DRN-5197985

The complaint and what happened

Mr M has complained about Mitsubishi HC Capital UK PLC, trading as Hitachi Personal 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 November 2024, which form part of this final decision. In my provisional decision I set out the reasons why I was not planning to uphold this complaint. In brief that was because I thought that there was insufficient evidence of an unfair relationship between Mr M and Mitsubishi.

I asked both parties to let me have any more information they wanted me to consider. Neither responded.

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 not upholding it, and I'll reiterate why, but first I've included here the relevant sections of my provisional decision:

> ***"What happened***
>
> *In April 2013, Mr M bought a solar panel system ('the system') using a 5-year fixed sum loan from Mitsubishi. He bought it from a supplier I'll call "P". The total amount payable under the agreement was £6,858, and it was due to be paid back with 120 monthly repayments of £57.15.*
>
> *Via a professional representative, Mr M complained to Mitsubishi. His representative said that he was told by a salesperson that the system was self-funding, but it isn't, 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 M had brought his claim more than six years after the cause of action occurred and so it wouldn't uphold it.*
>
> *Unhappy with Mitsubishi's response, Mr M referred his complaint to our service.*
>
> *An investigator considered Mr M's complaint, and 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 M and Mitsubishi.*

She recommended that Mr M keep the system and Mitsubishi take into account what Mr M had paid, along with the benefits he received, making sure the system was effectively self-funding. 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 M accepted that. Mitsubishi did not, highlighting again that the event complained of occurred in April 2013, and went on to disagree with the investigator's findings around how things should be put right for Mr M. Subsequently, it also made submissions around whether Mr M has in fact incurred any loss in this instance. So, the case was progressed to the next stage of our process, an Ombudsman's decision.

Having considered everything I have available to me, I'm currently not planning to uphold the complaint, which I will explain in detail.

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.

Having done so, I'm planning to find that this complaint is within my jurisdiction to consider, but that the merits of it should not be upheld.

My provisional findings on jurisdiction

The s.75 complaint

The event complained of here is Mitsubishi's alleged wrongful rejection of Mr M's s.75 claim on 19 October 2021, this relates to a regulated activity under our compulsory jurisdiction. Mr M brought his complaint about this to the ombudsman service on 16 December 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 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 M 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 him. 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 M's case the relationship was ongoing when he referred his complaint to the Financial Ombudsman. For the duration of the relationship, Mitsubishi was responsible for the matters which made its relationship with Mr M 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 M therefore complained about an event that had occurred fewer than six years before 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 M's complaint has been brought in time for the purposes of the alternative three-year rule under DISP 2.8.2R(2)(b).

Merits

The unfair relationship under s.140A complaint

When considering whether representations and contractual promises by P 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 P 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 P for which Mitsubishi were responsible under s.56 when considering whether it is likely Mitsubishi had acted fairly and reasonably towards Mr M.

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.

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

What happened?

Mr M says he had no interest in solar panels until one of P's representatives knocked on his door. He says he was told by that representative that the system would be self-funding, that is it would generate enough energy and save enough on electricity costs to cover the loan repayments.

Unfortunately, there is very little documentary evidence from the sale, other than the credit agreement and a couple of other pages confirming the installation. So I have no paperwork to review which sets out what Mr M was told about how much money the system would bring in. The loan agreement shows that both the total amount payable, and the monthly cost of the loan were clear to Mr M. However, there is no mention on the agreement of the potential benefits of the panels.

I have been able to access some archived content from P's website from just before the time of the sale, which I think is relevant when considering the likely content and tone of the information it would have given Mr M – both verbally and in writing. Of note are a couple of bullet points on the relevant page. One says:

> *"Low, fixed monthly payments will be mostly covered by your feed-in tariff payment."*

And the other notes that:

> *"Together with the reduced energy bills this should ensure that the solar loan is self-financing."*

So I find what Mr M has said to be plausible, despite the lack of original documents.

For the solar panels to pay for themselves, they would need to have produced combined savings and FIT income of a little under £685.50 per year. I accept that, based on the estimated performance of the system when it was installed, that would have been a stretch, and it may well not have achieved that within the term of the loan.

But, based on the fact that Mr M's system appears to have actually produced considerably more energy than expected (around 17% more), I accept Mitsubishi's submissions that it has broadly paid for itself. Whilst a few statements are missing, which means a forensic analysis of Mr M's actual savings on electricity isn't possible, Mr M has provided a large number of statements. So Mitsubishi has used those to give a reasonable estimate of what the electricity savings would have been over the loan term. And when that estimate is added to actual amount of energy generated by Mr M's system, I find it is more likely than not that the system has all but paid for itself.

So even if I accept that there could have been a misrepresentation at the point of sale, taking into account the estimated performance of the system, ultimately, I don't think Mr M has actually lost out or suffered any notable unfairness in his relationship with Mitsubishi.

Therefore, I don't have the grounds to say that Mitsubishi's decision to decline the claim was unfair, or that it would be likely a Court would find the relationship between them to have been unfair."

As mentioned above, neither party has responded to my provisional decision. Therefore I have seen nothing which alters my findings as set out therein. And so it follows that I don't uphold this complaint.

My final decision

For the reasons I've explained, I don't uphold this complaint and Mitsubishi HC Capital UK Plc doesn't need to do anything.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 7 January 2025.

Siobhan McBride
Ombudsman