DRN-4964553

The complaint

Mr B has complained about Mitsubishi HC Capital UK Plc's ('Mitsubishi') 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 140.A ('s.140A') of the CCA.

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

What happened

Mr B bought a solar panel system ('the system') from a company I'll call "M" using an eight year fixed sum loan from Mitsubishi. Mitsubishi signed the loan agreement on 7 December 2012. The agreement is signed by Mr B but not dated. The loan was for £12,199 and the monthly repayments were £170.18 for 96 months.

Mr B complained to Mitsubishi, he said that he was told by M that the 'feed in tariff' ('FIT') payments and savings he would make would cover the cost of the loan repayments, 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.

Mr B raised his complaint to Mitsubishi in a letter dated 15 October 2019. Mitsubishi issued a final response letter dated 13 May 2020. Mitsubishi considered Mr B had brought his claim more than six years after the cause of action occurred under the FCA's rules on dispute resolution and later Mitsubishi said that for the same reason they had no obligation under section 75 of the CCA. Unhappy with Mitsubishi's response, Mr B asked us to review his complaint. Mr B brought his complaint to this service on 29 October 2020.

An investigator considered Mr B's complaint, she ultimately thought that -

- Given the s.75 claim was more likely to be time barred under the Limitation Act ('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 B and Mitsubishi.

On 4 February 2023, the investigator recommended that Mr B keep the system and Mitsubishi take into account what Mr B had paid so far, along with the benefits he received, and make sure the system was effectively self-funding.

Mr B accepted the investigator's view. Mitsubishi told us on 22 February 2023 that it disagreed with our assessment of our jurisdiction in this case and with our view on

redress. So, the case was progressed to the next stage of our process, an Ombudsman's decision.

I issued my first provisional decision in respect of this complaint on 8 July 2024. Mitsubishi asked the decision to address some sample documentation they had provided. I issued my second provisional decision on 30 July 2024, a section of which is included below, and forms part of, this decision. In my provisional decision, I considered the sample documentation and I set out the reasons why it was my intention to uphold Mr B's complaint. I set out an extract below:

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

My findings on jurisdiction

I'm satisfied I have jurisdiction to consider Mr B'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 B's s.75 claim on 13 May 2020, this relates to a regulated activity under our compulsory jurisdiction. Mr B brought his complaint about this to the ombudsman service on 29 October 2020. 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

The event complained of here is Mitsubishi's participation, for so long as the credit relationship continues, in an alleged unfair relationship with Mr B. Here the relationship was ongoing until the loan was repaid in October 2015. The complaint was raised on 15 October 2019. So, the complaint has been brought in time for the purposes of our jurisdiction.

Merits

The s.75 complaint

The law imposes a six-year limitation period on claims for misrepresentation and breach of contract, after which they become time barred.

In this case the alleged misrepresentation and alleged breach cause of action arose when an agreement was entered into. Mitsubishi say an agreement was entered into on 26 November 2012. That is the date the contract was signed. There is no date on the loan agreement against Mr B's signature. The loan agreement was signed by Mitsubishi on 7 December 2012. Mr B brought his s.75 claim to Mitsubishi on 31 January 2020. So, I don't need to make a finding on the date the agreement was entered into because either date is more than six years before Mr B raised his complaint to Mitsubishi. Given this, I think it was fair and reasonable for Mitsubishi to have not accepted the s.75 claim. So, I do not uphold this aspect of the complaint.

The unfair relationship under s.140A complaint

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

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 s140A.

<u>What happened?</u>

Mr B has said that he was told by M's representative that the cost of the system would be fully paid for by the FIT payments he would receive and the savings he would make. And Mr B has told us that he was persuaded to go ahead with the solar panels because of assurances he received from M's representative. I have been shown no evidence that Mr B had already decided to take out solar panels before he was visited by M's representative.

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

The loan agreement sets out Mr B's responsibilities for repaying the loan amount and the monthly cost of that. Looking at the loan agreement it specifies that the goods being purchased were solar panels. So, I'm satisfied the loan was taken in Mr B's name to solely purchase the system sold by M.

But the loan agreement contains no mention of the income or savings that may be generated. So, there was no way for Mr B to compare his total costs against the financial benefits he was allegedly being promised from that document. Given the loan agreement doesn't contain information about the benefits, Mr B would have looked to M's representative to help him understand how much the panels would cost, what they would bring in and how much he would benefit from the system in order for him to make a decision.

Mitsubishi has sent in a sample document of the sales contract from M. Mitsubishi describe the purchase order form and a separate page as a two-page document. To keep things simple, I will refer to them as page one and page two.

The purchase order is on page one. Page two is titled 'QUOTATION AND SYSTEM LAYOUT'. Page two contains a space for a diagram of the system to be fitted and underneath it for the representative to provide details of likely performance and possible financial benefits. From copies of these forms from other cases, Mitsubishi think that M's

customers were provided with the benefits of the system in a clear way that was not inflated.

Mitsubishi have not provided a copy of Mr B's actual two-page document, just a sample. Mr B provided a copy of page one of that document when he brought his complaint to this service.

We sent Mr B a copy of the forms Mitsubishi had provided and asked Mr B for his copy of page two and his reflection on what happened at the time of the sale. Mr B told us that he was not left with any calculations by the representative of M or indeed saw the second page of the document. And Mr B also said,

"It is bizarre to say the least that the bank at this stage would provide such documents and not notice that on the last set of calculations you sent me the figures are actually inflated ie instead of using 50% of the FIT Tariff to calculate the electricity savings they use the full tariff. I believe this is one of many issues the merchant was reprimanded by their governing body the RECC for."

I have considered this aspect of the complaint along with all the other submissions that have been made to me in this case. I have considered that we do not have the second page that pertained to Mr B's sale. And Mr B kept copies of lots of documents that pertained to the sale, but not this one. That could mean Mr B was shown a completed page two but chose not to keep, was shown a completed page two and kept it but chose not to share it or that Mr B was not shown a completed page two and therefore had no reason to keep it, or that Mr B was not shown or given such a document.

Mitsubishi thinks the second page would always have been completed. But I have seen insufficient evidence to be able to safely make that finding.

And in considering the wider context of the sale, I note that page two contains no signature box. Mr B did not need to interact with page two at all in order to complete the order of the solar panels system. So, that lessens the weight I have placed on this being a two-page document. And I think it does reduce the weight I must place on the importance to the sales process of what Mitsubishi describe as page two.

I have also noted that in the three pieces of sample evidence of what Mitsubishi call page two, the benefits information has not been completed in a uniform manner on all three forms. Two have used the designated printed area to capture that information, whilst the other form has a more free-form approach in a space designed to describe the system layout.

It seems to me that M relied on its representatives to use their initiative as to how this page was used – if at all. In any event, it seems that this page was not as tightly controlled a part of the sales meeting as Mitsubishi has suggested.

I have looked at the calculations of electricity cost savings. Having done so I have noted that one of the calculations seems to have inflated the likely savings. I say that because the calculation suggests that consumer would use 100% of the energy produced by the system. This is quite high given the standard assessment procedure ("SAP") calculator and FIT scheme at that time were based on 50% self-consumption.

So, in forwarding these sample forms in support of its position Mitsubishi has shown that the consumer didn't need to interact with the second page to make their order, the forms weren't always completed in a consistent manner for each sale and that one of the sample documents seems to show the representative inflating the potential benefits of the system.

I cannot ignore that no page two has been provided for the sale to Mr B. Having considered all of the evidence supplied in this case, including the sample documentation that Mitsubishi has forwarded in its defence, I have seen no definitive evidence that the benefits were accurately explained to Mr B in any documentation from the time of the sale. So, I still think that Mr B would have looked to M's representative to help him understand how much the panels would cost, what they would bring in and how much he would benefit from the system in order for him to make a decision.

And when thinking about all of the above, I'm mindful of the actions taken by the Renewable Energy Consumer Code ('RECC') against M. My understanding is that the RECC administers the renewable energy consumer Code and ensures that its members comply with the Code.

The RECC investigated M's conduct. In May 2013, it determined that M was in breach of a number of sections of the code. The panel felt the evidence suggested that M showed a "persistent pattern of non-compliance" with the code. In particular, the panel found that M had:

- *complaints upheld about the quality of its advertisements by the advertising standards agency.*
- *representatives who had provided financial inducements at meetings that put consumers under pressure to sign up.*
- *failed to provide accurate performance information and predictions before the contract was signed.*
- *Failed to provide key documents, including little or no contractual information.*

The findings were deemed to have placed consumers at risk and were thought to be serious enough that the company's membership of the RECC was put on probation whilst remedial actions were implemented.

Whilst I accept that the above are findings based on cases that the RECC were looking at, and different to this case, yet the findings do suggest that there were conduct concerns in the areas that relate to Mr B's complaint around the time that he was sold his system.

Mitsubishi has claimed that page 2 would always have been completed and provided to the consumer. But Mr B told us he had no recollection of that and thought he had never been shown that page. And even if he had been shown a completed page 2, the samples include an example of a representative inflating the potential benefits of the system. And when I consider that, I must also consider that M admitted to the RECC during its disciplinary meeting that sometimes key documents hadn't been provided to consumers. Neither the sample documentation provided by Mitsubishi, nor M's recorded admittance to the RECC undermine Mr B's testimony that in this case, he did not see or receive the sample documentation provided by Mitsubishi, nor any evidence that the solar system would be anything other than self-funding.

Mr B left the meeting having agreed to an interest-bearing loan, with a monthly repayment of around £170, payable for eight years. Given the financial burden he took on, and in the absence of any evidence from Mitsubishi to the contrary, I find Mr B's account of what he was told by M to be 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 he's said he received from M.

I have noted that our investigator thought that Mr B's testimony seemed persuasive and explained why they thought that in their assessment. I have noted that Mitsubishi has not responded to that part of the assessment.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £2,042.16 per year. I have not seen anything to indicate Mr B's system was not performing as expected but his system was unlikely to produce that. Mr B's testimony is that it didn't and the information about Mr B's FIT payments also suggest that the solar panel system failed to generate anything close to the sort of income required to meet Mr B's loan repayments.

So, these statements were not true. I think the salesman from M must reasonably have been aware that Mr B's system would not have produced benefits at this level. I think the salesman would have known that Mr B's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to Mr B.

Considering Mr B's account about what he was told, and the documentation he was shown at the time of the sale, and in the absence of any other evidence from Mitsubishi to the contrary, I think it likely M gave Mr B a false and misleading impression of the self-funding nature of the solar panel system. On balance, I find Mr B's account to be plausible and convincing.

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

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

Where Mitsubishi is to be treated as responsible for M's negotiations with Mr B 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 B 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.

Fair compensation

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

Mitsubishi told us that it considers our approach to redress should be in accordance with the Court's decision in Hodgson v Creation Consumer Finance Limited [2021] EWHC 2167 (Comm) ('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 B's expectation of what he would receive. I consider Mr B 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 B.

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.

Therefore, to resolve the complaint, Mitsubishi should recalculate the agreement based on the known and assumed savings and income Mr B received from the solar panel system over the eight-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 B received by way of FIT payments as well as through energy savings. Mr B may need to supply up to date details to help Mitsubishi make that calculation. But Mitsubishi can and should use assumptions when information is not available. I say this particularly as we have been informed that Mr B settled the loan in full when he sold the house in October 2015. So further documentation may not be available.

Normally, by recalculating the loan this way, Mr B's monthly repayments would reduce, meaning that he would've paid more each month than he should've done resulting in an overpayment balance. And as a consumer would have been deprived of the monthly overpayment, I would expect a business to add 8% simple interest from the date of the overpayment to the date of settlement.

Mr B told us that the loan was settled early in October 2015. So, to put things right Mitsubishi must:

- *Calculate the total repayments Mr B made towards the loan up until he repaid it – A*
- *Use Mr B's electricity bills, FIT statements and meter readings to work out the known and assumed benefits he received up until he repaid the loan – B*
- *Use B to recalculate what Mr B should have repaid each month towards the loan over that period and reimburse him the difference between what he actually repaid (A) and what he should have repaid, adding 8% simple annual interest* to any overpayment, from the date of repayment until the date of settlement – C*
- *Use Mr B's electricity bills, FIT statements and meter readings to work out the known and assumed benefits he received between the loan being paid off and the end of the original loan term – D*
- *Deduct D from the amount Mr B paid off the loan – E*
- *Add 8% simple annual interest* to E from the date Mr B paid off the loan until the date of settlement – F*

- *Mitsubishi should pay Mr B C + F*

I agree Mitsubishi's refusal to consider the claim under s140A has also caused Mr B some further inconvenience. And I think the £200 compensation recommended by our investigator is broadly a fair way to recognise that.

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

I asked the parties to the complaint to let me have any further representations that they wished me to consider by 13 August 2024. Mr B has accepted my provisional findings. Mitsubishi has not acknowledged the provisional decision, made a further submission or asked for an extension to do so.

I think that both parties have had time sufficient to have made a further submission had they wished to do so. So, I am proceeding to my final decision.

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.

So, as neither party has provided any new information or argument for me to consider following my provisional decision, I have no reason to depart from those findings. And as I've already set out my full reasons (above) for upholding Mr B's complaint, I have nothing further to add.

So, having looked again at all the submissions made in this complaint, I am upholding Mr B's complaint and require Mitsubishi to calculate and pay the fair compensation detailed above.

Putting things right

I require Mitsubishi to calculate and pay the fair compensation detailed above.

My final decision

For the reasons set out, I'm upholding Mr B's complaint about Mitsubishi HC Capital UK Plc. I require Mitsubishi HC Capital UK Plc to calculate and pay the fair compensation as detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 11 September 2024.

Douglas Sayers
Ombudsman