10 years. Given his lack of prior interest and the financial burden he took on I find Mr W's account of what he was told by C 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 about saving money he's said he received from C.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £1,100 per year. I have not seen anything to indicate Mr W's system was not performing as expected, but his system has clearly not produced this. Based on the predicted performance of the system noted in the "Multi Array SAP Calculator", it seems unlikely that the system will pay for itself until at least 19 years have passed.

So, the statements about the system being self-funding, which I have made a finding were most likely made, were not true. I think C's representatives must reasonably have been aware that Mr W's system would not have produced benefits at this level. Whilst there are elements of the calculations that had to be estimated, the amount of sunlight as an example, I think C's representative would have known that Mr W's system would not produce enough benefits to cover the overall cost of the system as stated verbally to Mr W.

Considering Mr W's account about what he was told and the documentation he was shown at the time of the sale, I think it likely C gave Mr W a false and misleading impression of the self-funding nature of the solar panel system.

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

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

Where Mitsubishi is to be treated as responsible for C's negotiations with Mr W 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 W 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

Given my above conclusions and bearing in mind the purpose of my decision is to provide a fair outcome quickly with minimal formality, I don't think I need to provide a detailed analysis of Mr W's s.75 complaint. Furthermore, this doesn't stop me from reaching a fair outcome in the circumstances.

Fair compensation

In all the circumstances I consider that fair compensation should aim to remedy the unfairness of Mr W and Mitsubishi's relationship arising out of C's misleading and false assurances as to the self-funding nature of the solar panel system. Mitsubishi should repay Mr W a sum that corresponds to the outcome he could reasonably have expected as a result of C's assurances. That is, that Mr W's loan repayments should amount to no more than the financial benefits he received for the duration of the loan agreement.

Therefore, to resolve the complaint, I plan to direct Mitsubishi to recalculate the agreement based on the known and assumed savings and income Mr W received from the 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 W received by way of FIT payments as well as through energy savings. Mr W 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 considered the Hodgson judgment, cited by Mitsubishi in its rejection of the investigator's view. 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 W's expectation of what he would receive. I consider Mr W has lost out, and has suffered unfairness in his relationship with Mitsubishi, to the extent that his loan repayments to Mitsubishi exceed the benefits from the solar panels.

On that basis, I believe my determination results in fair compensation for Mr W. 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.

Finally, I consider that Mitsubishi's failure to fully deal with Mr W's complaint in a reasonable timeframe, with minimal communication, caused Mr W some degree of trouble and upset. In recognition of this, and in addition to what I have already set out above, Mitsubishi should also pay Mr W £100."

As mentioned above, Mr W has accepted my findings and Mitsubishi has not replied substantively to my provisional decision. Therefore I have seen nothing which alters my findings as set out therein. And so it follows that I uphold this complaint.

Putting things right

In order to put things right for Mr W, Mitsubishi HC Capital UK Plc must now:

- Calculate the total payments (the deposit and monthly repayments) Mr W has made towards the solar panel system up until the date of settlement – A
- Use Mr W's bills and FIT statements, to work out the benefits he received up until the loan term* – B
- Use B to recalculate what Mr W 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 W

*If Mr W is not 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 Mitsubishi to

complete the calculation I have directed it to follow in the circumstances using known and reasonably assumed benefits.

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

I also think the way Mitsubishi handled Mr W's complaint has caused him trouble and upset, and an award of £100 is appropriate.

My final decision

For the reasons I've explained, I uphold this complaint and Mitsubishi HC Capital UK Plc must put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 10 December 2024.

Siobhan McBride
Ombudsman