DRN-4997059

The complaint and what happened

Mrs M has complained about Mitsubishi HC Capital UK Plc's, trading as Hitachi Capital Consumer Finance, ('Mitsubishi') response to a claim she 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 August 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 Mrs M 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 her and Mitsubishi.

I asked both parties to let me have any more information they wanted me to consider. Mrs M accepted my findings and Mitsubishi has not 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 upholding it, and I'll reiterate why, but first I've included here the relevant sections of my provisional decision:

> ***"What happened***
>
> *In September 2014, Mrs M bought a solar panel system ('the system') from a company I'll call "S" using a 10-year fixed sum loan from Mitsubishi.*
>
> *Mrs M complained to Mitsubishi, she said that she was told by a salesperson from S that the 'feed in tariff' ('FIT') payments and electricity savings she would make would cover the cost of the loan repayments, however that hasn't happened, and she's suffered a financial loss. She also believed that what happened at the time of the sale created an unfair relationship between herself and Mitsubishi.*
>
> *Mitsubishi responded to the complaint in its final response, it considered Mrs M had brought her claim more than six years after the cause of action occurred under the Limitation Act ('LA').*
>
> *Unhappy with Mitsubishi's response, Mrs M referred her complaint to our service.*
>
> *An investigator considered Mrs M's complaint, he 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 Mrs M and Mitsubishi.*

He recommended that Mrs M keep the system and Mitsubishi take into account what Mrs M had paid so far, along with the benefits she received, making sure the system was effectively self-funding. He 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.

Mrs M accepted the investigator's view. Mitsubishi did not, highlighting again that the event complained of occurred in September 2014, and went on to disagree with the investigator's findings around how things should be put right for Mrs M. 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 Mrs M's complaint, both in respect of the refusal by Mitsubishi to accept and pay her 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 Mrs M's s.75 claim on 13 December 2021, this relates to a regulated activity under our compulsory jurisdiction. Mrs M brought her complaint about this to the ombudsman service on 15 December 2021. So, her 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.

Mrs M is able to make a complaint about an unfair relationship between herself 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 her. 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 Mrs M's case the relationship was ongoing when she referred her complaint to the Financial Ombudsman. At the time, Mitsubishi was responsible for the matters which made its relationship with Mrs 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 her complaint on the unfairness of the credit relationship between himself and Mitsubishi, Mrs M therefore complained about an event that was ongoing at the time she referred her 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 Mrs 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

<u>The unfair relationship under s.140A complaint</u>

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

<u>What happened?</u>

Mrs M has said that she was told by S's representative that the cost of the system would be paid for by the FIT payments she would receive and the savings she would make on her electricity charges. I haven't seen any evidence she had any prior interest in purchasing solar panels.

I've looked at the documents provided by Mrs M 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 Mrs M. However, there is no mention on the agreement of the potential benefits of the panels.

Mrs M has been able to provide me with the "Client Handover Pack" provided by S in 2014, which she had retained. It comprises several certificates and an Energy Performance Certificate (EPC). But there is nothing which sets out the expected benefits of the system.

However, I have given the EPC particular scrutiny as it suggests that there are only very modest savings to be made from the installation of a solar panel system. So I asked Mrs M why she hadn't taken that into account when making her decision to buy the system, and led her to question how the panels would be self-funding. She highlighted that the EPC only references savings from electricity bills, and in no way deals with FIT generation issues. She says the, "…conversation at the time of sale…" led her "…to believe that the FIT generation would pay for the solar panels itself or even provide a surplus amount."

In weighing up Mrs M's testimony, I have been able to access some archived content from S's website from around the time of the installation, which I think is relevant when considering the likely content and tone of the information it would have given Mrs M – both verbally and in writing. The website talks about estimated FIT payments of £900 per year – "in addition to your electricity bill savings." It also states that customers will, "…receive a serious return on your investment as the savings and energy cashback will eventually cover the installation – and more."

I find what Mrs M has said to be believable. Given the credit agreement doesn't contain information about the benefits, Mrs M would have looked to S's representative to help her understand what the panels would bring in and how much she would benefit from the system. As mentioned, I've seen no evidence of any motivation other than a financial one on Mrs M'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 her savings on her electricity bills and income from the FIT scheme would have been a central part of the conversation with a salesperson. I think the tone of S's website at the time suggests that conversation is likely to have portrayed the system as being at least self-funding, or possibly even profitable. On balance, I think it is more likely than not that Mrs M would not have agreed to the installation of the panels if S had made it clear that it would leave her out of pocket.

Mitsubishi hasn't provided evidence to dispute what Mrs M's said happened. Yet with no prior interest Mrs M left the meeting having agreed to an interest-bearing loan, with a monthly repayment of around £133, payable for 10 years. Given her lack of prior interest and the financial burden she took on I find Mrs M's account of what she was told by S credible and persuasive. The loan is a costly long-term commitment, and I can't see why she would have seen this purchase as appealing had she not been given the reassurances about saving money she's said she received from S.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £1,600 per year. I have not seen anything to indicate Mrs M's system was not performing as expected, but her system has clearly not produced this. So, these statements were not true. I think the S's representative must reasonably have been aware that Mrs M'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 S's representative would have known that Mrs M's system would not produce enough benefits to cover the overall cost of the system as stated verbally to Mrs M.

Considering Mrs M's account about what she was told, the documentation she was shown at the time of the sale, and the fact Mitsubishi hasn't disputed these facts, I think it likely S gave Mrs M a false and misleading impression of the self-funding nature of the solar panel system.

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

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

Where Mitsubishi is to be treated as responsible for S's negotiations with Mrs 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 Mrs M and Mitsubishi was unfair.

Because of this shortfall between her costs and the actual benefits, each month she has had to pay more than she expected to cover the difference between her solar benefits and the cost of the loan. So, clearly Mitsubishi has benefitted from the interest paid on a loan she 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 Mrs M'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 Mrs M and Mitsubishi's relationship arising out of S's misleading and false assurances as to the self-funding nature of the solar panel system. Mitsubishi should repay Mrs M a sum that corresponds to the outcome she could reasonably have expected as a result of S's assurances. That is, that Mrs M's loan repayments should amount to no more than the financial benefits she 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 Mrs M received from the system over the 10-year term of the loan, so she pays no more than that. To do that, I think it's important to consider the benefit Mrs M received by way of FIT payments as well as through energy savings. Mrs M 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 Mrs M's expectation of what she would receive. I consider Mrs M has lost out, and has suffered unfairness in her relationship with Mitsubishi, to the extent that her loan repayments to Mitsubishi exceed the benefits from the solar panels.

On that basis, I believe my determination results in fair compensation for Mrs M. 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 Mrs M's complaint in a reasonable timeframe, with minimal communication, caused Mrs M 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 Mrs M £100."

As mentioned above, Mrs M has accepted my findings and Mitsubishi has not replied at all to my provisional decision. 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 Mrs M, Mitsubishi Consumer Finance Ltd must now:

- Calculate the total payments (the deposit and monthly repayments) Mrs M has made towards the solar panel system up until the date of settlement – A
- Use Mrs M's bills and FIT statements, to work out the benefits she received up until the loan term* – B
- Use B to recalculate what Mrs M should have paid each month towards the loan over that period and calculate the difference, between what she actually paid (A), and what she 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 Mrs M

*If Mrs M is not able to provide all the details of her meter readings, electricity bills and/or FIT benefits, I am satisfied she has provided 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 Consumer Finance Ltd considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mrs M how much it's taken off. It should also give Mrs M a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

I also think the way Mitsubishi handled Mrs M's complaint has caused her 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 Mrs M to accept or reject my decision before 1 October 2024.
Siobhan McBride
Ombudsman