DRN-5142897

The complaint

Mr T complains about the way Hitachi Capital (UK) Plc (Hitachi) responded to claims he'd made in relation to misrepresentation, breach of contract, and an alleged unfair relationship taking into account section 140A ("s140A") of the Consumer Credit Act 1974 (the "CCA").

Mr T is represented in his complaint by a third party but for ease I have referred to all submissions from Mr T and the third party as if made by Mr T

What happened

In May 2014 Mr T entered into a fixed sum loan agreement with Hitachi. The loan was for a solar panel system which cost £8,750. The loan was to be repaid by regular instalments of £113.13 over the 120 month term. Although the amount borrowed was £8,750, with interest and charges the total amount repayable under the loan was £13,575.60.

Mr T complains that the solar panel system was missold as he was told the solar panels would effectively pay for themselves. More specifically, that the electricity savings from the system and the income generated from the Feed in Tariff (FIT) payments would more than cover the cost of the loan repayments.

Hitachi responded to Mr T's claim and explained why in its view that Mr T's claims had been submitted too late. Hitachi also then went on to explain why it did not consider there were any grounds to uphold his claim. Mr T remained unhappy and brought his claim to our service.

A complaint was raised with Hitachi and it responded to our service to say that it did not consider this was a complaint our service had the power to consider, as no complaint had actually been raised with Hitachi. One of our investigators explained that regardless of whether a complaint had been raised initially, more than eight weeks had now elapsed since Hitachi was made aware of Mr T's complaint and our service could therefore consider the complaint.

The investigator then went on to consider the complaint and set out to both parties why they considered Mr T's complaint should be upheld. In summary, they found that Mr T's complaint had not been submitted too late and that having considered the circumstances surrounding the sale of the solar panel system, Mr T was likely misled about the potential benefits of the system and the overall cost when considering the amount required to repay the loan.

The investigator then set out what they considered to be fair redress and what Hitachi should do to put things right. Mr T accepted the findings. Hitachi did not. As the complaint could not be resolved informally, it was referred to me so that a final decision can be issued as the last stage in our process.

I issued a provisional decision and set out the following:

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

Where the evidence is incomplete, inconclusive or contradictory (as some of it is here), I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in light of the available evidence and the wider circumstances.
Mr T has complained about the misrepresentations made by the solar panel supplier have created an unfair relationship, as set out in s.140A CCA. Mr T is able to make a complaint about an unfair relationship between himself and Hitachi per s.140A. The event complained of for the purposes of DISP 2.8.2R(2)(a) is Hitachi'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 still 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 its responsibility to correct unfairness in the relationship. In Mr T's case the relationship was ongoing when he referred his complaint to the Financial Ombudsman.

At the time, Hitachi was responsible for the matters which made its relationship with Mr T 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 Hitachi, Mr T 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 T's complaint has been brought in time for the purposes of the alternative three-year rule under DISP 2.8.2R(2)(b).

The unfair relationship under s.140A complaint

When considering whether representations and contractual promises by the solar panel supplier 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 the solar panel supplier to be the agent of Hitachi 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 the solar panel supplier for which Hitachi was responsible under s.56 when considering whether it is likely Hitachi had acted fairly and reasonably towards Mr T. But in doing so, I should take into account all the circumstances and consider whether a court would likely find the relationship with Hitachi was unfair under s.140A.

What happened?

Mr T says he was told that the solar panel system would effectively pay for itself within the loan term. So I've taken account of what Mr T says he was told at the time of arranging the solar panel system. I've also reviewed the documentation that has been presented to me in this case.

The fixed sum loan agreement sets out the amount being borrowed; the interest charged; the total amount payable; the term; and the contractual monthly loan repayments. I think this was set out clearly enough for Mr T to be able to understand what was required to be repaid towards the loan agreement. There is no reference to any of the estimated benefits of the solar panel system, or even that the loan was for a solar panel system, on the loan agreement.

Mr T has provided a copy of a document he was given at the time by the supplier of solar panel system and this does refer to various things about the property and that Mr T would be getting 16 panels. The panel output is referred to, but this is not in a monetary form. Although the cost of the system is shown to be £8,750, there is no reference on the document to the additional £4,825.60 that Mr T would be required to pay in interest on the Hitachi loan. It would not in my view have been easy to have established from this document whether or not the solar panel system would have actually generated enough in savings and returns to have more than covered the loan repayment costs to Hitachi.

Mr T says he was told the cost of the loan would be covered by the savings and amounts generated by the solar panel system. It is clear from what Mr T has said that this was a key factor in his decision to buy the solar panel system. I have seen nothing that indicates Mr T had a particular interest in purchasing a solar panel system before he met with the supplier. Mr T has been consistent throughout and I find what he says about the benefits of the system plausible.

It would in my view be difficult to understand why, in this particular case, Mr T would have agreed to install a solar panel system if his monthly outgoings would increase significantly by the amount he was required to pay through the loan repayments.

I'm required to decide the case quickly and with minimum formality and I need to consider what is fair and reasonable in all the circumstances. As I have already set out above, where the evidence is incomplete or inconclusive, as some of it is here, I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances. On balance, I find Mr T's account to be plausible and convincing. For the solar panel to be self-funding, they'd need to produce a combined savings of around £1,358 per year.

Having considered the estimated production amounts on the MCS certificate and compared those to the benefits and savings they would likely produce, I've not seen anything to suggest Mr T would achieve the benefits required to make the system self-funding within the ten year loan term. Based on what I've tried to calculate, taking into account the likely generation and export FIT, it seems like it would take significantly longer than the loan term to be self-funding.

I therefore find the statements that were likely made as to the self funding nature of the system weren't true and misleading. I think the salesperson of the solar panel system ought to have known this and made it clear to Mr T that the solar panel system wouldn't have produced enough benefits to cover the overall cost of the fixed sum loan agreement within the term.

Taking into account what I've said above, I think it likely the supplier of the solar panel system gave Mr T a false and misleading impression of the self-funding nature of the solar panel system. I consider this misleading presentation went to an important aspect of the transaction for the system, namely the benefits which Mr T was expected to receive by agreeing to the installation of the system. I consider that the 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 T went into the transaction. Either way, on balance, I think the solar panel system supplier's assurances were misleading and false, undermining the purpose of the transaction from Mr T's point of view.

Fair compensation

As I've found that Mr T was misled into entering into the solar panel system and taking out the loan, I will now consider what is required as fair compensation to Mr T. In all the circumstances I consider that fair compensation should aim to remedy the unfairness of Mr T and Hitachi's relationship arising out of the solar panel supplier's misleading and false assurances as to the self-funding nature of the solar panel system.

Hitachi should repay Mr T a sum that corresponds to the outcome he could reasonably have expected as a result of the solar panel supplier's assurances. That is, that Mr T's loan repayments should amount to no more than the financial benefits he received for the duration of the loan agreement.

I have noted what Hitachi has said around what it considers fair redress and I have had regard to the court's decision in Hodgson. I have considered the Hodgson judgment, but this doesn't persuade me I should adopt a different approach to fair compensation.

Hodgson concerned a legal claim for damages for misrepresentation, whereas I'm considering fair redress for a complaint where I consider it likely the supplier made a

contractual promise regarding the self-funding nature of the solar panel system. And even if I am wrong about that I am satisfied the assurances were such that fair compensation should be based on Mr T's expectation of what he would receive.

I consider Mr T has lost out, and has suffered unfairness in his relationship with Hitachi, to the extent that his loan repayments to Hitachi exceed the benefits from the solar panel. On that basis, I believe my determination results in fair compensation for Mr T.

Hitachi 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, Hitachi should recalculate the credit agreement based on the known and/or assumed savings and income Mr T 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 T received by way of FIT payments as well as through energy savings.

Mr T will need to supply up to date details, where available, of all FIT benefits received, electricity bills and current meter readings to Hitachi.

My provisional decision

My provisional decision is that I'm intending to uphold this complaint and direct Hitachi Capital (UK) Plc to:

• Calculate the total payments Mr T has made towards the solar panel system – A

• Use Mr T's bills and FIT statements to work out the benefits he received from the start date of the loan, up until the date of settlement – B

• Use B to recalculate what Mr T 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 T

**If Hitachi considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr T how much it's taken off.*

It should also give Mr T a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

I invited further comments from both parties before considering the complaint again. Mr T responded to say that he accepted my provisional findings. I did not receive a response from Hitachi.

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, and in the absence of any further comments or arguments from the parties,

I have come to the same overall conclusions and findings, as set out within my provisional decision, which is also set out above.

My final decision

My final decision is that I uphold Mr T's complaint and instruct Hitachi Capital (UK) Plc to settle the complaint in accordance with what I have set out in my provisional decision and above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 12 December 2024.

Mark Hollands
Ombudsman