DRN-5148815

The complaint and what happened

Mr H 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 H 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 H accepted my findings and although it requested copies of Mr H's FIT statements, Mitsubishi has not responded to my actual findings.

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 January 2015, Mr H bought a solar panel system ('the system') from a company I'll call "B" using a 10-year fixed sum loan from Mitsubishi.*
>
> *Mr H complained to Mitsubishi, he said that he was told by C that the 'feed in tariff' ('FIT') payments and electricity savings he would make would cover the cost of the loan repayments, and the system would have paid for itself within five years. 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.*
>
> *Mitsubishi responded to the complaint in its final response, it considered Mr H 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 H referred his complaint to our service.*
>
> *An investigator considered Mr H's complaint, she ultimately 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 H and Mitsubishi.*

She recommended that Mr H keep the system and Mitsubishi take into account what Mr H had paid so far, along with the benefits he received, making sure the system was effectively self-funding from year five. She also recommended an award of £100 distress and inconvenience as a result of the poor and protracted way in which Mitsubishi had dealt with this matter.
Mr H accepted the investigator's view. Mitsubishi did not, highlighting again that the event complained of occurred in January 2015, and went on to disagree with the investigator's findings around how things should be put right for Mr H. Subsequent to that, it also argued that the paperwork from the point of sale would have made Mr H aware that the panels would not be self-funding in any event. 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 H'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 H's s.75 claim on 1 March 2022, this relates to a regulated activity under our compulsory jurisdiction. Mr H brought his complaint about this to the ombudsman service on 16 June 2022. 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 H 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 H'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 H 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 H 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 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 B 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 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.

<u>What happened?</u>

Mr H has provided us with both documentation and various pieces of testimony about the sale of the system during the course of the investigation. He has repeatedly said that he was told by B's representatives that the cost of the system would be paid for within five or six years maximum 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.

I've looked at the documents provided by Mr H to see if there was anything contained within them that made it clear that the solar panel system wouldn't be self-funding.

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 H. However, there is no mention on the agreement of the potential benefits of the panels.

The point of sale documentation provided by Mr H includes a 19-page proposal document created by B with a couple of key pages setting out the predicted system performance. I have some concerns about how those calculations were arrived at by B, notably that it has assumed that Mr H's household will use 75% of the energy produced by the system. That is not in line with industry practice and applicable guidelines, which generally advised a maximum proportion of 50% when considering likely energy consumption by the household. Without clear evidence as to why Mr H's household was expected to consume so much more than the average, I can't conclude that was a reasonable approach for B to take.

However, I accept that on one page there is a table of figures with a column headed, "Accumulative Total", and which is shaded from the top in red, moving to green in row 13, in line with what would be year 12 of the system's expected lifespan. I also accept that the shading is meant to highlight the point at which the system will have generated enough income to cover its own cost.

Mitsubishi understandably argues that Mr H cannot therefore have reasonably believed that the system would pay for itself by year five. It also points out that this document suggests that the system will generate around £472 of income in year one, significantly less than the annual cost of the finance agreement. I have thought very carefully about these important points within the full context of the evidence in this case.

We asked Mr H what his recollections were of the sale and his understanding of the figures and colour coding in the key table in question. He says he was told, "…that the estimates were deliberately lower than the actual production." He reiterated that he was told the system would pay for itself in less than six years, and says he remembers that timescale being framed as a "conservative estimate".

Turning back to the table of figures described above, there are two essential elements of those calculations presented that fatally undermine the document as a valid piece of clear information for Mr H. Firstly, as set out above, the amount of energy that Mr H's household was expected to consume (which impacts the value and ultimately the returns of the system) was not in line with guidance and has not been explained. Secondly, the red to green shading, which I accept was likely intended to indicate the point at which the system would pay for itself, does not represent the actual cost of the system to Mr H. That is because B, despite brokering the finance for Mr H, failed to include the interest payable by Mr H through that finance agreement.

Mitsubishi also highlights a handwritten document called "Quotation Agreement", which it says shows that Mr H was considering whether to buy a system comprising six or eight panels, and the respective returns for both alternatives were set out. At face value, that does appear to be the case. However, the figures on this handwritten sheet do not accord with anything else within the point of sale documentation and I cannot reconcile them with any of the other information provided. For example, this seems to suggest that an eight-panel system will cost £10,601; possibly will provide £484 income a year; and have a total return of £17,064. The basis of any of those figures is frankly a mystery. The eight-panel system Mr H purchased had a cash price of £7,400 and a total cost of £11,037.60 including interest. The table described above suggested an annual income of £472, not £484. And I'm unable to identify how the total return of £17,064 was arrived at, and over what timeframe.

In the round, the information given to Mr H in writing can only be generously described as incomplete and unclear. Less generously, there is the possibility that it was deliberately obfuscating and knowingly based on calculations that were not in line with industry guidance and good practice at the time. With either level of generosity, relying on it as the evidential basis to conclude that Mr H was given clear, fair and not misleading information on which to make his decision about entering into this contract would be fundamentally irrational.

Mr H has been consistent in what he's told us about this sale, albeit some of his testimony is not particular detailed. Given the credit agreement doesn't contain information about the benefits, I think Mr H 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 H's part to agree to the panel installation. 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. On balance, I cannot identify any other reason for Mr H to have agreed to the installation of the panels. I think it is more likely than not that Mr H would not have done so if B had made it clear to him that it would leave him out of pocket.

Yet with no prior interest, Mr H left the meeting having agreed to an interest-bearing loan, with a monthly repayment of around £92, payable for 10 years. Given his lack of prior interest and the financial burden he took on I find Mr H's account of what he was told by B 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 B.

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 H's system was not performing as expected, but his system has clearly not produced this. In fact, after completing a calculation myself, I think it is unlikely that Mr H will recoup his outgoings even in a 25-year time period.

So, the statements about the system being self-funding, which I have made a finding were most likely made, were not true. I think B's representatives must reasonably have been aware that Mr H'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 B's representative would have known that Mr H's system would not produce enough benefits to cover the overall cost of the system as 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, I think it likely B gave Mr H a false and misleading impression of the self-funding nature of the solar panel system.

I consider B'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 include the documentation in that, the problems with which I have already described at some length.

I consider that B'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 B's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr H's point of view.

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

Where Mitsubishi is to be treated as responsible for B'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

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 H'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 H and Mitsubishi's relationship arising out of B'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 C'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 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 H 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 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 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 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 Mitsubishi 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.

Finally, I consider that Mitsubishi's failure to fully deal with Mr H's complaint in a reasonable timeframe, with minimal communication, caused Mr H 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 H £100."

As mentioned above, Mr H has accepted my findings and Mitsubishi has not replied substantively to my provisional decision. Mitsubishi did ask for FIT statements, which we were unable to provide as we have not received any. I want to take this opportunity to clarify that, whilst ordinarily FIT statements are one element of the evidence in such cases, here I didn't think I needed them. And that is because my own estimated calculations of what the system was likely to generate showed such a huge disparity between that and it being self-funding that I saw no value in delaying the case further to obtain them. The chances that such statements would show that Mr H's system was, in fact, self-funding were so low as to render them negligible in terms of the evidence needed for me to reach a decision.

Mr H will need to provide as much as he can in respect of bills and statements to facilitate Mitsubishi in carrying out the calculations I am directing in order for it to put things right. And so I'm satisfied that this issue – that is, the extent to which the system has contributed to Mr H's costs – will be fairly dealt with via the redress instructions below.

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 H, Mitsubishi HC Capital UK Plc must now:

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

*If Mr H is not able to provide all the details of his meter readings, electricity bills and/or FIT benefits, I am satisfied he will be able to provide 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 H how much 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 also think the way Mitsubishi handled Mr H'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 H to accept or reject my decision before 13 December 2024.

Siobhan McBride
Ombudsman