DRN-3146426

The complaint

Mr N has complained that Mitsubishi HC Capital UK Plc,[1] trading as Hitachi Capital Consumer Finance ("Hitachi"), rejected his claim against it under section 75 of the Consumer Credit Act 1974 ("section 75") in relation to his purchase of some solar panels.

Mr N has been represented in this complaint by a claims management company ("the CMC").

Background

Mr N bought solar panels for his home in 2014. The purchase was funded by a loan from Hitachi, and that business is therefore liable for the acts and omissions of the installer under the relevant legislation. In this case, that relates to the installer misleading Mr N into believing that the panels would be self-funding, which they weren't. Mr N also complains that the installer had told him it would register his panels for feed-in tariff ("FIT") payments, but had failed to do so.

Mr N's complaint was considered by one of our investigators. She thought that the benefits of the panels were mis-represented to Mr N, and that fair redress would be for the loan to be restructured to effectively make the panels self-funding over the ten year term of the loan. This restructure should be based on evidence of the actual performance of the panels, and a number of assumptions on future performance.

Hitachi accepted this recommendation in principle, but said that Mr N had failed to mitigate his losses. Mr N had never registered his panels for FIT payments, and he had then failed to raise this issue with the installer (or with Hitachi) for nearly six years after installation – although he must have realised he was not receiving FIT payments after no later than one year. If Mr N had raised this matter before April 2019 then something could have been done about this, but since then it has no longer been possible to register for the FIT payments scheme. Hitachi argued that the proposed redress should take this into account.

The investigator agreed. She issued a new opinion in which she said that the installer had made it clear to Mr N that FIT registration was his own responsibility. He had not raised the matter in time for the installer to do anything about it, and so he had not mitigated his loss. She concluded that the redress calculation she had originally described should be based on the assumption that Mr N had been receiving FIT payments, even though he actually hadn't been.

The CMC did not agree with that opinion. It argued that under the relevant time limits, Mr N was allowed up to six years to complain and so he was entitled to wait for that long if he chose to. He had complained within that time limit, and so he should not be disadvantaged for not having done so sooner. The CMC reiterated that the installer had failed to explain to Mr N that he had to register for FIT payments himself.

Since no agreement could be reached, the case was referred for an ombudsman's decision.

[1] This company used to be called Hitachi Capital (UK) PLC; it changed its name in February 2022.

My findings

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

Hitachi and the CMC are familiar with all the rules, regulations and good industry practice we consider when looking at complaints of this type, and indeed our well-established approach. So I don't consider it necessary to set all of that out in this decision.

Having carefully considered everything provided, for the same reasons as those explained by the adjudicator, I uphold this complaint in part. In brief, that is because the evidence supports the conclusion that a misrepresentation took place in that Mr N was not given clear information to demonstrate that the solar panels would *not* be self-funding and would equate to an additional cost for him.

So I think that the installer didn't treat Mr N fairly and he lost out because of what it did wrong. And this means that under section 75 Hitachi should put things right.

Putting things right

Our usual approach in cases where solar panels have been misrepresented would be to say that Hitachi should put things right by recalculating the original loan based on the known and assumed savings and income to Mr N from the solar panels over the ten year term of the loan so he pays no more than that, and he keeps the solar panel system, and any future benefits once the loan has ended.

That calculation would normally take into account the FIT payments to the complainant, since most consumers do receive FIT payments (just not for as much money as they were expecting). However, in this case Mr N did not receive any FIT payments at all. At an early stage of this case there was some conflicting information about why that might be, but after having seen an email sent by Ofgem to the CMC I am satisfied that it is because Mr N's panels were never registered for FIT payments in the first place.

There is a dispute about whose fault that is, but I don't think I need to decide that issue here. That's because our usual approach would be to say that even if we are satisfied that it was the complainant's own fault, we would still expect the respondent (*i.e.* Hitachi) to make the panels self-funding anyway, since the complainant would never have been in that position but for the original misrepresentation – that is, because they were told that the panels would be self-funding when they actually weren't.

However, I think it would be fair and reasonable on the facts of this case to depart from our usual approach, for the same reason as was given by our investigator – that Mr N failed to mitigate his loss, and instead waited until it was far too late for anyone to do anything about it.

As I've said already, the panels were installed in 2014, and they should have been registered for FIT payments at the same time. Mr N ought to have noticed that he was not receiving any FIT payments by, at the latest, a year later, although I think it should not really have taken him as long as that. If he had raised this matter with the installer before April 2019 (some five years later) then this would have been easy to resolve. The installer would have told him what he had to do, and the panels could have been registered promptly. Mr N would then have been receiving FIT payments ever since. (If he had complained to Hitachi instead, then the outcome would still have been the same – Hitachi would have either told him what to do, or would have referred him to the installer.) Instead, he waited until after it

was too late to register, the scheme having closed to new customers (but not to anyone already registered) on 31 March 2019.

I do not accept the CMC's argument that since the time limit for bringing a claim for misrepresentation or breach of contract is six years, Mr N was entitled to wait for over five years to raise this issue and then expect either the installer or Hitachi to reimburse him for five years of missed FIT payments, and also for a further five years' worth of future FIT payments which he cannot now receive. Whenever a person discovers that he has a claim for misrepresentation, and that he is losing money every month, it is incumbent on him to act swiftly to take reasonable steps to stop his losses from mounting up. It cannot be reasonable to do and say nothing for four or five years, while knowingly losing money month after month, year after year, until the deadline for bringing a claim is about to expire, and then bring a claim for all of that lost money and also for future losses which could have been avoided. On discovering that he was not receiving FIT payments, Mr N could – and should – have either registered for FIT payments himself, or told the installer (who I'm sure would then have told him what he needed to do). So it would not be fair of me to order Hitachi to pay him the extra compensation it would now need to pay him to make the panels cover the cost of the loan. Instead, I think it is fair to order Hitachi to calculate how much it would have needed to pay him to make the panels pay for the loan if he had been receiving FIT payments all along. (And, having regard to the law, I think the courts would follow the same or a similar approach.)

If the calculation I have described shows that Mr N is paying (or has paid) more than he should have, then Hitachi needs to reimburse him accordingly. (Should the calculation show that the misrepresentation has not caused a financial loss, then the calculation should be shared with him by way of explanation.)

If the calculation shows there is a loss, then where the loan is ongoing, I require Hitachi to restructure the loan. It should recalculate the loan to put Mr N in a position where the solar panel system is cost-neutral over the ten year loan term.

Normally, by recalculating the loan this way, Mr N's monthly repayments would reduce, meaning that he would have paid more each month than he should have done, resulting in an overpayment balance. And as he would have been deprived of the monthly overpayment, I would expect a business to add simple interest at 8% a year from the date of the overpayment to the date of settlement. So I think the fairest resolution would be to let Mr N have the following options as to how he would like his overpayments to be used:

a) the overpayments are used to reduce the outstanding balance of the loan and he continues to make his current monthly payment resulting in the loan finishing early,
b) the overpayments are used to reduce the outstanding balance of the loan and he pays a new monthly payment until the end of the loan term,
c) the overpayments are returned to Mr N and he continues to make his current monthly payment resulting in his loan finishing early, or
d) the overpayments are returned to Mr N and he pays a new monthly payment until the end of the loan term.

If Mr N accepts my decision, he should indicate on the acceptance form which option he wishes to accept.

If Mr N has settled the loan, Hitachi should pay him the difference between what he paid in total and what the loan should have been under the restructure above, with simple interest at 8% a year.

If Mr N has settled the loan by refinancing, then he should supply evidence of the refinance to Hitachi, and then Hitachi must:

1. Refund the extra Mr N paid each month with the Hitachi loan.
2. Add simple interest from the date of each payment until Mr N receives his refund.
3. Refund the extra Mr N paid with the refinanced loan.
4. Add simple interest from the date of each payment until Mr N receives his refund.

Pay Mr N the difference between the amount now owed and the amount he would have owed if the system had been self-funding.

My final decision

For the reasons I've explained, I'm upholding this complaint. Mitsubishi HC Capital UK Plc must put things right in the way I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 29 April 2022.

Richard Wood
Ombudsman