DRN-1396313

The complaint

Mr and Mrs W complain about A Shade Greener (Boilers) LLP's decision to charge them for a visit from an engineer to repair their boiler.

What happened

Mr and Mrs W had a conditional sale agreement with ASG under which it supplied both a boiler and maintenance services for the boiler including breakdown recovery services.
In March 2019 Mr and Mrs W contacted ASG about the boiler because it was not working properly. ASG initially tried to sort out the problem with Mr and Mrs W whilst on the phone. But when it could not, ASG contacted the manufacturer of the boiler. I'll call the manufacturer which is a company "V". V's engineer visited Mr and Mrs W's home. V concluded the cause of the issue was a problem with the electricity supply in Mr and Mrs W's home, that is it had nothing to do with the operation of the boiler. Subsequently ASG wanted to charge Mr and Mrs W £120 for this visit which it said was a *"non-warranty visit".*

Mr and Mrs W's position is that ASG is not entitled charge them in this way. Firstly, because there is no provision in the agreement for ASG to make this charge. Secondly, because the agreement provides that before V's engineer is called out ASG will first and try and sort things out, and it did not do this.

Mr and Mrs W refused to pay ASG for the visit. It in turn continued to pursue them for the money. Mr and Mrs W were worried about being chased for the money so under protest, they paid the £120.

ASG's position is that it is entitled to the fee. It points out its employee ran through the problem on the phone with Mr and Mrs W. This did not resolve the issue. Therefore, its employee thought the appropriate next step was to call V, but he let Mr and Mrs W know that they might be charged for this visit, if it turned out it was a non-warranty visit, and crucially they agreed to this. It is not clear if there was one call or more than one, but to keep things simple, I'll just refer to a call in this decision, as it makes no odds really whether it was one call or several.

Further, although ASG could not point to a provision in the agreement that talked about being able to charge £120 for a non-warranty call out, it did point out other provisions of the agreement that said that Mr and Mrs W were responsible for the upkeep of their own home where this includes parts of the heating system that it is not responsible for. ASG says this means Mr and Mrs W, are solely responsible for the supply of electricity to their home. According to ASG (and V), the problem with the boiler was due to a fault with Mr and Mrs W's electricity mains supply. That is something Mr and Mrs W have to maintain. As Mr and Mrs W's failure to keep to their part of the agreement led to V's visit, Mr and Mrs W have to pay for this.

Dissatisfied with ASG's response, Mr and Mrs W complained to our service.
One of our investigators looked at Mr and Mrs W's complaint. In short, she concluded that it was not fair or reasonable for ASG to seek to recover the £120 from Mr and Mrs W because

quite simply there was nothing in the agreement between the parties that allowed it to do this. On this basis, our investigator recommended that ASG should refund the £120.

Mr and Mrs W accepted our investigator's recommendation, ASG did not. In summary, it repeated its previous position. Further, it adds.

"Whilst you accept the customer was made aware of the charge, and did not take issue with it at the time, we believe it is unfair and unreasonable to suggest that the company has not suffered financial losses by attending a non warranty call out whereby the fault was caused by an electricity supply in the customers property. It is reasonable in cases where our equipment is not at fault to suggest there would be a charge for our losses, our agreement covers manufacturing faults with our equipment and not the electrical supply in a customer's property."

Mr and Mrs W then responded to ASG's response. In brief their position is, they too reiterate their initial position. Moreover, Mr and Mrs W suggested they'd agreed to the visit from V safe in the knowledge that ASG had no contractual basis to charge them for any such visit. It's implicit from their response that they never agreed in the phone call to pay for V's visit. Further, Mr and Mrs W told us that ASG had sent them an email about the visit, but that email had not made it clear that a £120 fee would be charged for a non-warranty visit, which is, according to them, another reason why ASG can't charge them.

Also, Mr and Mrs W point out there may well be a warranty agreement between ASG and V which permits V to charge ASG for a non-warranty visit but that is nothing do with them. In any event, ASG had not, as far as Mr and Mrs W are aware, even shown they had been charged by V so had made a loss.

ASG asked that an ombudsman take a fresh look at Mr and Mrs W's complaint.

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.

First, I want to apologise to both Mr and Mrs W and ASG for how long it has taken this service to deal with this complaint. I also wish to thank them both for their patience.
I'm very aware that I've summarised this complaint in far less detail than the parties and I've done so using my own words. I'm not going to respond to every single point made by all the parties involved. No discourtesy is intended by this. Instead, I've focussed on what I think are the key issues here.

Our rules allow me to do this. This simply reflects the informal nature of our service as a free alternative to the courts. If there's something I've not mentioned, it isn't because I've ignored it. I haven't. I'm satisfied I don't need to comment on every individual argument to be able to reach what I think is the right outcome.

Where the evidence is incomplete, inconclusive or contradictory (as some of it is here), I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances.

Mr and Mrs W have a conditional sale agreement with AGS. This agreement is a regulated agreement and this service has the power to look complaints about regulated agreements.

The parties have raised strongly held views about a number of aspects of this complaint some of which I've gone through above in the summary of the complaint. However, I think this complaint is very simple. As a starting point, I think the parties should be able to rely on

the terms of the contract. After all they both freely entered into it and they both agreed they wanted to contract on these terms. When I look at the contractual documents I see nothing that permits ASG to charge, Mr and Mrs W in these circumstances. In particular, I've seen nothing that says what a non-warranty visit is or how much Mr and Mrs W might be charged for it or that they may be charged for such a visit at all.

ASG talk about the loss it has made because it was charged by V. It may have made that loss, I don't know, but I don't need to look at this point. I say this because if ASG wants to pass on such charges to its customers, and I can see why it might want to, then there was nothing preventing it from saying so when it drew up the contract, but it did not. Rather, Mr and Mrs W contracted on the terms that ASG set out in its contract. ASG did not take the opportunity to cover this point in that contract. That might have been an oversight or error on its part, and that's unfortunate. But I don't agree it is fair and reasonable now, out of the blue, to try to introduce a new clause in the contract to cover this.

Further, I am not persuaded by ASG's contention that somehow the contract does cover this situation. ASG tries to rely on clause 8 which states *"Where the Goods require other systems or utility inputs to be operating properly .. the Customer will remain responsible for maintaining such systems .. in the property at its own expense"*. I don't read this clause as covering this situation at all, even at a stretch. There is nothing to say if the customer does not keep to this requirement and ASG has to send out V this will be a non-warranty visit which will incur a charge of £120 which the customer will pay.

Neither do I agree that the phone call where Mr and Mrs W were told a fee of £120 would be charged for a non-warranty visit changes anything. As far as I am aware, neither party disputes that this is what was said during the call. However, the point is this, that call did not vary the contract and put this term into it. And certainly, despite what ASG may have concluded, Mr and Mrs W were not agreeing to any such charge in that call. Rather, although Mr and Mrs W may have said nothing, their silence did not equal acceptance, and I don't think ASG acted reasonably in thinking that it did.

I don't need to go into any of the other points about whether ASG had to make a visit itself first before calling in V or what the ultimate cause of the boiler problem was. I say this because I don't need to think about those points in order to come to a fair and reasonable conclusion for the reasons I have set out above

During the course of this complaint, Mr and Mrs W have raised new issues about such things as ASG's approach to yearly servicing and the charges it might apply. I can see why Mr and Mrs W might want me to look at these new points too. But I cannot, I don't have the power to do so. Specifically, because these are new matters, they have not been looked at by ASG in its final response to Mr and Mrs W or investigated within this complaint. It follows that under our rules that I am unable to look at the new matters in this final decision. I don't say this to disappoint Mr and Mrs W, far from it. And I can well understand if this causes them consternation given how long we have had this complaint. But these are the rules I must follow I have no leeway to act differently here.

My final decision

My final decision is that A Shade Greener (Boilers) LLP must refund the £120 to Mr and Mrs W. It must also pay interest on the £120 at the rate of 8% simple per year. The interest to run from the date Mr and Mrs W paid it the £120 to the date of settlement.

If ASG considers it's required by HM Revenue & Customs to take off income tax from that interest, it should tell Mr and Mrs W how much it's taken off. It should also give Mr and Mrs W a certificate showing this if they ask for one, so they can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs W to accept or reject my decision before 21 April 2021.

Joyce Gordon
Ombudsman