[2023] EWHC 1904 (KB)

Case No: KA-2023-000001

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

ON APPEAL FROM THE COUNTY COURT AT CARDIFF
HHJ HYWEL JAMES
COUNTY COURT CASE NUMBER H18YJ847

Cardiff Civil and Family Justice Centre
2 Park St, Cardiff CF10 1ET

Date: 28 July 2023

Before :

MR JUSTICE GRIFFITHS

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Between :

NICOLA McKENZIE	**Claimant and Appellant**
- and -	
CREATION CONSUMER FINANCE LIMITED	**Defendant and Respondent**

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Frederick Lyon (instructed by SK Lloyds Solicitors) for the Appellant
Lia Moses (instructed by Eversheds Sutherland International LLP) for the Respondent

Hearing date: 12 July 2023

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Approved Judgment

Mr Justice Griffiths:

1. This is an appeal by the Claimant against the order of a judge in the County Court at Cardiff on 13 January 2023 dismissing the Claimant's claim with costs after a fast track trial for reasons given in a reserved judgment on 12 January 2023 after a hearing on 16 November 2022.

2. The case arose out of the purchase by the Claimant of solar panels from My Planet Ltd ("My Planet") after a cold call at her home from an agent of My Planet called "Clive". The price was £7,540 and it was entirely funded by finance from the Defendant, Creation Consumer Finance Limited. The total repayable amount, inclusive of interest and an arrangement fee, was £11,905.20. This was repayable by 120 monthly instalments of £99.21. My Planet has since gone into liquidation.

3. In findings against which there is no appeal, the judge found that the Claimant entered into the agreements in reliance upon false representations made by Clive on behalf both of My Planet and of the Defendant and for which the Defendant, therefore, was liable (applying section 56 of the Consumer Credit Act 1974).

4. However, he concluded that the Claimant had suffered no loss. The benefits to her of the solar panel system outweighed the costs by just under £1,500.

5. The Grounds of Appeal are that the judge erred in law and erred in making findings contrary to the evidence in that:

    i) He failed to give adequate reasons for his decision to set out the legal basis why the Claimant must give credit for the future benefits as would be derived from the panels.

    Another three Grounds are advanced on the basis of what the Claimant says are "the three alternative possible reasons why the Claimant was required to give credit", namely:

    ii) The judge found that, notwithstanding that the Claimant had moved from her property, she was required to give credit for the benefits received from the installed solar panels by the purchaser of that property. Such a decision (it is argued) was inconsistent with the decision in *Hodgson v Creation Consumer Finance* [2021[EWHC (Comm) 2167 and was wrong in law.

    iii) The judge found that the Claimant had benefitted from receiving a higher price for her property or alternatively had failed to sell her property at a higher price when she had the opportunity to do so when the evidence in the case (it is argued) did not support such a finding. The Grounds of Appeal argue that, in coming to his conclusion, the judge "placed weight on an irrelevant factor, namely that [the Claimant's] buyers conveyancing solicitors had asked whether the entitlement to receive the FIT [Feed-in Tariff] payments was included within the sale and disregarded the oral evidence of [the Claimant] that a nearby property without solar panels had recently sold for more than her own."

    iv) Insofar as the judge's findings can be termed a finding that the Claimant failed to mitigate her loss, such findings were wrong due to procedural irregularity

and/or gave weight to irrelevant factors. The Grounds of Appeal argue that the judge found that, by selling her property, the Claimant would secure a windfall (if future benefits of the solar panel system were not taken into account) by failing to take steps either to increase the value of her property or to avoid a sale altogether. As to that, the Grounds of Appeal argue:

a) An argument that the Claimant had failed to mitigate her loss by selling her property was not heralded prior to trial so as to allow her to meet the same.

b) The point was not canvassed with the Claimant in cross-examination.

c) The point was not advanced in closing submissions by the Defendant's Counsel.

d) Such a finding was, in any event (it is argued) not supported on the evidence and placed an undue burden on the Claimant.

6. Permission to appeal was granted on all grounds by Stacey J.

7. The appeal operates by way of a review and not re-hearing. The appeal will be allowed if the decision of the lower court was either "wrong" or unjust because of a serious procedural or other irregularity: CPR 52.21(3).

Ground 1 – Failure to give adequate reasons

8. Ground 1 is that the judge failed to give adequate reasons for his decision. The other Grounds are essentially derived from Ground 1. The Claimant argues that it is not clear which of the interpretations explored in Grounds 2, 3 and 4 is the operative basis of the judge's reasoning, and that the reasoning or at least the explanation provided for the reasoning in the judgment is therefore defective: see *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605 [2002] 1 WLR 2409.

9. Per Lord Phillips of Worth Matravers MR giving the judgment of the Court in *English v Emery Reimbold* at para 26:

> "Where permission is granted to appeal on the grounds that the judgment does not contain adequate reasons, the appellate court should first review the judgment, in the context of the material evidence and submissions at the trial, in order to determine whether, when all of these are considered, it is apparent why the judge reached the decision that he did. If satisfied that the reason is apparent and that it is a valid basis for the judgment, the appeal will be dismissed."

10. I therefore turn to the question of whether it is apparent why the judge reached the decision that he did.

11. When making his decision on breach of duty (against which there is no appeal) the judge found the Claimant to be credible in her recollection of the events of the day in which the false representations were made to her (judgment para 16).

12. The appeal is against the judge's finding that there was no loss, and the relevant part of the judgment therefore begins at para 30, which begins his consideration of that question.

13. The judge was asked to and did base himself upon the approach devised and applied by His Honour Judge Pearce in the Circuit Commercial Court in Manchester when considering another My Planet/Creation Consumer Finance case: *Hodgson v Creation Consumer Finance Limited* [2021] EWHC 2167 (Comm). He noted, however, "a significant distinguishing factor in this case", which was that the Claimant had at the time of the hearing before him sold the property, "together with the solar panels *in situ*" (judgment para 30). She had done this only a couple of weeks before the hearing (para 31). "No expert evidence was before the court that the property had a lower, or indeed greater, value as a result of the installation of the solar panels" (para 31). The Claimant stated in her oral evidence "she did not believe the panels had increased the value of the property" (para 32). I read this in conjunction with the previous observation that there was no expert evidence on this point. Whilst I accept (as is argued on her behalf) that the judge at no point resiles from his finding that she was a credible witness, it does not follow that he was saying that he would accept her view on a question of valuation, expressed as a belief, or opinion.

14. The judge noted her evidence that "the property had significantly increased in value since its purchase some 20 years earlier" (para 34). Before me, this is criticised as an irrelevant observation on the question of whether the price was increased or not by the inclusion of the solar panels, because 20 years is a long time, and a general increase in value is to be expected over that time. However, to my mind, it has to be read with the sentence which immediately follows it: "The house, she noted, sold for slightly more than the initial valuation" (para 34). It is part of a discussion suggesting that the sale price was more than expected, which therefore fits in to a later finding that it was increased because of the benefit provided by the solar panels included with it.

15. That reading is, to my mind, supported by the content and the phrasing of the next two sentences (para 35):

> "The claimant did note in her evidence a neighbouring property had sold for a greater sum than her property. No documentary or other corroborative evidence was provided to the court that this in any way was related to the solar panels."

16. The word "did" in the first sentence provides an emphasis that suggests that this passage is counter to the general direction of the judgment's travel. It is a piece of countervailing evidence. The next sentence, therefore, as I read it, is explaining why it is not taken entirely at face value. The fact that a neighbouring property sold for a greater sum might be, in itself, of very little weight. It might have been a bigger property. It might have been in better condition. To carry weight on the question before the judge, the extent to which the neighbouring property was comparable (over and above its geographical location) had to be considered, and the judge is in this sentence indicating that he did not know enough about the context to say whether the difference in sale price "in any way related to the solar panels".

17. Unusually for an appeal of this nature, no transcript of the hearing was included in my papers. When I queried this, both parties sensibly insisted that the appeal could and

should proceed without one. Both Counsel in the appeal appeared below and they were able to tell me that there was nothing in the evidence before the judge which went beyond what he said in the passage I have quoted in para 35. Because the sale went through so soon before the hearing, not much of the preparation had focussed on the question of what if any value attributable to the solar panels was reflected in the sale price of the Claimant's house. The Claimant did give evidence that a neighbouring property had sold for more; but the date of that sale, and the difference in price, and the characteristics of that property as compared with hers, apart from the absence of solar panels, were not given in her evidence: whether in a witness statement or in oral evidence, including cross examination. Nor were any particulars of that neighbouring property included in the Claimant's disclosure so far as I am aware.

18. The next passage of the judgment (para 36) notes that the sale of her own house meant that the Claimant "ceased, as from the date of the sale, to benefit from the solar panels". But it then says:

> "The panels do retain a benefit for the new owners, particularly under the FIT agreement and energy savings, and, in my assessment, would have been a factor in their consideration prior to purchase and in particular the purchase price. This would be particularly true at a time when there are concerns as to increasing energy prices. The response to enquiries by the conveyancing solicitors noted the property was sold with the benefit of FIT payments. The buyers would have been aware of any likely savings in their future electricity bills."

19. This is a clear finding that the solar panels "would have been a factor in… the purchase price", for reasons stated in that passage. It fits with what I have described as the judgment's direction of travel towards a finding that the proceeds of the Claimant's sale of her property were higher because it was sold with the benefit of the solar panels and with the benefit of the income and other benefits they brought with them (FIT payments and energy savings, both of which para 36 refers to expressly).

20. The judgment (in paras 37-38) makes some observations about the sale in the context of the case. It accepts that the sale was not forced by personal circumstances ("for example, due to disability needs") but, equally, accepts that the sale was not "in any way… a deliberate ploy" in connection with the litigation.

21. The judgment then says this (para 39):

> "The claimant's final submission is a stark one; namely, that the court should consider all the claimant's losses, but limit any offset for benefits up to the date of the sale of the property – namely, 4th November 2022. This of course falls within the 10-year loan period. The sale took place approximately seven and a half years after the solar panels were installed and the loan agreement entered into. The claimant has redeemed the loan agreement in full early. If the claimant's position holds true, it would be an encouragement for any claimant bringing a similar claim to sell their property or transfer it prior to a final determination so as to minimise the amount of any offset."

22. The last sentence suggests that the judge is not attracted by the proposition in the first sentence, but there might be some ambiguity in the proposition being advanced in the first sentence. Does it include the proceeds of the sale? Or is it referring only to the benefits drawn by the Claimant from the solar panels up to but not including the sale of the property, so that it does not include the proceeds of sale, even if they were higher because of the inclusion of the solar panels? If the former, then it is hard to see what is objectionable about it. If the latter, then the proposition does appear to be stark and, indeed, wrong. If the sale price is increased by the presence of the solar panels, it must be right that the increase is brought into the account: the contrary was not suggested to me. For that reason, I understand this passage in the latter sense. It makes more sense that way. That reading is also consistent with enhancement of the sale price being a relevant factor in the judge's reasoning, which is part of what I have described as the judgment's direction of travel and therefore another reason for adopting this reading.

23. The judge correctly stated the burden of proof (para 41). This included the burden of proving "any benefits from the contract" being on the Defendant. The burden of proving any increase in the property sale price by reason of the inclusion of solar panels was, therefore, on the Defendant and not the Claimant.

24. The judge performed calculations based upon the reasoning in *Hodgson* so as to produce *Hodgson*-reasoned figures on the facts of the Claimant's case (paras 42-44). There is no challenge either to the reasoning in *Hodgson* (about which, therefore, I say nothing) or to the figures based upon it in paras 42-44 of the judgment.

25. As the judge recognised (in para 30), there was an important difference in fact between this case and *Hodgson's* case. In *Hodgson*, the possibility of a future sale was built in at a discounted rate as a contingency, a mere possibility, which might or might not come to pass: see the judgment in *Hodgson* at paras 138, 141-142 and 148. In the present case, there had actually been a sale, and the sale included the benefit of the solar panels, which passed to the purchasers at a known date. What did the judge say about that?

26. He said (in para 45) that the Claimant was "fully aware of the future benefits" from the solar panels, "and she chose that these would pass to the buyers of the property". He then said (paras 46-48) as follows:

> "46. (…) This would have formed part of the consideration and negotiations of the overall sale price of her property. It would have been open to the claimant to negotiate a separate sum as an alternative. I ascribe to the claimant a sum equivalent to the future benefits as calculated in *Hodgson*. I have given consideration as to whether in the circumstances a further discount beyond *Hodgson* should be applied. I conclude it should not.
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> 47. I am entitled to take note that the benefit for the remaining two and a half years existed and that the benefits for Years 11 – 20 with appropriate discount, as noted in *Hodgson*, continue, though transferred to the new owners of the property. This would have been a consideration in their decision to purchase the property at the given sale price. It was raised, as I have noted, as a specific pre-contract enquiry. It would, as I have noted, have

> been open to the claimant to negotiate the sale price based on the future benefits to the new owners of the property. It would though, I note, be disproportionate, even if time had permitted, for there to be an expert valuation as to the apportionment as to the value of the property because of the inclusion of the solar panels and, more specifically, the FIT payments and energy savings.
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> 48. The defendant has satisfied me to the necessary standard of proof of the future benefits of the solar panels. This benefit is one received by the owners of the property. It is a positive factor. I am entitled to ascribe to the claimant those benefits on the basis it would, and did, form part of the consideration of the sale price of which she has had the benefit. The claimant, as I have noted, would have been aware at the time of the sale of the detailed calculations of those benefits as per *Hodgson*."

27. In this passage, the judge decides (a) that the future benefits of the solar panels "formed part of the consideration" for the sale of the house (quoting a phrase in both para 46 and para 48 of the judgment); and, (b), that the *Hodgson* calculation of the money value of those future benefits should be used to ascertain the increase in the sale price attributable to that, there being no other evidence (such as expert evidence) to do so by more conventional methods of property valuation ("I am entitled to ascribe to the claimant those benefits on the basis it would, and did, form part of the consideration of the sale price of which she has had the benefit").

28. Since this increase in value exceeded the costs of the solar panel transaction to the Claimant, she had suffered no loss (para 49).

29. I consider the judge's reasons to be sufficient to explain why he made the decision he did. In the words of *English v Emery Reimbold* at para 26, "it is apparent why the judge reached the decision that he did." He decided that the proceeds of sale had been increased by the inclusion of the solar panels and he decided that the amount of that increase (adopting *Hodgson* as the only available means of assessment given the absence of expert evidence or a specific apportionment), increased the total benefits (including benefits received from the solar panels before the sale) to a point which exceeded the total costs. Consequently, the Claimant succeeded in proving liability (she entered into the transaction in reliance on representations made to her by Clive which were false) but failed in proving an essential element of the tort, which was damage. That is why her claim was dismissed.

30. For completeness, I will acknowledge a submission on behalf of the Claimant that the reason for the judge's decision should also be deduced from what he said when refusing permission to appeal (at para 50 of the transcript). I consider the approved transcript of a judgment which was reserved (albeit that it was then delivered orally from a text rather than handed down) to be the principal source for the judge's reasoning. Having examined it on that basis, I am not persuaded that the brief reasons for refusing permission to appeal, given subsequently, render unclear what was previously clear, or that they either change the basis of the reasoning or should change my understanding of it. On the contrary, the few lines of transcript refusing permission to appeal would be hard to understand if they had not followed the fuller reasoning of the judgment.

31. It is the judgment which makes sense of the reasons for refusal, rather than the other way around. One sentence of the reasons for refusal, in particular, is relied upon by the Claimant, which says "The position I took in the decision was to ascribe to the Claimant benefits which were ascertainable and which she was aware of at the time of sale." Read with the judgment that had just been delivered, this means, I think, that, faced with a lack of evidence about the exact amount by which the sale price was increased by reason of the solar panels, and having found that there had been such an increase, the judge adopted the *Hodgson* calculation as the best available means of putting a figure on it. This is not obvious from the sentence itself, but the sentence seems to me to be a paraphrase of the reasoning in paras 46-48 of the judgment, which I have quoted in full, developing the point more fully.

32. I therefore reject the appeal on Ground 1.

Ground 2 – Claimant required to give credit for benefits received after sale

33. Ground 2 is based on reading the judgment to mean that the *Hodgson* calculation was to be applied regardless of the Claimant having ceased to own the property. That is not what happened in *Hodgson* itself, because in *Hodgson* the property had not been sold and (on the findings of the judge in *Hodgson*) might or not have been sold in the future.

34. On reflection, the Claimant did not maintain this as the correct reading of the judgment in this case, and Ground 2 therefore fell away.

35. In making this concession, the Claimant lost nothing, because, as I have explained during my consideration of Ground 1, that is not how I read the judgment either. The judge was not saying that the Claimant had to bring into account continuing benefits from the solar panels although she had sold her house with the panels and had therefore stopped receiving any energy savings or Feed-In Tariff (FIT) payments herself.

36. Instead, the judge was using the *Hodgson* calculation as a means of assessing the value of a benefit which he found on the evidence the Claimant had actually received, which was a higher sale price for her property.

Ground 3 – Judge wrong to find that the solar panels increased the sale price

37. Ground 3, on my reading of the judgment, becomes the heart of the appeal.

38. It argues that the judge's finding that the Claimant benefitted from receiving a higher price for her property, as a result of including the solar panels in the sale, was not supported by the evidence.

39. This is, at least in part, a challenge to the judge's findings of fact.

40. Many cases have emphasised the high bar which has to be surmounted for an appeal against findings of fact to be successful. An example is the Court of Appeal judgment in *Volpi v Volpi* [2022] EWCA Civ 464 [2022] 4 WLR 48 in which the whole Court agreed with Lewison LJ when he said:

> "The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases

that have discussed it; but the following principles are well-settled:

i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.

3. If authority for all these propositions is needed, it may be found in *Piglowska v Piglowski* [1999] 1 WLR 1360; *McGraddie v McGraddie* [2013] UKSC 58, [2013] 1 WLR 2477; *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [2014] FSR 29; *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600; *Elliston v Glencore Services (UK) Ltd* [2016] EWCA Civ 407; *JSC BTA Bank v Ablyazov* [2018] EWCA Civ 1176, [2019] BCC 96; *Staechelin v ACLBDD Holdings Ltd* [2019] EWCA Civ 817, [2019] 3 All ER 429 and *Perry v Raleys Solicitors* [2019] UKSC 5, [2020] AC 352.

(…)

> 5. Tribunals are free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense. Whether any positive significance should be attached to the fact that a person has not given evidence, or to the lack of contemporaneous documentation, depends entirely on the context and particular circumstances: *Royal Mail Group Ltd v Efobi* [2021] UKSC 33, [2021] 1 WLR 3863.
>
> (…)
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> 65. This appeal demonstrates many features of appeals against findings of fact:
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> i) It seeks to retry the case afresh.
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> ii) It rests on a selection of evidence rather than the whole of the evidence that the judge heard (what I have elsewhere called "island hopping").
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> iii) It seeks to persuade an appeal court to form its own evaluation of the reliability of witness evidence when that is the quintessential function of the trial judge who has seen and heard the witnesses.
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> iv) It seeks to persuade the appeal court to reattribute weight to the different strands of evidence.
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> v) It concentrates on particular verbal expressions that the judge used rather than engaging with the substance of his findings.
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> 66. I re-emphasise the point that it is not for an appeal court to come to an independent conclusion as a result of its own consideration of the evidence. Whether we would have reached the same conclusion as the judge is not the point; although I am far from saying that I would not have done."

41. The Grounds of Appeal argue that the judge's decision "placed weight on an irrelevant factor; namely that [the Claimant's] buyer's conveyancing solicitors had asked whether the entitlement to receive the FIT payments was included within the sale and disregarded the oral evidence of [the Claimant] that a nearby property without solar panels had recently sold for more than her own".

42. Taking the second point first, the judge did not disregard the Claimant's statement about her neighbour's property. He included it in his judgment, at para 35. However, as I have already observed, he then noted that "No documentary evidence or other corroborative evidence was provided to the court that this in any way was related to the solar panels". It was not, therefore, "rationally insupportable" (to quote the phrase used in *Volpi*) for the judge not to find that this showed the solar panels had no effect on the price paid for the Claimant's property. It was open to him to place little or no weight on this evidence, and weight was a matter for him to determine. This did not mean he doubted

the credibility of the Claimant. He did not reject the suggestion that a neighbouring property had sold for more.

43. As to the first point, there is no dispute about the fact that the enquiries before contract asked specific questions about the solar panels, both from a structural point of view and from the point of view of the financial and other benefits they might secure. It is common ground that the solar panels worked and gave energy savings, and that the system had been registered with the result that the buyer would be able to receive FIT payments, although the Claimant's solicitors failed to produce one of the certificates requested. The Claimant's solicitors confirmed that the solar panels were connected to the grid, that there was no financing involved (the judgment notes that the Claimant paid off the loan before the sale), and that "the benefit of the feed in tariff is included". I was taken to the documentary materials about this. They showed that questions were not initially answered satisfactorily and were then pressed. I do not agree that this was an irrelevant point. It showed that the buyer was aware of the solar panels and interested in them and, to that extent, supported at least slightly an inference that the buyer valued them and factored them into the value of the property. That could be so regardless of the conveyancer's failure fully to answer the questions about them or to produce some of the paperwork requested. Since the evidence was relevant, the question then was what weight to place upon it, and weight was a matter for the trial judge. The judge's reasoning was not based only on this evidence, but this was part of the evidence which supported his conclusion. He was not, therefore, wrong to refer to it.

44. It was suggested to me that the enquiries before contract came after the purchase price had been agreed and cannot therefore support a finding that the buyer's interest in the solar panels increased the price he or she was willing to pay. The evidence on that was not very clear: the high point was an email from the buyer's solicitors dated 15 November 2022 attaching a copy of the enquiries raised and the solar panel enquiries which said, "In relation to the value of this property, this is decided between all parties via the estate agents, prior to any instruction." It was submitted to me that a correct reading of the correspondence is that the price was agreed before solicitors were instructed and, therefore, without being influenced by the enquiries before contract referred to by the judge. Even assuming the proposition is correct, however, it does not go very far. The solar panels were not a feature highlighted in the very brief text of the sale particulars but they were clearly visible in one of the photographs and would have been visible when the property was viewed. The photograph of the rear view of the house in the sale particulars, taken from the garden and looking towards the house from the garden, shows that the solar panels covered almost the whole of the roof slope visible from the garden. Assuming the price offered did not change after the response to the enquiries before contract, but was settled before they were submitted (which is the proposition advanced to me on behalf of the Claimant), it could still be the case that the price was offered with the knowledge that solar panels were in place and in the expectation (confirmed by the enquiries before contract) that they would be included in the sale as a benefit to the purchaser.

45. This all seems to me to be a matter for the judge who heard the trial. I am not persuaded by these arguments, which I understand to have been developed before me with more emphasis than they were given in the course of the original fast track trial, that the judge's conclusion was wrong, or against the weight of the evidence, or based upon irrelevant evidence, or that it was "rationally insupportable".

46. The judge identifies the evidence in support of his conclusion, having recognised that the burden of proving the point lay on the Defendant, not the Claimant. This was not only or even principally the very large increase in value compared to when the Claimant bought it 20 years before but also the fact that the sale price slightly exceeded the initial valuation and, particularly, the benefit to the new owners of retaining the panels, "particularly under the FIT agreement and energy savings" (para 36). The judge placed this in the context of "concerns as to increasing energy prices" as well as the specific interest in them shown by the conveyancing solicitors' enquiries. The judge was correct in identifying these points as relevant to his conclusion on whether the solar panels increased the sale price, and they were capable of supporting it.

47. That being said, weight was a matter for him and whether or not he drew that conclusion was a matter for him. He did so, and I consider he was entitled to do so. He identified the evidence against his conclusion as well as the evidence which supported it. He did not therefore fail to take account of anything he ought to have taken into account.

48. The Claimant also objects to the judge's use of *Hodgson* to quantify the increase in the sale proceeds and says that was wrong, in law and/or fact.

49. It is true that *Hodgson* does not use the calculation of future benefits as a means of attributing an increase in the capital value of the property, because in *Hodgson* the property had not been sold. It is also true that the judge in *Hodgson* said (at para 146) "it is not self-evident that [the solar panels] have any significant value beyond their ability to generate electricity and it equally follows that they may have little if any effect on the valuation of the house, especially as they age." That was, however, a point of fact, and the judge in this case was not bound by findings of fact in another case, decided in different circumstances on different evidence. Even Judge Pearce referred to "little if any effect", rather than no effect, and recognised "their ability to generate electricity".

50. The effect on the sale price deduced by the judge in this case was based on specific findings, to which both he and I have referred, that the property was actually sold, and sold with the benefit of the solar panels, and that the solar panels continued (notwithstanding their age 8 years after installation in 2015) to provide benefits both in cash under the Feed-in Tariff scheme and by way of energy savings (judgment para 36), and that this was of both value and interest to the purchaser, as evidenced by specific focus on the solar panels in the enquiries before contract and as a matter of common sense (para 36). The judge found that there was an increase in the sale proceeds as a result, and the question for him was how to value that increase, or what it was.

51. It is not uncommon for a judge who has found as a fact applying the appropriate burden of proof that loss has been suffered to lack precise tools for measuring it. It is not wrong for him, despite that, to do his best to assess it. On the contrary, it is his duty to do that. The same goes when he has found as a fact applying the appropriate burden of proof that a valuable advantage has been obtained, in circumstances when the precise value of the advantage is not established by the evidence. In that case, too, it has to be assessed, to the best of the judge's ability on the evidence before him, applying the appropriate burden and standard of proof.

52. It would not, in my view, be appropriate in every case, or in most cases, to use the *Hodgson* calculation of future benefits as a proxy for determining an increase, if any, in the value of a house sold with the benefit of solar panels. There will be cases in which

there is no increase in value at all, and Judge Pearce in *Hodgson* at para 146 gave reasons for envisaging such cases. There may also be buyers for whom solar panels are a positive disadvantage: for example, because of the way they look, or because there is concern about their effect on the structural condition of a roof. Even a buyer who values the future financial benefits will not necessarily be willing to reflect them fully in the purchase price.

53. The judge decided that there was an increase in value. He also mentioned conventional ways in which the amount of the increase in value might have been proved before him. He referred to the possibility of solar panels being given a separate price and not simply bundled up into the total (judgment para 46, "It would have been open to the Claimant to negotiate a separate sum…). That would have been one basis for arriving at the increase in price, but it was not available in this case, because it had not been done.

54. He also referred to the possibility of expert evidence. Expert evidence of the effect on value (or lack of it) of the presence or absence of solar panels would obviously be a secure basis for assessing it. An expert can refer to comparable sales, and an expert might in this case have cast more light on the help to be gained from the sale of the neighbouring property referred to by the Claimant herself. It may be that solar panels will add value in one part of the country, and not in another. This could be because of the amount of sunshine, or the nature and priorities of the buyers typical to that area. It may be that solar panels will add value to one property and not to another, even in the same area. This could be because of the location of the panels on the property, or the interaction between the panels and a particular property (which could be relevant to aesthetic and to structural considerations). It may be that some solar panels will add more value than others, or will detract from value (because of their design and configuration, or because of their efficiency, or state of repair). All this and more is well suited to expert evidence or, at least, evidence very specific to the case.

55. The judge in this case did not have the benefit of expert evidence and, having found that there had been an increase in sale price, he had very little upon which to base his quantification of it. This was partly because the sale only took place two weeks before the hearing (judgment para 31) and the case had largely been prepared without consideration of it. Although the judge did not find the Claimant to be in any way at fault, it was an unusual feature of this case which would not be present in other cases. The Defendant objected to the effect of this late development and pointed to subsequent requests for disclosure which were not answered to its satisfaction.

56. The judge did not adjourn, as he might have done, for expert or other evidence to be obtained. Neither party wanted that or asked for it. The judge himself thought it would not have been proportionate to obtain expert evidence (judgment para 47).

57. Per Arden LJ in *Latimer v Carney* [2006] EWCA Civ 1417 at para 27:

> "… in cases where the amount in dispute is not large, courts regularly have to do their best on less than ideal material. That endeavour is consistent with the approach of the CPR 1998, which provide that their overriding objective is "enabling the court to deal with cases justly." (CPR 1.1(1)). The overriding objective states a fundamental value of any properly run system for the administration of justice."

58. Per Walker LJ in *Crewe Services & Investment Corp v Silk* (2000) 79 P & CR 500, 509:

> "… County Court judges constantly have to deal with cases that are inadequately prepared and presented, either as to the facts or as to the law (or both), and they must not be discouraged from doing their best to reach a fair and sensible result on inadequate materials. Moreover, there is a strong public interest in encouraging litigants not to incur the expense of a proliferation of expert witnesses (in this case, actuaries and valuers have been mentioned) unless the additional expense of time and money can be justified."

59. The closeness of the sale to the date of trial, and the sparsity of evidence going specifically to the sale and the increase in the property price attributable to the solar panels (which was established as a general proposition to the satisfaction of the judge) made this, I hope, an unusually difficult case and I would certainly not want it to be used as a precedent in other cases. However, the question for me is whether the judge's decision was wrong in this case.

60. I think it was rational for the judge to find a link between the purchaser's willingness to pay a higher price as a result of the future benefits to be gained from the solar panels (energy savings and Feed-In Tariff payments) and the value of those benefits in money terms. I think it was understandable that the judge should reach for the case upon which both parties based arguments before him as a guide to that value, particularly given that it was a case involving the same cause of action and against the same defendant. I recognise that the very elaborate calculation in *Hodgson* builds in a number of variables and contingencies (the judge in this case, however, took the trouble to adjust the variable constituted by prevailing interest rates). Although *Hodgson* is based on a future sale (and therefore cessation of benefits) being no more than possible, it attributes no enhanced value to the property in the event of such a sale, and to that extent made a more conservative assumption in the Claimant's favour than the facts of her own case, in which the judge found that the property did sell for a higher price because of the solar panels.

61. I am not sure that I would myself have equated the value of the future benefits to the purchaser from the solar panels, even on the discounted basis produced by the *Hodgson* calculations, *exactly* with the increase in price attributable to them, although I do notice that a similar approach to the valuation of a reversion, by reference to the actual cost of repairs which had not been carried out, was considered and approved by Arden LJ in *Latimer v Carney* [2006] EWCA Civ 1417 at para 32, citing *Jones v Herxheimer* [1950] 2 KB 106. However, I remind myself that I am not to substitute what I might have done for what the judge did. The question for me is whether the judge's approach was "rationally insupportable". I do not think that it was. He found there was an increase, and he had to put a figure on it. The figure did not, in fact, have to be precise, although the judge did reach a precise figure of £1,499.96 as the amount by which the benefit to the Claimant of the solar panel system (including but not limited to any increase in the sale price) outweighed the total costs of it. The only question was whether the benefits exceeded the costs flowing from the solar panel transaction which had been entered into in reliance on false representations. The increase in the sale price was, as I read the judgment, part of that calculation. The judge had very little to go on when deciding what the increase in the sale price had been. The tool he had to hand and used, from

Hodgson, was at the very least aligned with the question he had to decide. The burden of proof was on the Defendant, and the judge recognised that. On the other hand, it was the Claimant who was best placed to provide the evidence, and she had provided very little. There was some disadvantage to the Defendant in the timing of the sale relative to the trial and a complaint had been made about late and inadequate disclosure.

62. The judge was satisfied that the benefits did exceed the costs. He reached that conclusion, in part, by assessing the increase in the sale price by reference to the future benefits to the purchaser attributable to the solar panels. In this way, he brought the *Hodgson* calculation into his reasoning after as well as before the date of sale. I have decided that this was within the range of conclusions open to him on the evidence. It was, I think, a more rough and ready basis for deciding the increase in value received by way of a higher sale price than the precision of the *Hodgson* calculation might suggest. However, only a rough and ready conclusion was possible in this case, given the state of the evidence.

63. I reject the appeal on Ground 3.

Ground 4 – Judge wrong to find a failure to mitigate

64. Ground 4 is based on reading the judgment to mean that the judge made a finding against the Claimant that she had failed to mitigate her losses. If he did do that, it is argued that this was not an issue which had been pleaded, or explored in cross examination or in submissions, and it was therefore procedurally irregular to base a judgment upon it. It is also denied that she did as a matter of fact fail to mitigate, on the facts.

65. The judge does not use the word mitigate or mitigation anywhere in the judgment and, since it was not an issue that was pleaded or argued, it is on the face of it unlikely that he based his decision upon a finding that the Claimant failed to mitigate her losses when he did not make that point explicitly.

66. However, the following passages are particularly relied upon in support of Ground 4:

i) There was no evidence that the Claimant had any specific reason or specific need to sell the property (judgment para 34).

ii) It was the Claimant's decision to sell the property (para 38), which was not a situation considered in *Hodgson*, where cessation of solar panel benefits on account of death or a forced sale because of disability needs was referred to (para 37).

iii) Para 39:

> "If the Claimant's position holds true, it would be an encouragement for any Claimant bringing a similar claim to sell their property or transfer it prior to a final determination so as to minimise the amount of any offset."

iv) Limiting benefits to a *Hodgson* calculation to the date the Claimant sold the property "would give her a windfall. It was a conscious decision by the Claimant to divest herself of the future benefits" (para 45).

v) Para 46:

> "The Claimant was fully aware of the future benefits, and she chose that these would pass to the buyers of her property. This would have formed part of the consideration and negotiations of the overall sale price of her property. It would have been open to the claimant to negotiate a separate sum as an alternative."

67. The easiest and most reliable way of understanding a judgment is to read it as a whole. Picking out individual passages runs the risk of distortion. These extracts are consistent with an argument that the Claimant, by voluntarily foregoing the benefits of the solar panels for herself, was being fixed with those benefits by the judge in order to avoid what he called "a windfall". That does not, however, mean that he was criticising her decision to sell, or saying that she ought not to have sold and that, by selling, she failed to mitigate her losses. He at no point in the judgment finds that the sale was unreasonable. He is examining the consequences of the sale for the case.

68. On my reading of the judgment, which I have explained in my decision on Ground 1, he was determined that those consequences should include the benefit given to the Claimant by the solar panels after the sale (in the form of an increased sale price) and should not be limited to the energy savings and FIT payments calculated to the date of sale. If he did not include that benefit, she would be receiving a "windfall". Although the Claimant disputes the finding that the sale price was higher because of the solar panels, it is not disputed that, if there was an increase in the sale price, it had to be taken into account.

69. The judge used the future benefits accruing to the purchaser as a proxy for assessing the increase in the sale price attributable to the solar panels. He did not fix the Claimant with the value of those benefits on the basis that she ought not to have sold the house and that by doing so she failed to mitigate her losses. His reasoning is based on a benefit she did receive (a higher sale price) not a benefit she unreasonably failed to retain (future benefits from the solar panels as the property owner after the date of sale).

70. I therefore reject the appeal on Ground 4.

Conclusion

71. The appeal will be dismissed. I do, however, want to recognise the excellence of the analysis and arguments put to me on both sides by Counsel, both in their skeleton arguments and in their oral submissions. The appeal was thoughtfully approached and expertly argued by both of them.