DRN-3528361

The complaint

Mr and Mrs G complain that Shawbrook Bank Limited ("Shawbrook") has rejected the claim they made under sections 56 and 75 of the Consumer Credit Act 1974 ("the Act") in relation to a solar panel system they say was misrepresented to them by the supplier.

Background

In or around May 2019, Mr and Mrs G were 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 their home. After being visited by a representative of P, Mr and Mrs G decided to purchase the system and finance it through a ten year fixed sum loan agreement with Shawbrook. They also chose to buy an optional extra, a battery, which was financed with another Shawbrook loan. The system and battery were subsequently installed.

In December 2020 Mr and Mrs G made a claim to Shawbrook under section 75 of the Act. They said that 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 Mr and Mrs G to enter into the contract with P. These were:

- the feed in tariff (FIT) and savings on their electricity bills would offset some (though not necessarily all) of the monthly loan payments, but they had received considerably less than they had been led to expect; and
- the battery would continue to provide power in the event of a power cut, but it won't.

Shawbrook didn't agree that the system had been misrepresented to Mr and Mrs G or that there were any other reasons for the claim to be upheld. So Mr and Mrs G complained about the outcome of their claim. (Shawbrook later offered to pay them £200 for a delay in responding to their complaint, whether or not this complaint is upheld. Mr and Mrs G have said that they wish to accept that offer.)

Mr and Mrs G also complained separately to P. P also didn't uphold their complaint, and denied that its salesman had told them that the battery would still work in a power cut.

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 Mr and Mrs G, and so Shawbrook had not been wrong to deny their claim. The adjudicator found no other reason to uphold the complaint.

Mr and Mrs G didn't accept the adjudicator's view, in particular because it did not address their complaint about the mis-selling of the battery.

As an agreement couldn't be reached, the case has been 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 the complaint about the battery.

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 Mr and Mrs G paid for the system with a fixed sum loan agreement, Shawbrook agrees that section 75 applies to this transaction. This means that Mr and Mrs G could claim against Shawbrook (the creditor) for any misrepresentation or breach of contract by P in the same way they 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 Mr and Mrs G and P, as the supplier, are deemed to have been conducted by P as an agent of Shawbrook, making Shawbrook liable for whatever P said, whether amounting to a misrepresentation or not.

(Mrs G isn't named on the quote as P's customer, so it is possible that section 75 does not apply to her. But I think that point is academic, because section 56 would still apply.)

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 them loss.

Key documents

If 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.

There are several documents that have been provided by the parties. These include the two credit agreements, the quote for the solar panels, titled "Just for You: Your Personal Solar Quotation", a separate quote for the battery (actually this seems to be just a template since it does not say how much Mr and Mrs G were expected to save), and P's final response letter. I've considered these, along with Mr and Mrs G's testimony and recollection of the sales meeting, to decide on balance what is most likely to have happened.

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

The main 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 Mr and Mrs G, explaining any benefits of the system, prior to them agreeing to enter into the contract. Mr G has signed it. 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. So, I've taken this into account, along with Mr and Mrs G's account of events, when considering if there have been any untrue statements of fact.

I think the same thing about the second quote for the battery. Since this was an optional extra which had to be chosen, and a second loan was taken out to buy it, it's likely that this was referred to in the sales meeting too. It gives information about what the battery does and how it saves money.

P's final response letter says (among other things) that the battery would lose power during a power cut. It adds that their salesman says he knew that at the time of the sales meeting, and so he would not have told Mr and Mrs G otherwise.

<u>The battery</u>

Since the salesman denies saying that the battery would provide power during a power cut, and Mr and Mrs G insist that he did say that, I have referred to the relevant sales documents to see if it a salesman could have said that without fear of contradiction.

The battery quote does not say that the battery will work in a power cut, nor does it say that it will not. It does not mention power cuts at all. But on page 9, which is titled "Where Do My Earnings and Savings Come From?" it says:

> **On site consumption**
>
> Your new battery system stores excess solar electricity that you generate for free and don't use in your home. The battery allows you to use it early in the mornings or evenings when you need electricity the most! On site savings reduce the amount of electricity you have to buy from a utility.

That paragraph does not go as far as saying that the battery will continue to provide power in the event of a power cut. But it would not be inconsistent with a verbal statement to that effect either. It says that the battery stores energy to be consumed later. So I think that if a salesman did tell a customer that it would provide power during a power cut, the customer would not be able to point to this document and say "explain this then." On the contrary, the salesman could point to this paragraph and say that it actually supports his claim. So Mr and Mrs G's recollection of what they say the salesman said is not implausible.

I have considered whether so much time has passed since the sale that Mr and Mrs G's memories might be mistaken. I can't rule that out, but they brought their claim only a year and a half after the sale, so on balance I think that their recollections are probably still reliable.

For these reasons, I accept that Mr and Mrs G have told the truth about what was said in the meeting, and that they were misled about the battery.

However, it does not follow that they would not have bought the battery if they had been told that the battery would *not* work in a power cut. Power cuts are infrequent and usually don't last for long. This point does not appear to have been of some special importance to Mr and Mrs G. So on balance, I also think that they would still have bought the battery for the additional savings they could achieve with it.

That means that although they were misled, there was not a misrepresentation (because an untrue statement is only a misrepresentation if it induces someone to enter into a contract which they would not have entered otherwise). For that reason, I am not minded to require Shawbrook to unwind the contract and refund the entire cost of the battery. However, I do think, having regard to section 56, that Shawbrook ought to pay some compensation to Mr and Mrs G for their disappointment on learning that the battery would not function in the way that they were told it would (in addition to the offer Shawbrook has already made). I invite all parties to make further representations about how much that should be, but it is likely to be a modest sum.

Performance of the system

It is not in dispute that P told Mr and Mrs G that the FIT income and savings they would make from having the system would offset some of their loan payments. But if these benefits were exaggerated, and if they induced Mr and Mrs G to buy the system or the battery or both, and if as a result they suffered a financial loss, then this could potentially amount to a misrepresentation.

The quote sets out that the system is expected to produce 3,536 kWh a year. I have looked at Mr and Mrs G's FIT statements and can see that their system, on average, has generated 5,183 kWh a year. This is significantly more than estimated by P at the point of sale (146%), so I'm satisfied that the system is performing better than expected, in terms of energy generation, if not financially. So the reason Mr and Mrs G have 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.

According to the quote, P used Office of National Statistics (ONS) data between 2005 and 2017 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 explains why Mr and Mrs G haven't been receiving the financial returns they may have been 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.

As I have explained, the assumptions used by P were based on the information available from the ONS at the time. And based on this, I don't consider it unreasonable for P to have used them as the basis for calculating the potential financial income Mr and Mrs G could have expected to receive from the system. So, whilst I can appreciate that the returns may not have been as high as estimated at the point of sale, I'm not persuaded that this was due to unreasonable assumptions being used by P at the time Mr and Mrs G entered into the contract.

(As energy prices are expected to dramatically increase from now on, Mr and Mrs G may see that their system begins to save them more money than it has so far.)

Summary

Having carefully considered the evidence provided by all parties in this complaint, I'm satisfied that there were no untrue statements of fact made by P that induced Mr and Mrs G to enter into the contract for the system or the battery. But I am satisfied that they were misled about the battery's capabilities, and that a modest amount of compensation should be awarded for their loss of expectation.

Responses to my provisional decision

Mr and Mrs G explained that as they live in a rural area, power cuts occur more frequently than in a built-up area, so being told that the battery would work in a power cut was “at least a 50% factor” in their decision to buy it. They argued that this meant that their compensation should be at least 50% of the cost of the battery. (The battery cost £3,675.)

I don’t doubt that power cuts were a factor in their decision, since it’s likely that the reason the salesman mentioned this issue is because he was asked about it. But I’m not convinced it was the main reason. There were also other reasons to buy the battery as well – efficiencies and savings which could be made every day, not just occasionally. On balance, I think they would still have bought it.

For that reason, I think that refunding half the price of the battery would be too much. I think that another £300 is in line with what our service would typically award for the disappointment of learning that the battery would not operate in a power cut.

My final decision

My final decision is that I uphold this complaint in part. I order Shawbrook Bank Limited to pay Mr and Mrs G £300.

This is in addition to Shawbrook’s earlier offer of £200 compensation for its delay in responding to their complaint (which Mr and Mrs G have accepted independently of the outcome of this decision).

Under the rules of the Financial Ombudsman Service, I’m required to ask Mrs G and Mr G to accept or reject my decision before 11 November 2022.

Richard Wood
Ombudsman