DRN-3458522

## The complaint

Ms B complains that Shawbrook Bank Limited ("Shawbrook") has rejected the claim she made under sections 56, 75 and 140A of the Consumer Credit Act 1974 ("the Act") in relation to a solar panel system she says was misrepresented to her by the supplier.

Ms B is represented by a claims management company ("the CMC").

## Background

In or around May 2017, Ms B was contacted by a representative of a company I'll call "P" to talk about purchasing a solar panel system ("the system") to be installed at her home. After being visited by a representative of P, Ms B decided to purchase the system and finance it through a 15 year fixed sum loan agreement with Shawbrook.

However, after examining P's quote, Ms B was not satisfied about the system's cost, or about the expected financial returns. She says she contacted P again by email, and negotiated a discount on the price, and also an upgrade: the addition of an optional extra for free. P therefore cancelled the original contract, dated May, and it is now the email correspondence – of which the last is dated 1 June 2017 – which sets out the applicable terms of the purchase. P assured Ms B that the returns from the system would be more than enough to cover the loan repayments as they fell due, and sent her a table of figures setting this out (superseding the table in the original quote). The system was subsequently installed.

In March 2021 the CMC made a claim to Shawbrook on Ms B's behalf under section 75 of the Act. The CMC said that, following a cold call, P had made a number of representations about the system that had turned out not to be true, and it was these misrepresentations that had induced Ms B to enter into the contract with P. The CMC said the following misrepresentations had been made:

- the system would generate free electricity;
- the system would be self-funding; and
- the feed in tariff (FIT) and savings on her electricity bills would provide enough income to cover the monthly loan agreement payments; and
- the system would not require maintenance (but in fact the inverter would have to be replaced once or even twice during the system's 25-year lifespan, at a cost of £1,500 each time).

Further, the CMC said that P had not explained to Ms B that the solar panels would degrade over time and would produce less and less electricity each year. It asked for the contract to be rescinded.

Shawbrook has never responded to this complaint.

One of our adjudicators looked into what had happened. Having considered all the information and evidence provided, our adjudicator didn't think that P had misrepresented the system to Ms B and found no reason to uphold the complaint.

The CMC didn't agree with the adjudicator's view, for the following reasons:

- the adjudicator had relied exclusively on the May quote and had not considered the variation in the contract, and the fact that the figures had therefore changed, as set out in the June emails;
- it was the amended contract which had induced Ms B to purchase the system (or alternatively had induced her to continue with the purchase instead of withdrawing from the contract during the 14-day cooling-off period);
- the amended contract showed that P had assured Ms B that the system would be self-funding immediately;
- these assurances had turned out to be demonstrably false, and were so wrong that P could not reasonably have made them in good faith;
- it would actually take 26 years for the system to pay for the Shawbrook loan and to begin to make a profit;
- it was not plausible that Ms B would still have chosen to purchase the system if she had been told that at the point of sale.

As an agreement couldn't be reached, the case was passed to me for review. I wrote a provisional decision which read as follows.

**My provisional findings**

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 am minded to uphold it. I will explain why.

Relevant considerations

When considering what's fair and reasonable, I'm required to take into account relevant law and regulations, relevant regulatory rules, guidance and standards and codes of practice, and, where appropriate, what I consider to have been good industry practice at the relevant time. In this case the relevant law includes sections 56 and 75 of the Act.

Section 75 provides protection for consumers for goods or services bought using credit. As Ms B paid for the system with a fixed sum loan agreement, Shawbrook agrees that section 75 applies to this transaction. This means that Ms B could claim against Shawbrook (the creditor) for any misrepresentation or breach of contract by P in the same way she could have claimed against P (the supplier). So I've taken section 75 into account when deciding what is fair in the circumstances of this case.

Section 56 is also relevant. This is because it says that any negotiations between Ms B and P, as the supplier, are deemed to have been conducted by P as an agent of Shawbrook.

Section 140A is about unequal relationships between the parties to a credit agreement. In this case, the CMC relies on the alleged misrepresentation of the system, and also on the possibility that Shawbrook paid P commission or gave P some other financial incentive to broker the loan. Shawbrook has denied paying commission in other cases, and I have seen no evidence to suggest that this is untrue, or that Ms B's case is different.

For the purpose of this decision I've used the definition of a misrepresentation as an untrue statement of fact or law made by one party (or his agent) to a second party which induces that second party to enter the contract, thereby causing her loss.

Key documents, and the changes to the contract

Where there is a dispute about what happened, I must decide on the balance of probabilities – that is, what I consider to have been most likely to have happened, given the evidence that is available and the wider surrounding circumstances.

Ms B says that during a sales meeting she was told that the system would be entirely self-financing and come at no additional cost.

There are several documents that have been provided by both parties. These include the credit agreement, the original solar quote, dated 26 May 2017 and titled "Your Personal Solar Quotation", and the emails of 30 May and 1 June 2017. I've considered these, along with Ms B's testimony and recollection of the sales meeting, to decide on balance what is most likely to have happened.

The credit agreement sets out the amount being borrowed (*i.e.* the cash price of the system), the interest to be charged, the total amount payable, the term of the loan and the contractual monthly repayments.

The quote is a detailed document that sets out key information about the system, the expected performance, financial benefits and technical information. P, via Shawbrook, has told this service that this formed a central part of the sales process and the representative of P would have discussed this in detail with Ms B, explaining any benefits of the system, prior to her agreeing to enter into the contract. The CMC has said that after the meeting Ms B considered the quote carefully and, being dissatisfied with what she read, negotiated a better deal with P, as set out in the emails.

Having thought carefully about the available evidence, I'm satisfied that on balance the quote did form a central part of the sales process and therefore accept that the salesperson went through it during the meeting. I accept that this was superseded by the new contract set out in the later emails, but I've still taken the original quote into account when considering if there have been any untrue statements of fact, because the quote still sets out some information which was not changed and which is therefore not referred to in the emails, such as the fact that P used data from the Office of National Statistics (ONS) as the basis of the assumptions which underpinned its estimates in the original quote. I think it is reasonable to infer that the same ONS data was used for the recalculated figures which appear in the emails.

The emails set out the new price that was agreed, a summary of the new optional extra that was added, and the new figures for the estimated income and savings that the system would provide. These figures were contrasted with the monthly loan repayments, showing that the system would pay for itself each month from the start of the loan period, with some money left over.

I was a bit sceptical of the emails at first, because they came from a different email domain name to the one I have seen used by P in other cases. So I asked Shawbrook to contact P and verify that these emails are authentic. However, Shawbrook did not respond, even when I extended the deadline, and so the only evidence before me about this issue is Ms B's testimony. What she has said is not implausible, since it is certainly possible that P might send emails from more than one domain name (after all, the Financial Ombudsman Service does). So I accept that the emails are genuine, and I have based my decision on the figures given in the emails, rather than in the quote, along with Ms B's version of events, to decide if a misrepresentation was made.

The inverter

I don't think it is likely that the salesman would have told Ms B that the system would require no maintenance over its estimated lifespan of 25 years. It is possible that the salesman did not tell her during the meeting that the inverter would need to be replaced, but that is not the same thing as a misrepresentation.

I also note that the quote says, in a section titled "Inverter":

> "The Inverter is the one part of PV system that has a higher chance of failure and may require your attention within the 25 years."

So I don't uphold this complaint point.

Panels degradation

The quote contains a table which shows, in the first column (which is titled "Panel degradation"), how the panels will reduce in efficiency year on year. This is shown as a percentage which reduces each year, ending in year 25 at 91.2%. So I'm satisfied that P did tell Ms B about this, and that the quote and the emails did take into account that the panels would deteriorate over time (and that this would have been factored into both versions of the other table I have mentioned below).

| Panel degradation | Yr |
|---|---|
| 100.0% | 1 |
| 100.0% | 2 |
| 100.0% | 3 |
| 99.6% | 4 |
| 99.2% | 5 |
| 98.8% | 6 |
| 98.4% | 7 |
| 98.0% | 8 |
| 97.6% | 9 |
| 97.2% | 10 |

FIT payments and savings

The quote has a section headed "Repayments" with three tables (not the one mentioned above) showing repayments over 60 months, 120 months and 180 months. I've focused on

the table for 180 months as this is the length of the loan that Ms B entered into with Shawbrook. This table shows the loan as repayable in 180 monthly payments of £84.30. For each year of the 15 year loan it shows the expected grand total return from the system. It then averages that figure over 12 months, and subtracts the monthly loan repayment, to give an average difference between the monthly return from the system and the monthly loan repayment in each year. This gives a negative figure for the first nine years of the loan, meaning that the system would not begin to make enough money to cover the loan payments until year ten. So it is not surprising that Ms B decided to negotiate a better deal, resulting in the emails I have described.

The emails contain another version of this table, in which the corresponding figures are positive in every year – meaning that the system would cover the loan payments from the start. The loan payments themselves were reduced to £69.29 per month. The new table also shows higher returns from the system.

**180 payments of £69.29 p/m**

| Yr | Acc. grand total | Est. monthly return | Average monthly repayment diff. |
|---|---|---|---|
| 1 | £857.54 | £71.46 | £2.17 |
| 2 | £909.29 | £75.77 | £6.48 |
| 3 | £964.39 | £80.37 | £11.08 |
| 4 | £1,023.05 | £85.25 | £15.96 |
| 5 | £1,085.53 | £90.46 | £21.17 |
| 6 | £1,152.07 | £96.01 | £26.72 |
| 7 | £1,222.96 | £101.91 | £32.62 |
| 8 | £1,298.48 | £108.21 | £38.92 |
| 9 | £1,378.95 | £114.91 | £45.62 |
| 10 | £1,464.71 | £122.06 | £52.77 |
| 11 | £1,556.12 | £129.68 | £60.39 |
| 12 | £1,653.55 | £137.80 | £68.51 |
| 13 | £1,757.42 | £146.45 | £77.16 |
| 14 | £1,868.17 | £155.68 | £86.39 |
| 15 | £1,986.27 | £165.52 | £96.23 |

I think the revised table in the emails clearly sets out the income Ms B could expect to receive from the system, by way of FIT payments and savings, as well as her expected contractual monthly loan repayments. I think she was entitled to rely on it. Whilst I accept that the table doesn't simply compare the FIT income and savings to the monthly loan repayments, it does clearly set out that the overall income she could expect to receive by way of FIT income and any additional savings would immediately be sufficient to cover the monthly loan repayments, and actually make a profit too. But it has since turned out that that did not happen. I have therefore considered why that is.

Performance

The MCS certificate sets out that the system is expected to produce 2,542 kWh a year. I have looked at Ms B's FIT statements and can see that her system, on average, has generated 3,050 kWh a year. This is somewhat more than estimated by P at the point of sale (120%), so I'm satisfied that the system is performing as expected, in terms of energy

generation, if not financially. So the reason Ms B has not seen the expected financial returns is not because the system is defective, but for some other cause.

I have also looked at the assumptions used by P, including the self-consumption rate, expected annual increase in utility prices (EPR) and expected annual RPI inflation increase. I am satisfied that P's method for calculating these is fair and reasonable.

As I have mentioned already, P used ONS data between 2006 and 2015 to calculate the utility price and RPI inflation. I have looked at the actual yearly increases between 2016 and 2020, and the increases have been lower than predicted by P at the point of sale, and I think this at least partly explains why Ms B hasn't been receiving the financial returns she was expecting from the solar panels. Since actual energy prices have been lower than the modelling predicted, the savings achieved through the energy generated by the system have been correspondingly lower.[1]

Over the long term, I would accept that explanation as a reasonable defence to a claim for misrepresentation. (I have done so in other cases.) But the difficulty Shawbrook faces with Ms B's case, in my view, is that this does not explain why P's figures were wrong from the very start. The table above shows that the system was expected to pay for itself from the first month following installation, with an average monthly profit during the first year of £2.17. The system's failure to achieve that cannot be attributed solely to the failure of electricity prices to continue to follow a historic trend and increase year on year over the next 15 years in line with P's expectations. It was wrong immediately.

For that reason, I am satisfied that in this case a misrepresentation *was* made, and for that reason I propose to uphold this complaint.

**Putting things right**

Having thought about everything, I think that it would be fair and reasonable in all the circumstances of Ms B's complaint for Shawbrook to put things right by recalculating the original loan based on the known and assumed savings and income to Ms B from the solar panels over the 15 year term of the loan so she pays no more than that, and she keeps the solar panel system, and any future benefits once the loan has ended.

If the calculation shows that Ms B is paying (or has paid) more than she should have, then Shawbrook needs to reimburse her accordingly. Should the calculation show that the misrepresentation has not caused a financial loss, then the calculation should be shared with her by way of explanation.

If the calculation shows there is a loss, then where the loan is ongoing, I require Shawbrook to restructure the loan. It must recalculate the loan to put Ms B in a position where the solar panel system is cost-neutral over the 15 year loan term.

Normally, by recalculating the loan this way, Ms B's monthly repayments would reduce, meaning that she would have paid more each month than she should have done, resulting in an overpayment balance. And as she would have been deprived of the monthly overpayment, I would expect a business to add simple interest at 8% a year from the date of the overpayment to the date of settlement. So I think the fairest resolution would be to let Ms B 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,

[1] Now that energy prices have recently increased, Ms B's position is likely to improve in future.

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 Ms B and she continues to make her current monthly payment resulting in her loan finishing early, or
d) the overpayments are returned to Ms B and she pays a new monthly payment until the end of the loan term.

If Ms B accepts my decision, she should indicate on the acceptance form which option she wishes to accept.

If Ms B has settled the loan, Shawbrook must pay her the difference between what she paid in total and what the loan should have been under the restructure above, with interest at 8% a year.

If Ms B has settled the loan by refinancing, she should supply evidence of the refinance to Shawbrook, and then Shawbrook must:

1. Refund the extra Ms B paid each month with the Shawbrook loan.
2. Add simple interest from the date of each payment until Ms B receives her refund.
3. Refund the extra Ms B paid with the refinanced loan.
4. Add simple interest from the date of each payment until Ms B receives her refund.
5. Pay Ms B the difference between the amount now owed and the amount she would have owed if the system had been self-funding.

I'm satisfied that there was sufficient information available at the time that Ms B first contacted Shawbrook that means the claim should have been upheld. I direct that Shawbrook must pay £100 compensation for the inconvenience caused, in addition to the £200 it has already offered her for its delay in addressing her complaint.

So my provisional decision is that I intend to uphold this complaint. Subject to any further representations I receive from the parties by [27 July 2022], I intend to order Shawbrook to put things right in the way I have set out above.

**Responses to my provisional findings**

Neither party responded to my provisional findings, so there is no reason for me to depart from them and I confirm them here.

**My final decision**

My decision is that I uphold this complaint. I order Shawbrook Bank Limited to put things right in the way I have set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms B to accept or reject my decision before 23 August 2022.

Richard Wood
**Ombudsman**