DRN-5004635

The complaint

Mrs D has complained about Hitachi Capital (UK) Plc, now trading as Mitsubishi HC Capital UK Plc's ('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 140.A ('s.140A') of the CCA.

Mrs D has been represented in bringing her complaint but, to keep things simple, I'll refer to Mrs D throughout.

What happened

In August 2014, Mrs D bought a solar panel system ('the system') from a company I'll call "Z" using a 10-year fixed sum loan from Mitsubishi. The purchase order from Z was dated 28 August 2014 and the loan agreement was signed and dated the same day.

The loan agreement sets out the amount of credit is £8,500, the total charge for credit is £4,688 and the total amount payable is £13,188. The monthly payments were £109.90 and the term was 120 months. The loan was still being paid when the complaint came to this service and is due to complete imminently.

Mrs D raised her complaint to Mitsubishi on 22 July 2021, explaining she thought the system was mis-sold, in summary Mrs D said that Z:

- Told her that the system would pay for itself within the term of the loan and cost her nothing.
- Told her that the Feed in Tariff ('FIT') payments and savings she would receive would cover her monthly finance payments.
- Conducted a high-pressure sale.
- Failed to undertake a suitable and sufficient creditworthiness assessment for this agreement.
- Failed to provide pre-contractual information.

Mrs D said she had a like claim against Mitsubishi for misrepresentation and breach of contract under s.75. She said that the misrepresentations made by Z were on behalf of Mitsubishi under section 56 ("s.56") of the CCA. And that because of the misrepresentations, the breach of contract and matters that amounted to unfair trading practices the relationship between Mitsubishi and herself was unfair under s.140A.

Mitsubishi responded to the complaint on 19 October 2021 in its final response, it considered Mrs D's complaint was time barred under the Limitation Act ('LA'). Unhappy with Mitsubishi's response, Mrs D referred her complaint to this service on 27 October 2021.

Mrs D's complaint was considered by an Investigator on 27 February 2023, in summary she 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 D and Mitsubishi.

She recommended that Mrs D keep the system and Mitsubishi take into account what she had paid, along with the benefits she received, making sure the system was effectively self-funding over the original loan term. Our investigator also thought Mitsubishi's refusal to consider the claim under s140A had caused Mrs D some further inconvenience and suggested an award of £100 as compensation for that.

Mitsubishi responded on 9 March 2023, in summary it said:

- Our service didn't have jurisdiction to look at the s.75 or s.140A complaint because, in regard to both, the event being complained of was more than 6 years ago.
- Mrs D hadn't complained about the handling of her s.75 claim, however even if she had and Mitsubishi issued a response, the Financial Ombudsman Service wouldn't have jurisdiction under DISP 2.8.1R(1) to consider it.
- Events can give rise to an unfair relationship, but an unfair relationship is not an event in itself – the end of the relationship may be the starting point for limitation purposes in civil litigation but is not the starting point for the Ombudsman's jurisdiction under DISP 2.8.2R. The event being considered should be the event that gave rise to the unfair relationship.
- Our service should be adopting the High Court's approach in Hodgson v Creation Consumer Finance Limited [2021] EWHC 2167 (Comm) ('Hodgson') as an appropriate mechanism for calculating redress.

As there was no agreement the case was forwarded to the next stage of our process, an ombudsman's decision.

I issued my provisional decision on 15 August 2024, a section of which is included below, and forms part of, this decision. In my provisional decision, I set out the reasons why it was my intention to uphold Mrs D'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 provisional findings

Jurisdiction

I'm satisfied I have jurisdiction to consider Mrs D's complaint, both in respect of the refusal by Mitsubishi to accept and pay her s.75 claim and in relation to the allegations of an unfair relationship under s.140A.

The s.75 complaint

The ombudsman service's jurisdiction over complaints that a business is liable under s.75 is based upon the lender's failure to honour its liability when the borrower makes a valid claim under that section.

When a borrower under a regulated credit agreement seeks payment from the lender of the damages, he or she has suffered under a connected transaction because of something done or said by the supplier, the lender may or may not have a liability to the borrower under s.75.

But if the borrower's claim is valid, the lender should honour its liability – and its failure to do so is a matter to which the Financial Ombudsman's jurisdiction extends. That is because it is part of the lender's regulated activities to exercise its duties under a regulated credit agreement – and a complaint about a firm's acts or omissions in carrying on a regulated activity (or any ancillary activity carried on by the firm in connection with a regulated activity) come with our jurisdiction under DISP 2.3.1R.

Mitsubishi argues that the event complained of when the matter is brought to our service occurred as and when the supplier caused the alleged s.75 liability to arise in the first place. I disagree: the lender's s.75 liability in damages doesn't arise as a result of any act or omission of the lender in performing a regulated activity – it is simply a claim given by statute to the borrower against the lender. And it arises from the acts or omissions of a third party, the supplier. Only when and if that claim is presented by the borrower to the lender must the lender do anything about it, which is to honour its statutory liability by paying the claim if it is a valid one. Until then, the lender's acts and omissions are simply to have lent money to the borrower at the borrower's request, and that is not the matter complained about.

So, when a borrower brings a complaint to our service alleging that they were due money under s.75 which the lender has refused to pay, the "event complained of" in such circumstances isn't the supplier's conduct; it is the lender's refusal or failure to honour its alleged statutory liability when the borrower made the claim.

Mitsubishi did not accept the s.75 claim in its letter on 19 October 2021, this constituted the "event complained of". Furthermore, in its letter treated Mrs D as having brought a complaint which she was entitled to refer to our service.

Mrs D then brought her complaint to the ombudsman service on 27 October 2021. Given this, I'm satisfied her complaint in relation to the s.75 claim was brought in time for the purposes of our jurisdiction.

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

I am also satisfied the complaint about an unfair relationship under s.140A was brought in time so that the ombudsman service had jurisdiction. Section 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 creditor or the supplier on the creditor's behalf before or after the making of the 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 Courts have 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.

The Courts have also determined that 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 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. 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 still on foot, 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 this case Mitsubishi has said Mrs D's relationship ended with it in August 2014, when the solar panel system was sold to Mrs D, so Mitsubishi is responsible for the matters which made its relationship with Mrs D unfair and for taking steps to retrospectively remove the source of that unfairness so that the relationship is no longer unfair. By relying in her complaint on the unfairness of the credit relationship between herself and Mitsubishi, Mrs D is therefore complaining about an event which was still current, i.e. the loan was still running when the complaint was brought to this service, namely that Mitsubishi participated in and perpetuated an unfair credit relationship with her. Mrs D referred her complaint to the ombudsman service on 27 October 2021, so, taking into account DISP 2.8.2R(2)(a), I am satisfied that she is not prevented from bringing her complaint to the ombudsman service by the 'six-year' rule. I am otherwise satisfied the complaint is within the ombudsman service's jurisdiction to consider. In these circumstances, I don't consider it necessary to make findings about whether Mrs D'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 Z 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.

S.56 of the CCA has the effect of deeming Z 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 Z for which Mitsubishi were responsible under s.56 when considering whether it is likely Mitsubishi had acted fairly and reasonably towards Mrs D.

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.

What happened?

Mrs D has said that she was told by Z's representative that the cost of the system would be fully paid for by the FIT payments and electricity savings she would receive. Also, that the representative produced marketing material that also suggested the solar panel system would pay for itself over the term of the loan. Mrs D has said the system has not generated savings anywhere near the figures quoted on the document.

Mrs D told us that she was cold called by a representative of Z and that she had no prior interest in purchasing Solar Panels.

I've considered Mrs D's loan agreement I'm satisfied it clearly sets out, amongst other things, the amount being borrowed, the interest to be charged, total amount payable, the term of the loan and the contractual monthly loan repayments. I think this was set out clearly enough for Mrs D to be able to understand what was required to be repaid towards the agreement.

But the loan agreement does not mention the income or savings that may be generated. So, there was no way from that document for Mrs D to compare her total costs against the financial benefits she was allegedly being promised from that document. So, Mrs D would have looked to Z's representative to help her understand how much the panels would cost, what they would bring in and how much she would benefit from the system in order for her to make a decision.

Mrs D has provided a copy of a document called, 'Solar PV Quotation/Order Form'. This says that the system could produce an 'Estimated annual output' of '3668 kWh' and an 'Estimated annual total system benefit' of '£1201.81'. The first year's loan repayments would be £1,318.80. I note that figures refer to an annual performance and not the life of the loan. I would need more information from Z to understand how these figures were presented to Mrs D at the time of the sale. And, in this case, I have some such evidence to consider.

I note that same document contains writing which says,

'How long will it take for the system to pay for itself?'

…

To calculate how long the system will take to pay for itself, we can divide the total cost you have paid for the system and divide it by the estimated benefit you will receive each year.

***This would give you a payback period of: 7.07 YEARS**'*

So, whilst this document suggests the costs of the loan could outweigh the financial benefits in year one, it seems that Mrs D was receiving assurances from Z's representative that the solar panels would pay for themselves within the life of the loan. This document does not, in my opinion, undermine Mrs D's testimony that she was told the solar panel system would be self-funding over the lifetime of the loan. Having considered all of the submissions made to me in this case, it seems that consumers were supposed to understand that the solar panels would most likely be self-funding.

So, having considered Mrs D's account about what happened when she spoke to Z, specifically that the cost of the system would be fully paid for by the FIT payments and electricity savings she would receive, I find this evidence credible and persuasive.

Mitsubishi hasn't provided evidence to dispute what Mrs D said happened. Yet with no prior interest, Mrs D left the meeting having agreed to an interest-bearing loan, with a monthly repayment of £109.90, payable for 10 years. Given her lack of prior interest and the financial burden she took on, I find Mrs D's account of what she was told by Z, 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 she's said she received from Z.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of around £1,318.80 per year. I have not seen anything to indicate Mrs D's system was not performing as expected but Mrs D's system has not produced this.

So, these statements were not true. I think Z's representative must reasonably have been aware that Mrs D'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 Z's representative would have known that Mrs D's system would not produce enough benefits to cover the overall cost of the system in the timescales stated verbally to Mrs D.

Considering Mrs D's account about what she was told, and the documentation she 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 Z gave Mrs D a false and misleading impression of the self-funding nature of the solar panel system.

I consider Z's misleading presentation went to an important aspect of the transaction for the system, namely the benefits and savings which Mrs D was expected to receive by agreeing to the installation of the system. I consider that Z'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 D went into the transaction. Either way, I think Z's assurances were seriously misleading and false, undermining the purpose of the transaction from Mrs D'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 Z's negotiations with Mrs D 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 D 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 and additional s.140A complaint points

Mitsubishi received Mrs D's s.75 complaint on 22 July 2021. Given my findings above I'm not proposing to provide a detailed analysis of her s.75 complaint and also her 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 Mrs D and Mitsubishi's relationship arising out of Z's misleading and false assurances as to the self-funding nature of the solar panel system. Mitsubishi should repay Mrs D a sum that corresponds to the outcome she could reasonably have expected as a result of Z's assurances. That is, that Mrs D's loan repayments should amount to no more than the financial benefits she received for the duration of the original loan term.

Mitsubishi told us that it considers our approach to redress should be in accordance with the Court's decision in Hodgson. I have considered this 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 Mrs D's expectation of what she would receive. I consider Mrs D has lost out, and has suffered unfairness in her relationship with Mitsubishi, to the extent that her loan repayments to it exceed the benefits from the solar panels. On that basis, I believe my determination results in fair compensation for Mrs D.

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 Mrs D received from the solar panel 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 D received by way of FIT payments as well as through energy savings. Mrs D will need to supply up to date details, where available, of all FIT benefits received, electricity bills and current meter readings to Mitsubishi.

I agree Mitsubishi's refusal to consider the claim under s140A has also caused Mrs D some further inconvenience. And I think the £100 compensation recommended by our investigator is broadly a fair way to recognise that.

So, to put things right, for the reasons I have explained, I'm intending to uphold Mrs D's complaint and direct Mitsubishi HC Capital UK Plc to:

- *Calculate the total payments (the deposit and monthly repayments) Mrs D has made towards the solar panel system up until the end of the loan term – A*
- *Use Mrs D's bills and FIT statements to work out the benefits she received up until the end of the loan term* – B*
- *Use B to recalculate what Mrs D 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 each payment until the date of settlement** – C*
- *Reimburse C to Mrs D*
- *Pay Mrs D an additional £100 compensation*

**Where Mrs D is not able to provide all the details of her meter readings, electricity bills and/or FIT benefits, I am satisfied she has currently provided sufficient information in order for Mitsubishi to complete the calculation I intend to tell it to follow in the circumstances using known and reasonably assumed benefits.*

*** If Mitsubishi considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mrs D how much tax it's taken off. It should also give Mrs D a tax deduction certificate if she asks for one, so she 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 29 August 2024. Mrs D has told us she accepts my provisional findings. Mitsubishi has made a further submission disagreeing with my provisional findings.

So, as I have had submissions from both parties, 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.

Mitsubishi has made a further submission in response to my provisional decision. Mitsubishi has referred to the document called the '*Solar PV Quotation/Order Form'.* This document is considered in the provisional decision. And I referred to the following statement,

"This would give you a payback period of: 7.07 YEARS"

Mitsubishi notes that the whole document is not visible in the form it was shared to all parties. Mitsubishi told us that we can see no evidence on the form of the solar panels being paid for by a loan. And that this is evidence the figures in the document are not factoring in the interest payments that would be payable for customers paying for the solar panels by a loan. Mitsubishi wants the statement above to be considered in that context and think the complaint should not be upheld. Mitsubishi hasn't said why explicitly, but it seems likely that they think the paperwork was not misleading.

I have considered again all of the submissions made in this case, and having done so, I do not agree with Mitsubishi.

In my provisional decision I noted that we would need more information from Z to know how this document was presented to Mrs D at the time she agreed to the solar panels. But the document does say,

'How long will it take for the system to pay for itself?'

…

To calculate how long the system will take to pay for itself, we can divide the total cost you have paid for the system and divide it by the estimated benefit you will receive each year.

***This would give you a payback period of: 7.07 YEARS**'*

It is true that we can't see in the order form that the solar panels were to be paid for by credit. But I must consider all of the submissions made to me in a case. And so, I cannot ignore that this document is dated 28 August 2014. And that is the same date that the loan agreement was signed. So, this order form which included the above statement in bold and

the loan agreement for the credit that was to pay for the solar panels were signed at the same meeting.

That being the case, it seems less likely to me, as Mitsubishi have suggested, that Z were providing performance estimates to Mrs D ignoring the fact that the solar panels were to be financed by a loan. I also note that if the prediction is just the cost of the panels divided by the loan costs then the prediction in the document would have been for a repayment time nearer to six and half years most likely. So, at the very least, I do not think the evidence sufficiently supports the finding that Mitsubishi wishes me to make.

In any event, in considering the document with more certainty, we would also need to hear from Z about the assumptions that underlie the calculations provided. For instance, it is not unusual for performance estimates to index the benefits of future savings on energy costs as those are anticipated to rise over the lifetime of a loan.

And I have also considered that the document explains that to, *'calculate how long the system will take to pay for itself, we can divide the **total cost** you have paid for the system and divide it by the estimated benefit you will receive each year'*.

If the cost of the solar panels was just the cost of the PV system, it is hard to understand what Z are referring to when they talk about the 'total cost'. The total cost would normally be the cost of the purchase plus any associated costs of borrowing (in this case the cost of any interest in servicing the loan).

I also note that the statement above considers the '*estimated benefit you will receive each year'.* So, it seems that the document 'Solar PV Quotation' and the clear prediction of the loan being self-funding is supposed to consider predicted benefits not just from year one but also from subsequent years. And in this case, that has led to a clear prediction (in bold) that the loan could be repaid in a little over seven years. So, it is my opinion that it would not be entirely fair to assess the prediction that the loan could be repaid in a little over seven years, purely in relation to the year one figures for costs and estimated benefits as Mitsubishi has suggested.

In my provisional decision I said that,

"So, having considered Mrs D's account about what happened when she spoke to Z, specifically that the cost of the system would be fully paid for by the FIT payments and electricity savings she would receive, I find this evidence credible and persuasive.

…Yet with no prior interest, Mrs D left the meeting having agreed to an interest-bearing loan, with a monthly repayment of £109.90, payable for 10 years. Given her lack of prior interest and the financial burden she took on, I find Mrs D's account of what she was told by Z, 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 she's said she received from Z."

And having considered again all of the submissions made in this case, including the latest arguments from Mitsubishi, I have seen insufficient reason to depart from my findings as expressed in my provisional decision, which is repeated above. And as I've already set out my full reasons (above) for upholding Mrs D's complaint, and my full reasons for not agreeing with Mitsubishi's arguments made after my provisional decision, I have nothing further to add.

Putting things right

I require Mitsubishi HC Capital UK Plc to calculate and pay the fair compensation as detailed above.

My final decision

For the reasons set out, I'm upholding Mrs D'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 Mrs D to accept or reject my decision before 3 October 2024.

Douglas Sayers
Ombudsman