

complaint

Mrs W complains that Shawbrook Bank Limited (“Shawbrook”), has rejected the claim she made under section 75 of the Consumer Credit Act 1974 (“the Act”) in relation to a solar panel system she says was misrepresented to her by the supplier.

Mrs W is represented by a claims management company (“the CMC”).

background

In or around February 2014, Mrs W 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, Mrs W decided to purchase the system and finance it through a 15-year fixed sum loan agreement with Shawbrook. The system was subsequently installed.

In December 2016 the CMC made a claim on Mrs W’s behalf under section 75 of the Act to Shawbrook. 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 Mrs W to enter into the contract with P. The CMC said the following misrepresentations had been made:

- the total cost of the system including VAT had been documented as £7,240.00 to mislead Mrs W – this figure did not include any interest associated with the loan, so the true cost was £14,184.00;
- Mrs W was promised a tax-free year 1 benefit £688.06 but it was not explained that after making the monthly repayments there would be an annual deficit £574.38;
- the credit agreement would be ‘self-funded’ by the FIT payments alone;
- the system ‘would not cost her a penny’; and,
- she would make savings on her electricity bills.

The CMC also raised concerns under section 140A of the Act. It said there was an unfair relationship between Mrs W and Shawbrook due to the misleading representations made about the system’s expected performance.

On making the section 75 claim to Shawbrook, the CMC provided; a copy of a non-compliance hearing from the Renewable Energy Consumer Code (“RECC”) dated December 2013, copies of marketing material used by P, a job advert for P, the loan agreement with Shawbrook and some of Mrs W’s electricity bills and FIT statements.

In its final response letter, Shawbrook said, having reviewed the information it held on file, as well as information provided by P, it didn’t agree the system had been misrepresented to Mrs W or that there were any other reasons for the claim to be upheld. In summary, it said:

- the contract P had provided Mrs W set out the expected total returns from the system and this, alongside the finance agreement, made it clear that the system was not self-funding immediately and that there would be a cost involved;
- the contract with P showed that the expected annual return in year one was £676.25 and the loan agreement clearly stated the loan repayments were £78.80 or £945.56

annual, so it was clear there would be a deficit;

- the performance of the system and any deterioration are set out in the contract;
- the system wouldn't increase Mrs W's electricity consumption, and any increase in her electricity bills would be due to a change in lifestyle; and
- Shawbrook didn't pay any commission to P for introducing Mrs W to it.

Unhappy with this response, the CMC referred the complaint to this service. One of our investigators looked into what had happened. Having considered all the information and evidence provided, our investigator thought the benefits of the system were misrepresented as the system is underperforming compared to the estimations provided at the point of sale.

The investigator recommended that Shawbrook should reduce the total amount payable by Mrs W so that it equalled the benefits the system would generate over the original loan term.

Shawbrook and the CMC did not respond, so the case has been passed to me for review.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

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 section 56 and section 75 of the Act. Section 75 provides protection for consumers for goods or services bought using credit. It states:

"If the debtor under a debtor-creditor-supplier agreement falling within section 12(b) or (c) has, in relation to a transaction financed by the agreement, any claim against the supplier in the respect of a misrepresentation or breach of contract, he shall have a like claim against the creditor, who, with the supplier, shall accordingly be jointly and severally liable to the debtor."

As Mrs W paid for the system with a fixed sum loan agreement, Shawbrook agrees that section 75 applies to this transaction. This means that Mrs W 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 Mrs W and P, as the supplier, are deemed to have been conducted by P as an agent of Shawbrook.

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.

Section 140A of the Act is also relevant. This states:

“(1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following:

- (a) any of the terms of the agreement or of any related agreement;*
- (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;*
- (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).*

(2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).”

So, I've considered whether a court might find that there existed an unfair relationship.

Key documents

There are several documents that have been provided by both the CMC and Shawbrook. These include the credit agreement and the quote Mrs W received from P. I've considered these in detail and whether they support P having made the alleged representations.

The quote is a detailed document that sets out key information about the system, the expected performance, financial benefits and technical information. I'm satisfied that it formed a central part of the sales process and is therefore relevant when considering if there have been any untrue statements of fact alongside Mrs W's recollection of the sale.

Shawbrook have provided detailed information explaining P's sale processes. This detailed that P's sales practice was for the quotation to be sent to the consumers shortly after the initial meeting via email. Based on our experience of what we have seen with similar complaints, I'm satisfied that, on the balance of probabilities, P would have sent this document to Mrs W and I have no reason to doubt that's what happened in this complaint.

The credit agreement, which was also provided by the CMC at the time the original complaint was made, sets out the amount being borrowed, the interest to be charged, total amount payable, the term of the loan and the contractual monthly repayments.

I'll now consider each of the alleged representations made as set out above.

The FIT payments

Mrs W has alleged that she was told her monthly loan repayments would be covered, or 'self-funded' by her FIT payments. I've considered the quote that was provided by P and considered whether this supports what she says she was told as I consider the quote was central to the sales presentation.

Page five of the quote sets out the estimated income Mrs W could expect to receive by way of FIT payments from the system. This is split out into two tables. The first shows the expected FIT payments in the first year and the second shows the expected average income over 20 years. My understanding is that the system would only receive FIT payments for 20 years and this is why 20 years has been used in the quote. These tables are set out as follows:

I think that these tables, especially the first one, are clear that Mrs W could expect to receive a total income in year one of £408.67 from her FIT.

The quote goes on to look at the electricity savings Mrs W could expect from the system as well as any savings they would make from taking out any optional extras including a voltage optimiser. The expected year one electricity savings is £181.79 and the combined income and savings in year one is shown as £676.25. This is shown in a table titled 'Putting it all together'. All of these tables are on page five of the quote.

There is another page titled 'system performance and returns' with a further series of tables. There's a section titled 'repayments'. This has three tables set out over 60 months, 120 months and 180 months. I've focused on the table for 180 months this is the length of the loan that Mrs W entered into with Shawbrook. This table sets out that there are 180 monthly payments of £78.80 due and compares the overall expected grand total from the system, averaged over a monthly basis, versus the expected loan repayments.

The table is shown as:

I think the quote clearly sets out the income Mrs W could expect to receive from the system, by way of FIT payments, as well as her expected contractual monthly loan repayments. Whilst I accept that the table doesn't simply compare the FIT income to her 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 not be immediately sufficient to cover her monthly loan repayments. Therefore, I'm not satisfied that she was told that her monthly loan repayments would be covered by the FIT income alone.

Total cost of the system and expected benefits

Mrs W has said that the cost of the system was documented as £7,240.00. She has said that this was done to mislead her as this figure did not include any interest associated with the loan so hid the true cost of the system, £14,184.00.

I'm satisfied that the quote provided to Mrs W makes it clear that the cost of the system is £7,240.00. This is supported by the credit agreement which sets out that the total amount of credit is £7,240.00. But this goes on to show that the total amount payable would be £14,184.00.

And as the quote provided by P is clear that there would be a monthly loan repayment due, as set out in the table above, I'm satisfied that the two documents (the quote and the credit agreement), made it clear that although the cost of the system was £7,240.00, it would cost Mrs W more than this as she had decided to pay for it with a fixed sum loan.

I'll now consider whether P told Mrs W that the system 'would not cost her a penny', and that she could expect to receive a Tax-Free Year 1 benefit of £688.06.

I've considered the table above that sets out the expected income from the system versus the expected benefit. My view is that this table is in an easily accessible format, comparing the two.

I'm satisfied that this table shows that in the first year Mrs W was expected to have made a loss of £22.45 a month and in the second year this would decrease to a loss of £18.92 a month. It wouldn't be until year seven was repaid that the expected benefits would exceed her monthly loan repayments, and, by my calculation, it wouldn't have been until around year 14 that she would have sufficiently recouped any previous annual losses and the system would be paying for itself.

I'm of the view that this makes it clear that the system wouldn't be self-funding from the start, and I'm unable to conclude that Mrs W was told that the system 'would not cost her a penny'. I think the quote is clear that there would be a difference between her expected income and monthly loan repayments.

I do accept that Mrs W were told that they'd receive a year one benefit of £676.25 as this was the expected combined income from FIT payments and electricity savings on her energy bills. Having said that, taking into account the available evidence, I'm not persuaded that Mrs W was led to believe that she'd receive this sum in her hand. I'm satisfied that the quote makes it clear that she'd have to make loan repayments and overall there would be a deficit.

I also accept that Mrs W was told by P that the system would pay for itself over the loan term. The 'estimated performance over 20 years' page of the quote has a table detailing the performance over 20 years.

This shows that by year 14 the overall benefits that Mrs W could expect to receive would have exceeded the total amount payable under her loan agreement. This table also sets out the panel degradation rate so I'm satisfied that P made her aware that performance of the system would deteriorate over its lifetime.

As I've set out above, I'm satisfied that P told Mrs W that the system would pay for itself by year 14, as supported by the table above. If that were an untrue statement of fact, and I'm satisfied that this was what induced her to enter into the contract, and she subsequently suffered a loss, that would amount to a misrepresentation.

So, I've gone on to consider the performance of the system and whether this is in line with the contract between P and Mrs W. The quote sets out that the system is expected to produce 2,750 kWh a year and this in turn would generate the income Mrs W could expect to receive by way of FIT payments and savings in her energy bills.

I've calculated that, on average, the system should generate 7.53 kWh of energy each day. Mrs W has provided her FIT statements which show that between March 2014 and December 2020 the system generated 14,537.39 kWh which equates to 5.94 kWh a day or 2,168.10 kWh a year. This is significantly less than the estimations provided at the point of sale.

I'm satisfied that the estimated generation, and the related FIT payment and electricity savings, would have induced Mrs W into entering the contract. The actual generation and therefore income are significantly lower than she was promised so she has suffered a loss.

Shawbrook have not responded to the investigator's assessment with any explanation or reason as to why the system is significantly underperforming. Therefore, based on the information we have on file I think it's more likely than not that the system is underperforming and this amounts to a mis-representation. So, I think this case should be upheld.

I note the CMC has raised some additional points. But, whilst I have considered these, having already established there was most likely a misrepresentation at the point of sale, it is not necessary to discuss these points in this decision.

I'll go on to explain what I think fair compensation should be.

Fair compensation

Our role is to resolve individual disputes between consumers and businesses fairly, reasonably, quickly and informally. Determining fair compensation is not always an exact science and it is more difficult in a case like this where solar panels have been installed at the property.

I've considered if it's fair to unwind the credit agreement, remove the solar panels and give Mrs W a refund of all the payments made (less any financial benefit gained from the installation of the solar panels). But I think it may be disproportionate to do this when the panels are working and generating green energy. I think there's an alternative that would put Mrs W in a fair position.

In this case, I think fair compensation is trying to make sure that Mrs W doesn't suffer a financial loss, which in my view would mean that the solar panel system should be cost neutral over the 15-year loan term – in summary, my aim is to make sure that total outgoings (including the monthly loan repayments) are equal to any income and savings that the panels generate.

So, I think to put things right Shawbrook should recalculate the original loan based on the known and assumed savings and income to Mrs W 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. This will put Mrs W in a cost neutral position over the loan term, meaning that she's not disadvantaged by the mis-representation.

Normally, by recalculating the loan this way, Mrs W's monthly repayments would reduce, meaning that she would have paid more each month than she should have 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 W have the following options as to how she would like the 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, based on the recalculated loan, until the end of the loan term,

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

I also think that Shawbrook should pay £100 compensation for the trouble and upset caused.

my final decision

My final decision is that I uphold Mrs W's complaint. Shawbrook Bank Limited should put things right in the manner set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs W to accept or reject my decision before 10 October 2021.

Sam Thomas
ombudsman