

The complaint

Mr and Mrs P complain that Shawbrook Bank Limited declined their claim under sections 75 and 140A of the Consumer Credit Act 1974 ("the Act") relating to their purchase of solar panels.

Mr and Mrs P are represented in this case by a claims management company ("the CMC").

Background

In or around November 2016, Mr and Mrs P 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 P decided to purchase the system and finance it through a ten year fixed sum loan agreement with Shawbrook. The system was subsequently installed. This included an optional extra called a voltage optimiser.

In September 2020 the CMC made a claim to Shawbrook on Mr and Mrs P's behalf under sections 75 and 140A 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 Mr and Mrs P to enter into the contract with P. The CMC said the following misrepresentations had been made:

- the system would not only make enough money to cover the cost of the loan but would actually make a profit;
- the salesman's calculations about the performance of the system were false and had been made recklessly.

The CMC also alleged the following breaches of contract by P:

- the terms of P's quote were incorporated into the contract with Mr and Mrs P, and as the returns have not achieved what was promised a breach of contract had occurred; and
- the salesman's statement that Mr and Mrs P would not suffer a loss by buying the solar system was a warranty which had been breached.

The CMC also alleged that an unfair relationship existed between Shawbrook and Mr and Mrs P. In further letters in March and September 2021 the CMC elaborated on this. It said:

- P had used data from the Office for National Statistics (ONS) to add credibility to its quote, but the figures used to calculate the benefits of the system over its lifetime did not match the ONS data on which P claimed it was based. The CMC said this was evidence that P was systematically and fraudulently inflating the figures to make the system and the voltage optimiser appear more attractive to customers.
- The voltage optimiser prediction was inaccurate, was not calculated using the consensus of independent reports available at the time of sale, and was beyond the range of reasonableness.
- The personal allowance for electricity savings at 75% was a forecast not made with reasonable care and skill. The government's calculation for personal usage is 50%, and a fair quote would have used this figure.
- The cost of credit was unaccountably omitted from the "Putting it all together" section

- of P's quote and from the profit calculations.
- P's failure to communicate clear, accurate and balanced information about the benefits of having the system contravened the FCA's *Principles of Business* and the *Consumer Credit Sourcebook* ("CONC").
- The system had failed to generate the savings P had predicted.

In response to the original claim letter, Shawbrook issued a final response and explained that it didn't agree the system had been misrepresented to Mr and Mrs P or that there were any other reasons for the claim to be upheld. However it offered £200 compensation for its delay in responding to the claim. Following the new claim letters, Shawbrook did not alter its position. Being dissatisfied with those responses, Mr and Mrs P instructed the CMC to bring this complaint to our service.

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 P, or that an unfair relationship existed.

The CMC disagreed with the adjudicator's view for the following reasons:

- She did not appear to have considered the specific Principles of Business and provisions of CONC on which the CMC had relied.
- She had not considered whether an unfair relationship had existed (other than quoting section 140A of the Act).¹
- The CMC relies not on statements of fact made by the salesman, but only on implied representations.
- The tables in the "System Analysis" section of the quote do not include the cost of finance.
- P's quotes since 2020 do not include savings for voltage optimisers. The CMC argued that this meant that P must agree that the voltage optimisers do not save money, and therefore all of the earlier quotes must have been wrong.
- The quote is complex and difficult to understand.

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.

I have read all of the submissions made by the CMC and by Shawbrook, and have taken all of these into account when making my decision. But the Financial Ombudsman Service was set up to be a quick and informal alternative to the courts. So I will not refer to every comment that has been made by the parties. Instead, my decision sets out what I think are the most important points in order to explain my decision in a way that is intended to be concise and clear.

¹ I disagree with this point; in her decision the adjudicator explained why she did not agree with the points the CMC had made in support of its contention that there was an unfair relationship. She then explicitly concluded that no unfair relationship existed.

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, 75 and 140A of the Act. Relevant rules made by the regulator include Principles 2, 7 and 9; the CMC also relies on certain provisions of CONC.

Section 75 of the Act provides protection for consumers for goods or services bought using credit. As Mr and Mrs P 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 P 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 P 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 alleged breaches of CONC and the *Principles of Business* by failing to provide relevant information in a clear and balanced way.

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 him loss.

In the FCA's *Principles of Business*, Principle 2 requires a firm "to conduct its business with due care, skill and diligence." Principle 7 says "a firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading." Principle 9 says "a firm must take reasonable care to ensure the suitability of its advice". The CMC argues that P's quotation breached all of these principles.

CONC 1.2.2R(2) requires a firm which carries on credit-related regulated activities (such as entering into a consumer credit agreement as lender, as Shawbrook did) to "take reasonable steps to ensure that other persons acting on its behalf comply with CONC." The CMC argues that Shawbrook failed to ensure that P complied with CONC, with the result that an unfair relationship arose between Shawbrook and Mr and Mrs P.

CONC 2.5.3R(2) requires a firm to take reasonable steps to ensure that a product the firm recommends is not unsuitable for the customer. CONC 3.3.1R(1) requires a firm to "ensure that a communication or a financial promotion is clear, fair, and not misleading." The CMC says that P's quotation did not comply with these provisions.

CONC 2.5.3R(1) requires a firm to "explain the key features of a regulated credit agreement to enable the customer to make an informed choice". CONC 4.2.5R(1) and (2) require a firm to provide a customer with an adequate explanation of various matters, including in particular "the features of the agreement which may operate in a manner which would have a significant adverse effect on the customer in a way which the customer is unlikely to foresee". (Here "the agreement" refers to the loan agreement, not the contract for the purchase of the system.) The CMC says that P's quotation failed to adequately explain certain features of the loan agreement, for example by not including the cost of credit.

There is some overlap between each of these provisions, so rather than write about them all separately, I will consider whether P adequately and accurately explained the benefits and cost of the system (including the cost of finance) overall. I have however taken P's and Shawbrook's obligations under these provisions into account when forming my opinion.

Documents

Shawbrook has provided the quote it says the installer provided to Mr and Mrs P at the time of the sale, which is entitled "Your Personal Solar Quotation".

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 Mr and Mrs P, explaining any benefits of the system, prior to them agreeing to enter into the contract. One of them 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 I therefore accept that the salesperson went through it during the meeting. So, I've taken this into account, along with Mr and Mrs P's description of events, when considering if there have been any untrue statements of fact.

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 cost of the system

The cash price was set out clearly in the quote and in the credit agreement as £8,859. However, the overall cost to Mr and Mrs P was more than that, due to them paying for the system using an interest-bearing loan. Although that is not shown in the System Analysis section of the quote, it is shown clearly elsewhere in the quote, where there is a table setting out the loan repayments over ten years. That says that Mr and Mrs P will have to make 120 monthly payments of £115.27.

This information is repeated in the credit agreement, along with the total amount payable, £13,932.40. So I think it was made clear to Mr and Mrs P how much they would have to pay.

Alleged misrepresentation: the system would make a profit

The quote included a table setting out the estimated performance of the system over 25 years. The total income over 25 years was broken down as follows:

- Generation tariff: £2,869.66
- Export tariff: £1,685.54
- Savings on energy bills: £20,192.91
- Voltage optimiser savings: £14,855.18
- Grand total: £39,603.29

The total is more than the cash price of the system and also more than the total payable under the loan agreement. So, I accept that Mr and Mrs P were told that the overall benefits of the system over 25 years were estimated to exceed what they would pay for it overall, which was £13,932.40.

So the question now is whether this was a misrepresentation that induced Mr and Mrs P to purchase the system when they otherwise would not have done.

System performance

Based on that table, I'm satisfied that the installer told Mr and Mrs P that the system would pay for itself by the end of year 15, as the accumulated grand total of income and savings would by that time have exceeded the total cost of the system, including the finance costs. If that turns out not to be true and if I'm satisfied that this induced Mr and Mrs P into entering the contract and that they thereby suffered a loss, then that would amount to a misrepresentation.

In the quote the installer has estimated that Mr and Mrs P's system would generate 2,133 kWh of electricity a year. Mr and Mrs P have provided their meter reading, which shows that the system generated 10,291 kWh between the installation in November 2016 and the date of the reading, 3 November 2022. This works out as an average of 1,724.6 kWh a year, or about 81% of the estimate. So I am satisfied that the system has significantly underperformed compared to P's estimates from the point of sale.

I'm satisfied that the estimated generation and estimated FIT payments and electricity savings would have induced Mr and Mrs P into entering the contract. The generation, and therefore income, are significantly lower than they were promised, so they have suffered a loss. For that reason, I am minded to uphold this complaint.

Mr and Mrs P raised underperformance in their claim to Shawbrook, but I can't see that this point has been addressed before. However, I have set out below a way forward in line with our usual approach in such cases, in the section titled in bold "Fair compensation."

However, before dealing with compensation I will first deal with some of the other complaint points raised by the CMC.

Solar panel savings and the self-consumption rate

To calculate the savings from the solar panels, P used a self-consumption rate of 75%. Self-consumption rate is the proportion of electricity generated by the solar panels that P assumed that Mr and Mrs P could use themselves, rather than exporting it to the grid. My understanding is that P tailored the self-consumption rate based on what it knew about the customer and how they used electricity, and then referring to tables compiled by an industry body (the Microgeneration Certification Scheme, or MCS).

For example, since solar power would be generated in daylight hours, a person that is usually home during the daytime is able to use more of the power generated than someone who only tends to be home during the evenings.

The CMC has argued that P should have used the "industry standard" self-consumption rate of 50% when calculating the savings. But I don't think it was unreasonable for P to tailor the self-consumption rate based on the information available to it, using the variable rate published by MCS. And I have not seen sufficient evidence to persuade me that the self-consumption rate used by P was unreasonable in this instance (bearing in mind information available to it at the time of sale). I'm aware that P has used lower self-consumption rates on other quotes that I have seen – which reinforces its claim that it was tailoring it to each customer.

I think that the electricity savings from the solar panels were based on reasonable assumptions about the amount of electricity generated by the system and the self-consumption rate. So, I don't think those savings estimates were a misrepresentation.

That remains the case even if the savings have not in fact been as high as estimated. The savings will be dependent upon how electricity is used in the home and that is beyond P's control. The quote included the following clarification in the section about electricity bill savings – "The amounts saved will depend on the amounts used." So, I don't think the estimated savings were presented as being guaranteed.

Voltage optimiser

The CMC has suggested the estimated voltage optimiser savings were too high, given various reports that were available at the time. However, I understand that P's method of calculating the savings was approved by MCS, so I am not persuaded that it was unreasonable, even if P has since revised its methodology.

How P calculated the savings was also explained in the quote, with reference to a specific report that informed its method of calculation. The quote also included the following statement alongside the figures for electricity savings from the voltage optimiser:

"Savings are dependent on individual circumstances and may be higher or lower than those stated above and are based on the manufacturer's own figures."

Overall, I think there were a number of reports which found that voltage optimisers could provide various levels of benefit. Considering those reports, I think that P's estimated voltage optimiser savings in this case are not outside of a reasonable range.

One report mentioned by the CMC said that the benefits of voltage optimisers would reduce over time. So, the CMC argued that savings from the voltage optimiser should have reduced rather than increased as shown in the quote. But it appears to me that P estimated the benefit of the voltage optimiser based on what it knew about the product it was selling, Mr and Mrs P's home and how they used electricity. I am not persuaded that P's estimate of the benefit of the voltage optimiser was unreasonable. And I'm not persuaded that the benefit of the voltage optimiser should have been estimated to reduce each year, rather than increase with inflation.

Summary of findings regarding savings

Overall, I think the underlying assumptions used to calculate the savings were reasonable. As such I don't think those figures constitute a misrepresentation.

Alleged misrepresentation: ONS data

I have checked the inflation figures used by P in this case to see if there was an error. I can see that the figures used do not exactly match the average inflation figures for the ten-year period stated on the quote.

However, the figures used by P in the quote are significantly higher than what I have calculated they should be. The quote predicts a utility price index of 9.1% based on the data for the period 2006 to 2015, but the ONS data for that period gives an average of only 7.28%. The quote gives the retail price index for the same period as 5.1%, when the ONS

data used (according to the quote) gives 2.84%.² These are significant differences, and while I am not persuaded that this must have been deliberate, these errors were still to Mr and Mrs P's detriment. So I am also minded to uphold this complaint on this ground too.

I have taken into account the fact that the quote clearly stated that the inflation rate can go up or down, and that the quote gave three different graphs showing the estimated returns if inflation was as much as P predicted, if inflation was half as much as P predicted, and if there was no inflation at all. But I still think that P ought to have given the correct figures for the first two graphs to be properly understood.

Remaining complaint points

Because I have found that misrepresentations were made and I propose to uphold this complaint, it is not necessary for me to go on to consider whether there were breaches of contract or whether an unfair relationship exists.

I am not persuaded that the quote was complex or difficult to understand (although I have found that it was inaccurate). The information is, in my opinion, laid out clearly and in an accessible way.

Fair compensation

Having thought about everything, I think that it would be fair and reasonable in all the circumstances of Mr and Mrs P's complaint for Shawbrook to put things right by making sure that Mr and Mrs P don't suffer a financial loss as a result of the system's underperformance. In my view that would mean that the solar panel system should generate roughly what was promised in the quote.

This would mean that Shawbrook must:

- a) calculate the difference between what the panels have generated as income (through the FIT and savings) for Mr and Mrs P and what the sales paperwork set out as being the annual "total income savings", and
- b) add simple interest to that amount at the rate of 8% a year, and pay the total to Mr and Mrs P (either directly or via the CMC).

To ensure that Mr and Mrs P don't lose out going forward, Shawbrook must then:

- c) calculate the average annual underperformance percentage so far, and assume that the panels will continue to underperform at that rate through to the conclusion of the finance agreement,
- d) recalculate the "total income savings" for each year going forward until the conclusion of the finance agreement, having applied the percentage reduction identified in paragraph c) above,
- e) pay Mr and Mrs P the difference between the revised amounts calculated in paragraph d) above and the "total income savings" set out in the sales paperwork.

I will also direct Shawbrook to pay £100 compensation for the inconvenience caused by not upholding the claim in the first place. (This is in addition to the £200 already offered in the

² Table 43 line 95 and Table 37 column J: see

<https://www.ons.gov.uk/economy/inflationandpriceindices/datasets/consumerpriceinflation/current>

final response letter.)

My provisional decision

I am currently minded to uphold this complaint in part. Subject to any further representations I receive from the parties by the date below, I intend to order Shawbrook Bank Limited to put things right in the way I've set out above.

Responses to my provisional decision

Shawbrook accepted my provisional decision. The CMC did not reply. So there is no reason for me to depart from my provisional findings, 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've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P and Mrs P to accept or reject my decision before 7 March 2023.

Richard Wood
Ombudsman