DRN-5143498

The complaint and what happened

Ms H and Mr S have complained about Mitsubishi HC Capital UK Plc, trading as Novuna Personal Finance's ("Mitsubishi's") response to a claim they 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 October 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 Ms H and Mr S 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 them and Mitsubishi.

I asked both parties to let me have any more information they wanted me to consider. Ms H and Mr S have not formally accepted my findings, but have provided updated energy bills and FIT statements. Mitsubishi asked for FIT statements, but has not responded to my findings. It has been provided with the FIT statements available.

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 March 2013, Ms H and Mr S bought a solar panel system ('the system') from a company I'll call "H" using a 8-year fixed sum loan from Mitsubishi.*
>
> *Ms H and Mr S complained to Mitsubishi, they said that they were told by a salesperson from S that the 'feed in tariff' ('FIT') payments and electricity savings they would make would cover the cost of the loan repayments, however that hasn't happened, and they've suffered a financial loss. They also believed that what happened at the time of the sale created an unfair relationship between them and Mitsubishi.*
>
> *Mitsubishi responded to the complaint in its final response, it considered Ms H and Mr S had brought their claim more than six years after the cause of action occurred under the Limitation Act ('LA').*
>
> *Unhappy with Mitsubishi's response, Ms H and Mr S referred their complaint to our service.*
>
> *An investigator considered Ms H and Mr S's complaint, she ultimately thought that –*
>
> - *Given the s.75 claim was more likely to be time barred under the LA, Mitsubishi's answer seemed fair.*
> - *We could look at a s.140A complaint 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 Ms H and Mr S and Mitsubishi.*

She recommended that Ms H and Mr S keep the system and Mitsubishi take into account what Ms H and Mr S had paid so far, along with the benefits they received, making sure the system was effectively self-funding. She 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.

Ms H and Mr S accepted the investigator's view. Mitsubishi did not, highlighting again that the event complained of occurred in March 2013, and went on to disagree with the investigator's findings around how things should be put right for Ms H and Mr S. It also underlined that Ms H and Mr S had raised no concerns about the fairness or otherwise of their relationship with it, and had not mentioned anywhere S.140A of the CCA. Subsequently, it also raised arguments around why, in the circumstances of this particular case, it believes Ms H and Mr S would have understood that the system would not be self-funding. 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 Ms H and Mr S's complaint, both in respect of the refusal by Mitsubishi to accept and pay their 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 Ms H and Mr S's s.75 claim on 27 January 2023, this relates to a regulated activity under our compulsory jurisdiction. Ms H and Mr S brought their complaint about this to the ombudsman service on 24 April 2023. So, their 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 taking into account s.140A.

It seems to me that Ms H and Mr S's complaint is, at its heart, both about Mitsubishi's response to their s.75 claim and also about the consequences of H's alleged misleading representations/contractual promises (which for reasons I'll explain later Mitsubishi was responsible for). In part that seems to me to amount to a complaint about the unfairness of the overall lending relationship they have had with Mitsubishi, bearing in mind the failings that Ms H and Mr S have alleged and the detriment that they say they experienced as a result. In my view therefore, their concerns extend to and include a complaint about Mitsubishi's participation in and perpetuation of an unfair relationship.

So, with reference to my inquisitorial remit, I'm satisfied that one of the events complained of here is Mitsubishi's participation, for so long as the credit relationship continued, in an alleged unfair relationship with Ms H and Mr S. Given the relationship was ongoing until September 2018, and Ms H and Mr S first complained about it in September 2022, they have raised concerns within six years of the event in question. And so, that particular complaint has been brought in time for the purposes of our jurisdiction.

Merits

The unfair relationship under s.140A complaint

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

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?

Ms H and Mr S have said that they were told by H's representative that the cost of the system would be paid for by the FIT payments they would receive and the savings they would make on her electricity charges. They also say that H's representative told them that H would then be promoting the systems throughout Ms H and Mr S's neighbourhood and that they would earn a commission if any of their neighbours also purchased solar panels. Whilst Mitsubishi has cast doubt on this, which I will discuss in more detail shortly, I haven't seen any persuasive evidence they had any prior interest in purchasing solar panels.

I've looked at the documents provided by Ms H and Mr S 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 Ms H and Mr S. However, there is no mention on the agreement of the potential benefits of the panels.

Ms H and Mr S has been able to provide me with an undated letter, presumably provided by H around the time of the installation in 2013, which they had retained. It contains the Standard Assessment Procedure (SAP) figures, that is, the expected performance and financial benefits of the system. In the introduction, it says, "It is generally accepted though that the figures are under-estimated."

It would appear that the estimate was originally based on a slightly larger system, with more capacity, than that ultimately purchased by Ms H and Mr S. So there are both typed and handwritten figures on it, and it isn't clear when the handwritten figures were added, or in what conversational context. It also suggests that this was provided to Ms H and Mr S at a later date than the original meeting with H's representative, as there appears to be some sort of apology for the sales representative not having been able to provide figures when he had met Ms H and Mr S in person.

Mitsubishi asserts this means that Ms H and Mr S therefore committed to buying the system without receiving any predictions about its performance. I don't actually know when the initial conversations were had with Ms H and Mr S, or when the letter in question was sent. So I cannot say whether they had signed the contract before receiving it or not. However, in any event, that isn't pivotal. What is relevant is how the documentation contributes to the overall evidential picture

when considering whether I think it is more likely than not that the system's benefits were misrepresented to Ms H and Mr S, and that was what induced them to agree to its installation.

The basis of some of the calculations on this letter are unclear. However, there are some key figures to note. Firstly, it would appear that one of the handwritten calculations is suggesting that the system will provide a monthly financial benefit of around £95, which is significantly less than the monthly repayment on the loan of just over £155. On the other hand, there are two key typed figures of interest, and which have not been superseded or altered by any handwritten ones. One suggests that the income and savings over 20 years would be in excess of £35,000. Another sets out that the "payback period", that is, the length of time it will take for the full cost of the system to be paid for by the income and savings, would be just over eight and a half years.

Underlined on the letter are the figures denoting year one income and savings. And the handwritten figure is less than £40 lower than the typed figure. Additionally, as mentioned, not all of the typed figures have been replaced or annotated with handwritten ones. So, overall, I think that the typed figures would still have been presented to Ms H and Mr S as valid to their own purchase. I acknowledge the possibility that they may have therefore been told that the 20-year income and savings would be slightly less than what was shown, and the "payback period" perhaps slightly more. But that, at best, is only a possibility.

In weighing up Ms H and Mr S's testimony, I have asked them both about this document, and about whether, as a result of their jobs in the energy sector, they had any other motivation in buying the system. Or indeed understanding of the working of solar panel systems.

Turning first to their potential expertise in solar panel systems and/or additional motivation in agreeing to their own system, Ms H and Mr S have been at something of a loss to understand the relevance of that to their decision in 2013. It would appear that Mr S was not established in the role cited by Mitsubishi until 2014 – the year after the sale. He has described what his role has been over the years, and it broadly speaking relates to helping businesses reduce their energy costs. So I'm not persuaded this would have given him any tangible solar power expertise in 2013. Nor can I see that he would have had any additional motivation to want a solar panel system at home, given that his role involves working with business owners. Mitsubishi hasn't spelled out what that motivation could have been. But in fairness to it, I have considered this at some length. For example, I've thought about whether there could have been an incentive for Mr S to be able to tell his clients that he had a solar panel system installed at home. However, that makes no sense in the context of what his role actually is. Clearly, he is not a solar panel salesman. And despite their professional roles, I have also not been provided with any evidence that they have a particularly high interest in conservation or the environment.

In respect of the letter I've described, I asked Ms H and Mr S to give me their full recollections about it, including when the handwritten annotations were added, and why the monthly income figure written didn't lead them to question that the system would be self-funding. Unsurprisingly, they said they cannot remember the detail of how the writing came to be on the letter, as it happened too long ago. They also said they didn't really appreciate or notice that the differences between the typed and handwritten figures relate to different size systems.

They've again told us about their conversation with H's representative. They say that they trusted him, and that he had convinced them that the system would pay for itself. They've again talked about how they were also told they could potentially earn a type of commission payment if any of their neighbours bought a solar panel system. They say that they went back and, "…queried this…", with the installer at some point, and that they were then told that they had been "naïve" to believe it. I don't have the full details of this query, but don't consider that I need them to reach a decision in this case. Whilst I do not place significant weight on this comment, it does add a further layer to their testimony.

I find what Ms H and Mr S has said to be believable. Given the credit agreement doesn't contain information about the benefits, Ms H and Mr S would have looked to H's representative to help them understand what the panels would bring in and how much they would benefit from the system. As discussed already, I'm not persuaded of any motivation other than a financial one on Ms H and Mr S'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 their savings on their electricity bills and income from the FIT scheme would have been a central part of the conversation with a salesperson. Given what they say they were told about their opportunity to earn a small commission on any future sales, that also supports a conclusion that money was at the heart of the conversation with H, and their decision. On balance, I think it is more likely than not that Ms H and Mr S would not have agreed to the installation of the panels if H had made it clear that it would leave them out of pocket.

The loan is a costly long-term commitment, and I can't see why they would have seen this purchase as appealing had they not been given the reassurances about saving money they've said they received from H.

For the solar panels to pay for themselves, they would need to produce combined savings and FIT income of over £1,800 per year. I have not seen anything to indicate Ms H and Mr S's system was not performing as expected, in fact, it would appear to have quite significantly overperformed. Yet despite this, their system has clearly not produced this level of financial benefit. And when considering what the documentation set out about the 20-year return, and the 'payback period', the written figures simply don't add up. Having performed my own estimated calculation, it seems unlikely that the system will pay for itself even within 20 years, and certainly will not generate anything approaching £35,000 in that timeframe.

So, the statements, both written and verbal, were not true. I think H's representative must reasonably have been aware that Ms H and Mr S'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 Ms H and Mr S's system would not produce enough benefits to cover the overall cost of the system as stated verbally to Ms H and Mr S, or as written in the key letter discussed.

Considering Ms H and Mr S's account about what they were told, the documentation they were shown at the time of the sale, and the fact Mitsubishi hasn't been able to substantively dispute these facts, I think it likely H gave Ms H and Mr S a false and misleading impression of the self-funding nature of the solar panel system.

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

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

Where Mitsubishi is to be treated as responsible for H's negotiations with Ms H and Mr S 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 Ms H and Mr S and Mitsubishi was unfair.

Because of this shortfall between their costs and the actual benefits, each month they have had to pay more than they expected to cover the difference between their solar benefits and the cost of the loan. So, clearly Mitsubishi has benefitted from the interest paid on a loan they would otherwise have not taken out.

<u>The s.75 complaint</u>

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 Ms H and Mr S'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 Ms H and Mr S and Mitsubishi's relationship arising out of H's misleading and false assurances as to the self-funding nature of the solar panel system. Mitsubishi should repay Ms H and Mr S a sum that corresponds to the outcome they could reasonably have expected as a result of H's assurances. That is, that Ms H and Mr S's loan repayments should amount to no more than the financial benefits they 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 Ms H and Mr S received from the system over the 8-year term of the loan, so they pay no more than that. To do that, I think it's important to consider the benefit Ms H and Mr S received by way of FIT payments as well as through energy savings. Ms H and Mr S 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 Ms H and Mr S's expectation of what they would receive. I consider Ms H and Mr S have lost out, and have suffered unfairness in their relationship with Mitsubishi, to the extent that their loan repayments to Mitsubishi exceeded the benefits from the solar panels.

On that basis, I believe my determination results in fair compensation for Ms H and Mr S. 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 Ms H and Mr S's complaint in a reasonable timeframe, with minimal communication, caused Ms H and Mr S 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 Ms H and Mr S £100."

As mentioned above, neither party has replied substantively to my provisional decision. I would like to clarify that the FIT statements provided to Mitsubishi have only recently been received from Ms H and Mr S. Those they had previously supplied could no longer be forwarded and so the investigator obtained new ones to assist Mitsubishi. However, they demonstrate that, despite the possibility that the panels have overperformed, the system still has not been self-funding.

Therefore I have seen nothing which alters my findings as set out in my provisional decision. And so it follows that I uphold this complaint.

Putting things right

In order to put things right for Ms H and Mr S, Mitsubishi HC Capital UK Plc must now:

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

(A), and what they 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 Ms H and Mr S

*If Ms H and Mr S is not able to provide all the details of their meter readings, electricity bills and/or FIT benefits, I am satisfied they 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 HC Capital UK Plc considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Ms H and Mr S how much it's taken off. It should also give Ms H and Mr S a tax deduction certificate if they asks for one, so they can reclaim the tax from HM Revenue & Customs if appropriate.

I also think the way Mitsubishi handled Ms H and Mr S's complaint has caused them 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 Ms H and Mr S to accept or reject my decision before 13 December 2024.

Siobhan McBride
Ombudsman