DRN-3979631

The complaint

Mrs M has complained about Mitsubishi HC Capital UK Plc's ('Mitsubishi's') response to a claim under s.75 of the Consumer Credit Act 1974 (the 'CCA') and in relation to allegations of an unfair relationship taking into account s.140A of the CCA.

What happened

In early 2014, a representative of a company I'll call "C" knocked on Mrs M's door to talk about buying a solar panel system ('the system') to be installed at her home.

Mrs M was 65, retired and lived alone. She owned an off license, which she's said was barely breaking even, so her pension of £105 per week was her only income.

After this visit Mrs M decided to buy the system and finance it through a 10-year fixed sum loan agreement with Mitsubishi (then known as Hitachi). The system was installed soon after. My understanding, as of the date of this decision, is that the loan is ongoing.

On 6 March 2020 Mrs M's representative sent a letter of complaint to Mitsubishi explaining that Mrs M considered she had a valid s.75 claim against them due to misrepresentation and breach of contract by C, and also complained there had been an unfair relationship taking into account s.140A. Mrs M explained the following:

- C told her that the 'feed in tariff' (FIT) payments would cover the loan repayments.
- She did not understand the true cost of the panels.
- She would not have bought the system if she had known that the FIT payments would not cover the loan repayments.
- The above and several other actions at the time created an unfair relationship between herself and Mitsubishi.

More than eight weeks passed without a final response from Mitsubishi, and on 24 March 2021 Mrs M referred the complaint to our service.

On 28 June 2021, the case was considered by an Adjudicator, who said they didn't think that Mitsubishi had dealt with the s.75 claim fairly, and that the complaint should be upheld.

Mitsubishi responded and said they had no record of receiving a complaint from Mrs M and in any case the claim was made more than six years after the sale of the panels so the Limitation Act 1980 (the 'LA') would apply.

They also stated they would need 8 weeks to respond to the complaint, though I am not aware of any final response having been sent to Mrs M, whether to her directly or via her representative or the ombudsman service since.

On 16 January 2023 an Investigator considered both the complaint about the lack of response to the s.75 claim and the complaint that there was an unfair relationship per s.140A. He said that he thought it was fair for Mitsubishi to decline to consider the s.75 claim.

He also said the complaint in relation to s.140A:

- Was a complaint the Financial Ombudsman Service could look at under our rules.
- Had been brought in time under our rules and the relevant Limitation period.
- That misrepresentations could be considered under s.140A.
- That misrepresentations had occurred, and had induced Mrs M to purchase the system and enter into the loan agreement with Mitsubishi.
- That a Court would likely find that an unfair relationship had been created between them.

He recommended that Mitsubishi estimate the benefits of loan over the term of the original loan and ensure that Mrs M paid no more than that for her panels. He did not address the aspects of the complaint so far as it concerned an alleged breach of contract.

On 14 February 2023 Mitsubishi provided further comments to the Investigator's conclusions, saying:

- Mrs M was complaining about events relating to the sale of her solar panel system.
- Our jurisdiction to consider complaints comes from the DISP rules, which state the ombudsman cannot consider complaints brought more than 6 years after the event complained of.
- The event complained of was more than 6 years ago, so we had no jurisdiction to look at the complaint.
- Mrs M hadn't complained about the handling of her s.75 claim, however even if they had and had issued a response, the Financial Ombudsman service wouldn't have jurisdiction under DISP 2.8.1R(1) to consider it.
- The Investigator's conclusion runs counter to the purpose and plain meaning of the FCA's rules.
- Mrs M's allegation of an unfair relationship is based on alleged misrepresentations and other actions that were made in February 2014, and there is no mention of any event after this date.
- 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 Mitsubishi did not accept the Investigator's assessment, the case was progressed to the next stage of our process, an Ombudsman's decision.

My Provisional Decision

In my provisional decision, I reached broadly the same outcome as the investigator, and set out in detail my reasoning for concluding why the complaint was in our jurisdiction and why It intended to uphold Mrs M's complaint.

My reasoning was as follows.

Our approach to our jurisdiction to consider the complaint

Our powers to consider complaints are set out in the Financial Services and Markets Act 2000 (the 'FSMA') and in rules and guidance contained in the FCA's Handbook known as DISP.

These form part of the FCA Handbook. The rules surrounding time limits are set out in DISP 2.8.2R.

> *"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:*
>
> > *(1) more than six months after the date on which the respondent the complainant its final response, redress determination or summary resolution communication; or*
> >
> > *(2) more than:*
> >
> > > *(a) six years after the event complained of; or (if later)*
> > >
> > > *(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;*
> >
> > *unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received"*

Further, DISP 2.3.1R sets out the activities which I can consider under our compulsory jurisdiction and within scope are complaints which relate to acts or omissions by firms in carrying on one or more regulated activities (see DISP 2.3.1R(1)).

I'll first consider our service's jurisdiction to look at Mrs M's s.75 and s.140A complaints before turning to address their merits.

My findings on jurisdiction

(1) Jurisdiction to look at the s.75 complaint

Where Mitsubishi is exercising its rights and duties as a creditor under a credit agreement it is carrying on a regulated activity within scope of our compulsory jurisdiction under Article 60B(2) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the 'RAO'). In undertaking that activity, the creditor must honour liabilities to the debtor.

So, if a debtor advances a valid s.75 claim in respect of the credit agreement, the creditor has to honour that liability and failing or refusing to do so comes under our compulsory jurisdiction.

The event complained of here is Mitsubishi's allegedly wrongful failure to accept Mrs M's s.75 claim where she had sought to make the s.75 claim on 6 March 2020 and received no response. So, her complaint was brought in time for the purposes of our jurisdiction where it was referred to our service on 24 March 2021.

I understand Mitsubishi claim they did not receive the letter of 6 March 2020, but I have not seen any evidence to suggest it was not sent correctly or that it wouldn't have been received.

(2) Jurisdiction to look at the complaint about an unfair relationship under s.140A

Mrs M is able to make a complaint about an unfair relationship between her 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 continues, in an allegedly unfair relationship with her.

This accords with the court's approach to assessing unfair relationships – where if the credit relationship is continuing an assessment of whether a relationship is unfair is made as at the date of assessment, and if the credit relationship has ended, as at the date the relationship ended: Smith v Royal Bank of Scotland plc [2023] UKSC 34.

In this case the relationship was ongoing at the time it was referred to the ombudsman service on 24 March 2021 (and still is), so the complaint has been brought in time for the purposes of DISP 2.8.2R(2)(a). I am satisfied that I have jurisdiction to consider the complaint about the alleged unfair relationship per s.140A in the circumstances.

Merits

(1) My findings on the merits of the s.75 complaint

Creditors have no means of knowing what s.75 liabilities they may have, nor of investigating such liabilities nor of recovering them from suppliers, unless or until debtors raise s.75 claims against them; and (as I have explained above) raising the claim, if it's a valid one, brings the creditor under a duty then to honour its liability.

But it would not be fair or reasonable to require a creditor to respond to s.75 claims however long in the past they arose. And our service must decide complaints on the basis of what is fair and reasonable in all the circumstances of a case.

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

Taking into account this time period, the particular nature of liability under s.75, and the need for the debtor to raise a s.75 claim against their creditor before any cause for complaint to our service can arise, I consider it is fair and reasonable for a creditor not to have to look into or honour a s.75 claim that was first raised with it by the debtor after the claim had become time barred under LA. This is in line with our service's long-standing approach to complaints under s.75.

The alleged misrepresentation cause of action arose when an agreement was entered into on 24 February 2014 based on the alleged misrepresentations. The alleged breach of contract isn't defined but I take it to be that C (acting on behalf of Mitsubishi) warranted that the solar panel system it agreed to provide had the capacity to finance the loan repayments, when that was incorrect. As such, the breach of contract also occurred as soon as the agreement was entered into.

In these circumstances Mrs M had brought her s.75 claim to Mitsubishi on 6 March 2020 that is more than six years after she entered into an agreement with them on 24 February 2014 which I consider to be around the time when the causes of action for misrepresentation and breach of contract to have accrued.

Where it is unlikely a claim against the supplier could succeed due to expiry of the likely relevant limitation periods of six years, I am persuaded that 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.

(2) <u>My findings on the merits of the complaint about an unfair relationship under s.140A</u>

I've considered whether representations and contractual promises by C can be considered under s.140A.

Therefore, I've considered the court's approach so far as it is relevant to the merits of the s140A complaint I am considering. In Scotland & Reast v British Credit Trust [2014] EWCA Civ 790 ('Scotland'), in which the Court of Appeal said the following when considering what could be relevant to an unfair relationship claim under s.140A, the judgment states:

> *"In this regard it is important to have in mind that the court must consider the whole relationship between the creditor and the debtor arising out of the credit agreement and whether it is unfair having regard to one or more of the three matters set out in s.140A(1), which include 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 of relevant and important aspects of the transaction seem to me to fall squarely within the scope of this provision."*

Scotland makes it clear that relevant matters would include misrepresentations and other false or misleading statements as to relevant and important aspects of a transaction.

Where s.56 of the CCA has the effect of deeming C to be the agent of Mitsubishi in any antecedent negotiations, and so Mitsubishi is responsible for the antecedent negotiations C carried out direct with Mrs M.

I think the negotiations were antecedent because they preceded the relevant conclusion of the agreement. The scope of 'negotiations' and 'dealings' is wide. And 'representations' covers statements of fact, contractual statements and other undertakings.

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 unfair relationship those negotiations and arrangements by C for which Mitsubishi were responsible under s.56 when considering whether it is likely Mitsubishi had acted fairly and reasonably toward Mrs M.

But in doing so, I should take into account all the circumstances and consider whether a Court would find the relationship with Mitsubishi was unfair under s140A.

What happened?

When speaking to our Investigator, Mrs M said at the point of sale she was 65, retired and lived alone. She owned an off license, which she's said was barely breaking even, so her pension of £105 per week was her only income.

She had no interest in solar panels until the representative from C knocked on her door. She says she was told she would get free electricity, and an income from the panels, which would cover the cost of the loan. She was told the system wouldn't cost her anything but that hasn't been the case, and she felt conned. She was still paying the loan, and this was around a quarter of her monthly income.

I've considered Mrs M's account about what happened when she was contacted by C. I find her account to be credible and persuasive. I think it is unlikely that she would've agreed to the solar panel system and the associated loan with Mitsubishi unless she'd been led to believe that it would be self-funding and come at no additional cost to her.

I can find no reason why someone of Mrs M's age and income at the time of the sale would have entered into an agreement increasing her outgoing significantly, with no immediate financial benefit.

Mitsubishi has not supplied any evidence or reasoning to challenge Mrs M's account, and as I consider it persuasive, I accept Mrs M's version of events.

The documentation

I've gone on to consider the paperwork that has been provided to see if there was anything contained within it that made it clear that the solar panel system wouldn't be self-funding.

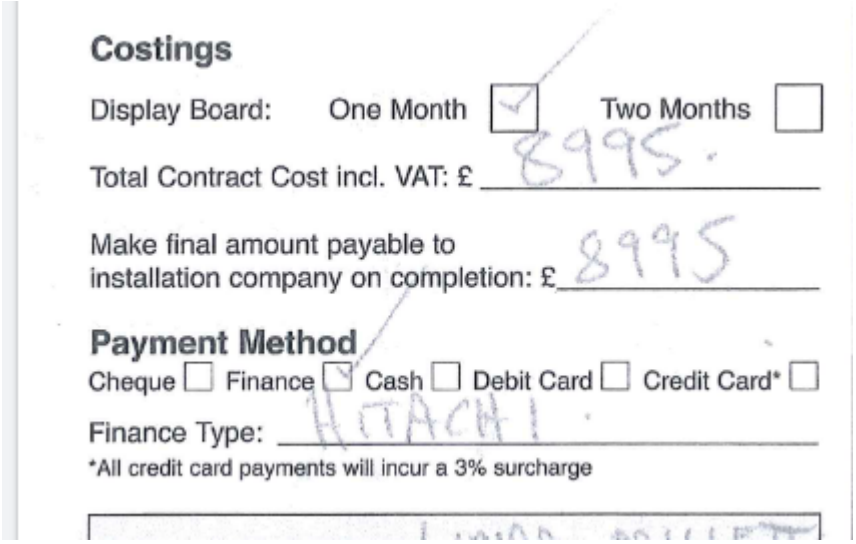
What I am considering is whether or not all the documentation Mrs M had access to at the time of the sale would have made it evident that, despite what she says she was told, the solar panels would not be self-funding.

In order for her to make an informed decision about the benefits of the panels in relation to the overall costs to her she needed to be able to compare the cost of the solar panel system to any benefit she may receive or have been promised.

I've considered the loan agreement. This is dated 24 February 2014, and 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'm satisfied that this is clear.

I've also considered the contract signed by Mrs M and the installer on the same date. This which includes the following:



Costings

Display Board: One Month ☑ Two Months ☐

Total Contract Cost incl. VAT: £ 8995.

Make final amount payable to installation company on completion: £ 8995

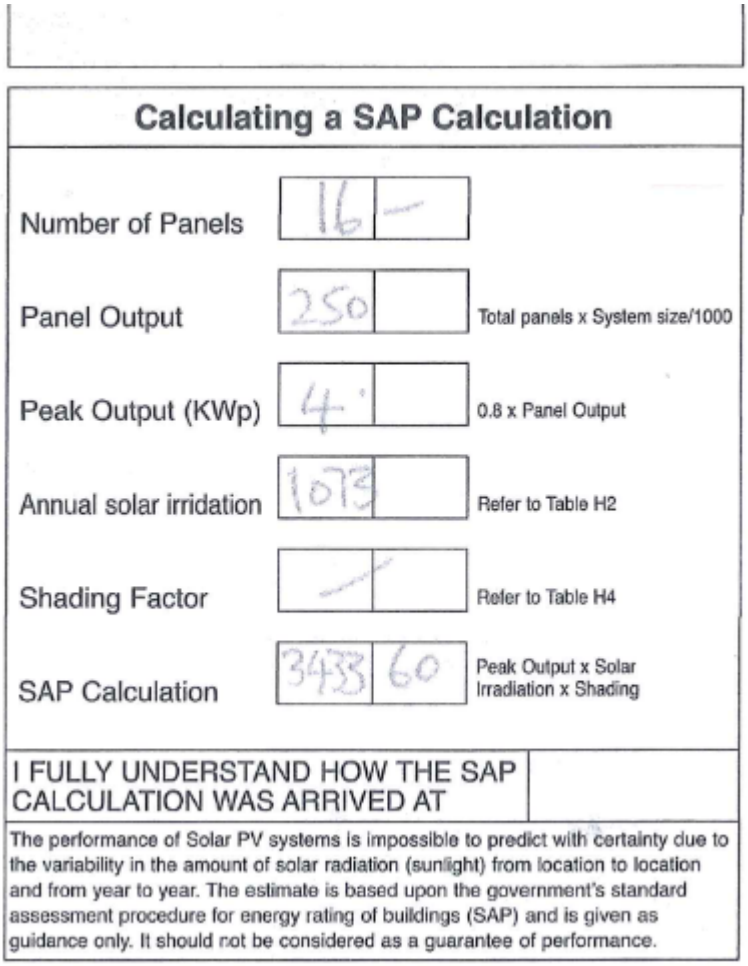
Payment Method

Cheque ☐ Finance ☑ Cash ☐ Debit Card ☐ Credit Card* ☐

Finance Type: HITACHI

*All credit card payments will incur a 3% surcharge

And



Calculating a SAP Calculation

Number of Panels	16	
Panel Output	250	Total panels x System size/1000
Peak Output (KWp)	4	0.8 x Panel Output
Annual solar irridation	1073	Refer to Table H2
Shading Factor		Refer to Table H4
SAP Calculation	3433 60	Peak Output x Solar Irradiation x Shading

I FULLY UNDERSTAND HOW THE SAP CALCULATION WAS ARRIVED AT

The performance of Solar PV systems is impossible to predict with certainty due to the variability in the amount of solar radiation (sunlight) from location to location and from year to year. The estimate is based upon the government's standard assessment procedure for energy rating of buildings (SAP) and is given as guidance only. It should not be considered as a guarantee of performance.

There's no explanation here as to how these numbers were calculated or what they mean in relation to the actual benefits for Mrs M. The likely financial benefits of the system aren't included on this document so there is no way for Mrs M to compare her total costs against the financial benefits she was being promised.

Mrs M has said the financial benefits were discussed; despite the paperwork I've seen not including information about them. I find this believable as the potential benefits would be a key reason to purchase the panels and her savings on her electrical bills and income from the FIT scheme would have been a central part of the conversation.

Given the contract doesn't contain information about the benefits, Mrs M would have looked to C'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.

Mrs M has said her pension was around £455 a month, her business was barely breaking even, and she had no prior interest in taking solar panels. However, she left the meeting with C having agreed to an interest-bearing loan, with a monthly repayment of around £116.29, payable up until she was 75.

Mrs M has said that she was told wouldn't have to pay for the loan, and I find what she's said both plausible and persuasive. I say this because given her circumstances I find it unlikely she would have agreed to purchase the panel without the reassurances she says was given.

The loan cost makes up a quarter of her monthly incomings, a significant commitment. She's told us her business was struggling, yet she took on a costly long-term commitment. I can't see how she would have seen this purchase as appealing given this. However, I can see why being told the cost of the loan would be covered would have made the purchase appealing, once the loan was repaid the income and savings would be pure profit along with her pension.

I think the salesman from C would have been aware 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 the salesman would have known that Mrs M's system would not produce enough benefits to cover the overall cost of the panels as stated verbally to Mrs M.

Considering Mrs M's account about what she was told, and the documentation she was shown at the time of the sale, I think it likely C gave Mrs M a false and misleading impression of the self-funding nature of the solar panel system.

The salesman, acting in a position of knowledge about the effectiveness of the panels, must reasonably have been aware that they would not pay for themselves in the way Mrs M was led to believe. I've not seen anything to demonstrate Mrs M decided to purchase the solar panel system for anything other than the cost savings this would produce for her on her energy bills. And as I have found, the system would not actually produce the savings she was led to believe she would receive within the time explained by the salesman or in the documentation.

I consider C's misleading presentation went to an important aspect of the transaction for the system, namely the benefits which Mrs M was expected to receive by agreeing to installation of the system. I consider that C'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, C's assurances were seriously misleading and false, undermining the purpose of the transaction from Mrs M'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 C'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 be likely to 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.

Therefore, I am persuaded taking into account the court's approach that Mitsubishi has not treated Mrs M fairly or reasonably in all the circumstances of the complaint. I consider the fairest way to address this is to resolve the matter as I set out below.

Fair compensation

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

Mrs M entered the relationship with Mitsubishi on the basis that the loan would not cause her any increased expenditure, and once the loan was repaid, from that point onwards any benefits would then accrue to her. When a consumer takes out a loan to pay for goods over a certain period and the loan is repaid, it is entirely reasonable for that consumer to enjoy the benefits of their purchase in the years after the loan is repaid.

In this instance Mrs M has made a decision to sell her home, which will effectively deny her these on-going benefits and those costs, so I think it's entirely reasonable to base any redress on the period of the loan.

I think to put things right Mitsubishi should recalculate the original loan based on the known and assumed savings and income Mrs M received from the solar panels over the 10-year term of the loan, so she pays no more than that

Normally, by recalculating the loan this way, Mrs M's monthly repayments would reduce, meaning that she would've paid more each month than she 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.

So, I think the fairest resolution would be to let Mrs M have the following options as to how she would like her overpayments to be used:

- *(a) the overpayments are used to reduce the outstanding balance of the loan and she continues to make her current monthly payment resulting in the loan finishing early,*
- *(b) the overpayments are used to reduce the outstanding balance of the loan and she pays a new monthly payment until the end of the loan term,*
- *(c) the overpayments are returned to Mrs M, and she continues to make her current monthly payment resulting in her loan finishing early, or*
- *(d) the overpayments are returned to Mrs M, and she pays a new monthly payment until the end of the loan term.*

Finally, I consider that Mitsubishi's failure to deal with Mrs M's s.75 claim and complaint about an unfair relationship under s.140A 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 £300.

I asked for any responses by 15 January 2024.

Responses to my provisional decision

Mrs M's representatives responded on 10 January 2024 asking for an extension to respond. They later accepted the provisional decision and asked that the FIT payments supplied to date be used for any redress calculations.

Mitsubishi responded on 11 January 2024 asking for two weeks to review the file and respond. They included a copy of their letter of February 2023.

In order to be fair to both parties, I agreed to an extension until 29th January 2024.

Nothing further has been received.

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.

This includes considering whether the ombudsman service's jurisdiction permits me to consider the entire subject matter of this complaint and, if relevant, what's a fair and reasonable resolution of the complaint in all the circumstances.

Having done so, I'm satisfied that

- I do have jurisdiction to consider Mrs M's complaint, both in respect of the allegations of any unfair relationship under s.140A and the refusal by Mitsubishi to accept and pay her s.75 claim.

- It was fair and reasonable in all the circumstances for Mitsubishi to reject the s.75 claim on the basis relevant limitation periods would have expired, providing it with a defence to the s.75 claim under the Limitation Act 1980 (the 'LA').

- I uphold the complaint alleging that Mitsubishi was party to an unfair relationship with Mrs M under s.140A.

- Fair compensation in the particular circumstances of this complaint should be based upon fulfilling the assurance given to Mrs M that the system would be self-funding.

- It is appropriate for Mitsubishi to work out the likely benefits of the solar panels over a period of 10 years, based on actual data supplied and by reasonably using estimations where not.

Jurisdiction over the complaint about the s.75 claim

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 (as I have said) 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.

In this case, Mitsubishi didn't respond to the s.75 claim and alleges it did not receive the letter of 6 March 2020, but I have not seen any evidence to suggest it was not sent correctly or that it wouldn't have been received by it. In any event, Mitsubishi did not accept the s.75 claim and, in those circumstances, this constituted the "event complained of".

In any event, Mitsubishi's points around our jurisdiction to consider the complaint about the s.75 claim are somewhat academic, as I have not upheld this aspect of the complaint on the merits.

Merits of the complaint about the s.75 claim

On the merits of the complaint, I remain persuaded it was fair and reasonable for Mitsubishi not to have accepted and paid Mrs M's s.75 claim, because the relevant limitation periods for the alleged misrepresentation(s) and/or breach(es) of contract of the supplier had expired before Mrs M first brought her s.75 claim to Mitsubishi.

Jurisdiction over the complaint about an unfair relationship under s.140A

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 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 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.

Therefore, in the present case, for as long as the credit agreement with Mrs M remains outstanding Mitsubishi is responsible for the matters which make its relationship with Mrs M unfair and for taking steps to 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 M is therefore complaining about an event which is

continuing, namely that Mitsubishi is participating in and perpetuating an ongoing unfair credit relationship with her.

So, taking into account DISP 2.8.2R(2)(a), I am satisfied – where Mrs M's credit relationship with Mitsubishi is continuing – 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 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 of the complaint about an unfair relationship under s.140A

Mitsubishi has not responded in respect of the merits of the complaint about an unfair relationship except to the extent it has requested I adopt the approach in Hodgson when determining what is fair compensation if I uphold the complaint.

I remain of the view that the complaint about an unfair relationship should be upheld for the same reasons I expressed in my provisional decision. In summary, I am persuaded that Mitsubishi is participating in, and continues to perpetuate, an unfair relationship with Mrs M which has arisen out of C's misleading and false assurances as to the self-funding nature of the solar panel system.

I am also satisfied the approach to fair compensation which I set out in my provisional decision remains the fair and reasonable way of resolving Mrs M's complaint.

I consider C's misleading presentation of the package of solar panels and financing went to an important aspect of the transaction for the system, namely the benefits which Mrs M was expected to receive. C's assurances in this regard likely amounted to a contractual promise that the solar panels 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, C's assurances were seriously misleading and they put Mrs M into a position where the financial reality for her was less satisfactory than he had been led to expect.

In my view, the fairest way to put this right is for Mitsubishi to repay Mrs M a sum that corresponds to the outcome she could reasonably have expected as a result of C's assurances. That is, that Mrs M's loan repayments should amount to no more than the financial benefits from the solar panels.

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 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.

My final decision

My final decision is that I uphold this complaint.

I require Mitsubishi to

- Calculate the total payments (the deposit and monthly repayments) Mrs M has made towards the solar panel system - A
- Use the bills and FIT statements available, to work out the benefits she received and would have received over the 10-year loan period - B
- Use B to calculate what Mrs M should have paid each month towards the loan and apply 8% simple interest to any overpayment from the date of her payment until the date of settlement - C
- Give Mrs M the option of offsetting this amount (C) from any outstanding loan amount, recalculating either her monthly payments or remaining loan term, or a refund of the overpayments.

Where Mrs M has not been able to provide all the details of her bills and FIT statements, Mitsubishi should seek to complete the calculation based upon reasonably assumed benefits

I also think the way Mitsubishi handled Mrs M's complaint has caused her trouble and upset, and an award of £300 is appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 25 April 2024.

Sarah Holmes
Ombudsman