

The complaint

Mr M has complained about the way Mitsubishi HC Capital UK Plc (“MHCC”) responded to claims he’d made in relation to misrepresentation, breach of contract, and an alleged unfair relationship taking into account section 140A (“s.140A”) of the Consumer Credit Act 1974 (the “CCA”).

Mr M has been represented in bringing his complaint but, to keep things simple, I’ll refer to Mr M throughout.

What happened

In March 2013 Mr M entered into a fixed sum loan agreement with MHCC to pay for a £5,650.28 solar panel system (“the system”) from a supplier I’ll call “E”. The total amount payable under the agreement was £8,095.20 and it was due to be paid back with 120 monthly repayments of £67.46.

In December 2021 Mr M sent a letter of claim to MHCC explaining he thought the system was mis-sold. He said E told him he’d be paid for the electricity the system generated through the government’s Feed in Tariff (FIT) payments and that the system would be self-funding. He said E told him the system would be maintenance free with a 25-year life expectancy and his energy bills would go down. He said E told him he’d earn up to 10% annually tax free and that his property value would increase.

Mr M said the system was misrepresented and believed the statements and several other actions at the time of the sale created an unfair relationship between himself and MHCC.

MHCC sent a response to the claim in January 2022 to say, in summary, that the claim under section 75 (“s.75”) was made out of time. It said it didn’t think the relationship between Mr M and MHCC was unfair. It said there was no evidence it hadn’t complied with relevant law and that the documentation set out clearly the financial information relating to the purchase of the system. MHCC said Mr M had the right to cancel and that there was no suggestion he didn’t understand the agreement. It said Mr M had benefitted from FIT payments and that he’d continue to receive that benefit. It also said no commission was paid in relation to the agreement and it thought its decision to lend was responsible.

Unhappy with MHCC’s response, Mr M decided to refer his complaint to the Financial Ombudsman. MHCC sent a final response in January 2023 reiterating what it had set out in its claim response. Mr M remained unhappy.

One of our investigators looked into things and thought E had likely told Mr M the system would be self-funding and that the documentation didn’t clearly set out it wasn’t. She noted E’s website from 2013 set out there were solar panels that paid for themselves. Our investigator didn’t think the system was self-funding over the course of the loan term, and so she thought E had misrepresented it. She thought a court would likely find the relationship between Mr M and MHCC was unfair and that he’d suffered a loss through entering into the agreement. She thought MHCC should recalculate the loan based on known and assumed savings and income over the course of the loan so that Mr M pays no more than that, and he

keeps the system. She also recommended £100 compensation for the impact of MHCC not investigating the s.140A claim.

MHCC didn't accept the view. In summary, it said:

- The complaint was brought more than six years after the events complained of, so outside the time limits which apply to the jurisdiction of the Financial Ombudsman.
- Mr M's allegations of an unfair relationship don't relate to any events post-dating the sale of the system in March 2013.
- The end of a credit relationship may be the starting point for limitation purposes in civil litigation, but it isn't the starting point for the six-year period under DISP 2.8.2R(2)(a), where the unfair relationship itself would not constitute an event. It is the event(s) giving rise to an unfair relationship which are the "events complained of" for the purposes of that rule.
- Without prejudice to its position on jurisdiction it considers the approach to redress should be in accordance with the court decision in *Hodgson v Creation Consumer Finance Limited* [2021] EWHC 2167 (Comm) ("Hodgson").

I issued a provisional decision setting out why the complaint was within our jurisdiction to consider. Neither party disagreed with what I said so I'm not going to set it out again. For the merits of the complaint, my provisional decision said:

The unfair relationship under s.140A complaint

When considering whether representations and contractual promises by E 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 E to be the agent of MHCC 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 E for which MHCC were responsible under s.56 when considering whether it is likely MHCC 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 MHCC was unfair under s.140A.

What happened?

Mr M says he was verbally misled that the system would effectively pay for itself. I've taken account of what Mr M says he was told, and I've reviewed the documentation that I've been supplied.

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 M to be able to understand what was required to be repaid towards the agreement.

It's curious it looks like the loan agreement was signed after the commissioning date on the MCS certificate. We've asked if there was other documentation from the point of sale, but Mr M said he's supplied everything he had. I've not seen enough to demonstrate Mr M had documentation from the point of sale that would've given him enough information about the savings he'd likely make from the system.

Like our investigator pointed out, I'm conscious that E's website from the time advertised 'solar that pays for itself'. The website suggested customers could enjoy solar benefits without upfront costs. And that there were loans available that allowed customers to pay for solar panel systems out of the income generated from FIT payments and energy bill savings. I think this supports Mr M's allegation that E told him the system would be self-funding.

I've not seen anything to indicate Mr M had an interest in purchasing solar panels before E contacted him. Mr M has said he only agreed to the purchase because E told him the system would be self-funding. The loan is a costly and long-term commitment. I'm mindful it would be difficult to understand why, in this particular case, Mr M would have agreed to the installation if his monthly outgoings would increase significantly.

For the solar panels to be self-funding, they'd need to produce a combined savings and FIT income of over £800 per year. I've not seen anything to indicate there's a problem with the system. Based on the generation readings I've seen it looks like it's slightly overperformed. But I've also not seen anything to suggest Mr M achieved the benefits required to make the system self-funding within the term of the agreement. I therefore find the representations that were likely made weren't true. Whilst there are elements of the calculations that had to be estimated, the amount of sunlight as an example, I think the salesperson ought to have known this and made it clear the system wouldn't have produced enough benefits to cover the overall cost of the fixed sum loan agreement.

Considering Mr M's account about what he was told, the information on E's website, and that MHCC hasn't disputed these facts, I think it likely E gave Mr M a false and misleading impression of the self-funding nature of the system.

I consider E's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Mr M was expected to receive by agreeing to the installation of the system. I consider that E's assurances in this regard likely amounted to a contractual promise that the 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 M went into the transaction. Either way, I think E's assurances were seriously misleading and false, undermining the purpose of the transaction from Mr M's point of view.

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

Where MHCC is to be treated as responsible for E's negotiations with Mr M 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 M and MHCC 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 MHCC has benefitted from the interest paid on a loan he would otherwise have not taken out.

The s.75 complaint and additional s.140A complaint points

Given my findings above I'm not proposing to provide a detailed analysis of Mr M's s.75 complaint and also his other s.140A complaint points.

This doesn't stop me from reaching a fair outcome in the circumstances, and I'm mindful the purpose of my decision is to provide a fair outcome quickly with minimal formality.

Fair compensation

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

MHCC told us that it considers our approach to redress should be in accordance with 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 M's expectation of what he would receive. I consider Mr M has lost out, and has suffered unfairness in his relationship with MHCC, to the extent that his loan repayments to MHCC exceed the benefits from the solar panels. On that basis, I believe my determination results in fair compensation for Mr M.

MHCC 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, MHCC should recalculate the agreement based on the known and assumed savings and income Mr M 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 M received by way of FIT payments as well as through energy savings. Mr M will need to supply up to date details, where available, of all FIT benefits received, electricity bills and current meter readings to MHCC.

Seeing as though I understand Mr M now should have repaid the agreement, I think there's only one viable option for redress.

Finally, our investigator recommended £100 compensation, but as I think MHCC did respond to the various claims Mr M raised, I'm not proposing it needs to do that.

Mr M accepted the provisional decision. MHCC didn't. In summary, MHCC said:

- Many other customers had provided documentation to support their complaints, unlike Mr M.
- It was aware from previous complaints that E did provide customers full documentation which included a calculation of the estimated benefits.
- There was nothing on the website at the time Mr M purchased the system that would lead him to believe the system would be self-funding within the loan term. It said it was true that the solar panels would pay for themselves.

- Another similar case was found in its favour.

MHCC supplied a sample copy of the paperwork it said E would have given Mr M. Without prejudice to what it said about the merits of the complaint MHCC proposed again I should adopt a different approach to fair compensation, and proposed I should use the following methodology:

- Benefits using electricity bills and FIT statements are calculated over the life of the panels: including degradation, would be 20 years
- Benefits between years 11-20 have a 50% reduction applied to them
- RPI at 4% and EPI at 2.50%

MHCC said using the above to calculate Mr M's benefits meant that:

- Benefits received between years 1 to 10 = £6,322.31
- Benefits received between years 10 to 20 (50% reduction) = £3,966.81
- Total Benefits received = £10,289.11

Therefore, no refund was owed to Mr M.

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.

I'd like to thank the parties for their responses. We contacted Mr M to see if he recalled seeing the document MHCC referred to. He explained he didn't recall seeing a document. And he reiterated E had misled him about the benefits he'd receive. He also explained he didn't complain sooner because he didn't know he could until he saw an advert about mis-selling.

It's not clear Mr M saw the form MHCC has supplied an example of. And we don't have a signed copy of the form. So it's not clear how much weight can be put on the example copy. But even looking at the example copy that MHCC supplied, I still don't think it clearly sets out the system (for the example case) wouldn't be self-funding without the customer having to carry out detailed calculations. Although it does have to be highlighted, understandably, MHCC hasn't supplied an associated example loan agreement.

From looking at the example form, I can see:

- The monthly loan payments were £85
- The estimated year 1 return was £849
- The monthly profit started to arise from year 7 after a break even in year 6, and it jumped significantly from year 11
- The total revenue over 20 years was £25,021
- The total loan payments came to £10,224
- The total profit was £14,796

I think you could also argue that unless the agent made it clear, a reasonable person may have understood the system (for the example) would have been self-funding with the loan term based on the documentation. If the total revenue over 20 years was over £25,000 and the total amount payable under the agreement (within 10 years) was around £10,000 it could be reasonable to think the system (for the example) would pay for itself within the loan term. While the first year estimated benefit is around £150 less than the annual repayments, given the chart shows that the system would be making monthly profit from year 7, I don't think the

example paperwork shows the system clearly wouldn't be self-funding. I don't think the example form changes my opinion on what's most likely to have happened.

While the website doesn't specifically say the system will be self-funding within the loan term, I think it supports Mr M's assertions that the benefits of it were discussed, and the system was sold as an investment, without upfront costs. I've also set out why I thought his arguments regarding being told the system would be self-funding within the loan term were convincing and plausible.

It seems to me that MHCC are suggesting a similar compensation methodology to the one used in the Hodgson judgement, mainly that benefits past the loan term should be included in the calculation, albeit with a reduction applied. This does not persuade me to depart from the conclusions I reached in my provisional decision. I say this as I explained in my determination the reasons why I don't think a different approach to fair compensation should be used.

As I said previously here, I'm considering fair redress for a complaint where I think it likely the supplier made a contractual promise regarding the self-funding nature of the solar panel system. But even if I'm wrong. I'm satisfied the assurances were such that fair compensation should be based on Mr M's expectation of what he would receive. Mr M has lost out, and therefore has suffered unfairness in his relationship with MHCC, to the extent that his loan repayments to it exceed the benefits from the solar panels. So, I believe my determination results in fair compensation for Mr M. And while I understand MHCC may have received a different outcome on a case it finds similar, as I'm sure it will appreciate, I need to decide this complaint on its own individual merits when deciding what I think is fair and reasonable in all the circumstances.

Taking everything into account, I'm not going to depart from the conclusions I reached in my provisional decision.

My final decision

For the reasons I have explained I uphold Mr M's complaint and direct Mitsubishi HC Capital UK Plc to

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

*Where Mr M has not been 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 MHCC to complete the calculation I have directed it to follow in the circumstances using known and reasonably assumed benefits.

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 2 October 2024.

Simon Wingfield
Ombudsman