

Neutral Citation Number: [2021] EWHC 2167 (Comm)

Case No. CC-2019-MAN-000043

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN MANCHESTER

CIRCUIT COMMERCIAL COURT (QBD)

CAPPED COSTS LIST

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Date: 29 July 2021

Before :

HIS HONOUR JUDGE PEARCE SITTING AS A JUDGE OF THE HIGH COURT

Between :

MR ALLAN HODGSON

Claimant

- and -

CREATION CONSUMER FINANCE LIMITED

Defendant

MARK HARPER QC (instructed by SMITH JONES) for the Claimant

TOBY RILEY SMITH QC AND LIA MOSES (instructed by EVERSHEDES SUTHERLAND INTERNATIONAL plc) for the Defendant

Hearing dates: 25, 26 May 2021

Supplemental written submissions: 21 July 2021 and 28 July 2021

JUDGMENT

His Honour Judge Pearce :

This judgment was handed down in private at 2pm on 29 July 2021. I direct that no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

INDEX

BACKGROUND		3
PROCEDURAL MATTERS		4
THE EVIDENCE	Agreed Facts	6
	Approach to lay witness evidence	7
	The witness evidence	9
THE ISSUES		12
DISCUSSION	Issue 1 – statements made by the sales representative	14
	Issue 2 – authority of the sales representative	16
	Issue 3 – understanding of statements made by the sales representative	18
	Issue 4 – were they statements of fact or opinion?	19
	Issue 5 – were the statement(s) false?	19
	Issue 6 – intention/entitlement to rely on the statement(s)	19
	Issue 7 – was there reasonable reliance on the statement(s)?	20
	Issue 8 – correction of the statement(s)	21
	Issue 9 – contributory negligence	21
	Issue 10 - estoppel	24
	Issue 11 – measure of loss	26
	A General Principles	
	B Uncertainty of loss	28
	C Foreseeability	30
	D Financial benefits from the solar panels	32
	Issue 12 – past losses and deductions	40
	Issue 13 – future losses and deductions	41
	Issue 14 – cost of removing the solar panels	41
	Issue 15 – damages for distress and inconvenience	42
CONCLUSION		42
APPENDIX A	Agreed Facts In Relation To Pecuniary Benefits	45
APPENDIX B	Benefits Calculator	47
APPENDIX C	Actual Benefits in Years 1 to 7	49
APPENDIX D	Predicted Benefits from Years 8 to 20	50

BACKGROUND

1. Solar power, generated by rooftop panels to domestic housing, is attractive both for its contribution to reducing climate change and for the potential savings on electricity bills that the householder can make. One can hope for a reduction in one's own electricity bills, but further the government has operated schemes to encourage the installation of solar panels that involve subsidies for the production of such power as well as payment for exporting electricity to the national grid. At the time relevant to this case, 2014, the so-called Feed In Tariffs ("FIT") scheme was in operation, pursuant to which the householder received payments for the generation of electricity ("generation payments") and payments for the export of electricity to the grid ("export payments").
2. Mr and Mrs Hodgson live at 52 Rothbury Close, Trimdon Grange in County Durham. They were interested in having solar panels installed to their house. Following contact from a sales representative of a company called MyPlanet Ltd, they contracted to purchase a solar panels system ("the solar panel agreement") funded by a fixed sum loan agreement for a term of 10 years ("the loan agreement") with the Defendant. It is their case that they entered into the solar panel and loan agreements in reliance on a representation¹ from the sales representative that the system would pay for itself within 10 years, said to mean that the combined reduction in electricity bills plus payments from the FIT scheme would equal or exceed the sums payable to the Defendant under the loan agreement.
3. Many people might think that the North of England would not be a productive area for the generation of power through solar panels and indeed Mr Hodgson now complains that the solar panels are not as profitable as they had been led to believe and that, far from the system having paid for itself, through reduced electricity bills and the tariff payments for producing and exporting such electricity, within ten years, the system may never pay for itself and certainly, if it does, it will not be for some time. The Defendant concedes that the system would never have achieved the necessary return for this representation to be true and contends that this was (or should have been) obvious to the Claimant.
4. The Claimant seeks damages against the Defendant pursuant to the Consumer Credit Act 1974 ("the 1974 Act"). The supplier, MyPlanet, has long since ceased to trade, liquidators having been appointed in March 2016. They are not a party to this litigation. Further, the sales representative who met Mr and Mrs Hodgson has not been available to give evidence since he has not been

¹ The whole argument in this case is based on the premise that this is a claim for damages under the Misrepresentation Act 1967 ("the 1967 Act"). In point of fact, the 1967 Act is not referred to in the Particulars of Claim, though, as Mr Riley Smith QC says, there is no other pleaded basis of liability and the case as put clearly fits that cause of action.

traced. Thus the court has the uncontradicted evidence of the householders as to what was said and how it influenced their decision making.

5. The Defendant not only puts the Claimants to proof of their factual allegations but contends that their account is inherently unlikely. Even if the Defendant is liable to the Claimant, there are significant issues as to the correct calculation of the loss (if any) that the Claimant has suffered especially as to the potential benefits to be gained from the solar panels and the quantification of those benefits.

PROCEDURAL MATTERS

6. The case was issued in the now defunct Capped Costs List of the Circuit Commercial Court in Manchester. The pleaded value of the claim was just in excess of £16,000. The Defendant applied to strike out the case alternatively to transfer it to the County Court, given its value. That application was refused by Judge Halliwell on 27 July 2020.
7. The case came before me for case management on 10 September 2020. By this time, it was apparent that there were a number of similar cases either already issued or close to being issued, and this case was treated as a case that might provide guidance to other cases. Leading counsel were to be instructed on both sides and I understand that some other cases have been stayed pending judgment being handed down in this case.
8. It had been my hope at the Case Management Conference that the parties would be able to agree the approach to the calculation of benefits from the system, at least in so far as one was concerned with the probable future performance of the system and the probable future tariffs. The possibility of expert evidence was considered but rejected at that stage. The expert evidence proposed related to the calculation of the benefits to be made from the installation of the solar panels. For reasons noted below, whilst it is possible that expert evidence could assist the court in calculation of some of the detail of the benefits, it is likely that such costs would be disproportionate to the benefit given that the matters that would be addressed would only marginally affect the valuation of the claim.
9. In the event, whilst the future tariffs have been agreed, the likely future performance of the system has not and indeed the parties' opening positions reflected radically different approaches to whether it was even possible to predict the future performance of the system as well as the likely benefits from such performance. During the trial, it became clear that there was reasonably reliable evidence of the past performance, sufficient to make findings as to probable future performance. However, for reasons identified below, there are further contingencies, at least as important as the future performance of the system, to which it is necessary to have regard.

10. The trial took place on 25 and 26 May 2021. Mr and Mrs Hodgson gave evidence and were cross examined. The Defendant called Mr David Carson, its current Director of Legal and Regulatory Affairs.
11. The parties prepared comprehensive skeleton arguments and a detailed list of issues. I am obliged for their diligence in presenting the case. In the event not all of the issues fall for determination and one particularly difficult issue on remoteness has been rendered hypothetical by a change in how the Claimant put the case. Nevertheless, in order to assist the parties in this case, as well as to provide what I hope is a practical framework for resolving such relatively low value cases, I have sought to deal with as many of the points as possible.
12. The Claimant produced three electronic bundles of documents for trial. The first contained the statements of case, witness statements, orders and key document. The second contained correspondence in chronological order. The third somewhat confusingly contained previous skeleton arguments, more documents and more correspondence. The contents of the third bundle may be explained by the contents only coming into existence or coming to light after the first two bundles had been prepared. However, what cannot be properly explained (or at least justified) is the pagination of the bundles. In each case, the bundle as provided to the court started with an index. These pages were not paginated on their face. Thus, in the first bundle, when one reaches the page that bears the number 1, the electronic page number is 3, so the page numbers are for a short section two out. Later on, three pages are incorporated into the bundle containing the Schedule of Loss. These are numbered 15a, 15b and 15c. Thus when one gets to the page which bears the printed number 16, one is on electronic number 21. Thereafter the pages are 5 out. In second bundle, the two page unnumbered index renders the rest of the bundle 2 pages different than the electronic numbering. In the third bundle, the introduction of a one page unnumbered index renders all of the other pages one out.
13. These discrepancies create considerable difficulty for advocates, witnesses and judge alike. Inevitably some people prefer to use paper bundles, other electronic bundles. The confusion causes delay and adds an extra burden to ensure that everyone is looking at the same page.
14. It is essential that electronic page numbering in bundles matches the numbering which is printed on the page. The need for this is repeatedly emphasised in court guidance, whether in the Supreme Court (<https://www.supremecourt.uk/procedures/electronic-bundle-guidelines.html>) the Administrative Court (<https://www.judiciary.uk/wp-content/uploads/2021/05/ACO-Bundle-Guidance-26-May-2021-2.pdf>) or the Business and Property Courts in Manchester ([Guide-to-preparation-and-service-of-bundles-etc.pdf](#) (judiciary.uk)). Most court users are having no difficulty in complying with this guidance. A few are, as demonstrated for example by the judicial comments in DRSP Holdings Ltd & Anor v O'Connor & Anor [2021] EWHC 626 (Ch) and

Global Technologies Racing Ltd v 5 West (t/a Alex Thomson Racing [2020] EWHC 3334 (Comm). Whilst the Courts may have been willing to tolerate problems early in the COVID-19 pandemic, when solicitors were struggling with new challenges, including a lack of the traditional support from those who might assist with preparing bundles, as well as the sudden need to get to grips with the challenges of preparing electronic bundles in all cases, there has been plenty of opportunity by now to get to grips with those challenges. I repeat that most court users have done. Those who have not must realise that they are likely to be sanctioned for the problems caused by such failures.

15. I circulated a judgment in draft on 22 June 2021, inviting the parties to submit any corrections to typographical or other obvious errors (including arithmetic errors) in the usual way. In response, I received suggested corrections to the text but the parties also invited me to permit further written submissions on the issue of the proposed deductions from the anticipated benefits of the system to reflect contingencies. Reference is made to the judgment of Smith LJ in Egan v Motor Services (Bath) Limited [2007] EWCA Civ 1002:

“50. Only in the most exceptional circumstances is it appropriate to ask the judge to reconsider a point of substance. Those circumstances might be, for example, where counsel feels that the judge had not given adequate reasons for some aspect of his/her decision. Then it may be appropriate to send a courteous note to the judge asking him/her to explain the reasons more fully. By way of further example, if the judge has decided the case on a point which was not properly argued or has relied on an authority which was not considered, the appropriate course will be to ask him/her either to reconvene for further argument or to receive written submissions from both sides.”

16. I note that it is suggested in that the questions of deductions to be made from the potential benefits to reflect contingencies was not an issue raised at trial. This is not correct. It is right to say that the submissions of the parties did not address the quantification of such contingencies, but the possibility of deductions for contingencies was raised with counsel during closing submissions. The Claimant’s response was that the burden lay on the Defendant to prove the chance of such contingencies and that it could not discharge that burden. The Defendant’s case was that either the burden lay on the Claimant and he could not discharge the burden or that the contingencies were in event *de minimis*. For reasons that I addressed in the draft judgment and which remain essentially the same in this judgment as handed down, I disagree with both approaches.
17. Nevertheless, since the quantification had not been addressed and my judgment assessed those deductions on a basis that seemingly neither party had contemplated, I felt it desirable so that this judgment should provide the greatest assistance in other cases as well as to do justice to the parties in this case that I should permit further submissions lest the points had not been argued properly. I therefore made an order requiring supplemental submissions on the issue of the proposed deductions from the anticipated benefits of the system to reflect contingencies by

Wednesday 14 July 2021, with any submissions in reply to be lodged 7 days later. In the event, the time for supplemental submissions was extended to 21 July 2021, with responsive submissions permitted by 28 July 2021. Both parties field supplemental submissions and the Defendant filed responsive submissions.

THE EVIDENCE

Agreed Facts

18. There are areas of common ground in this case:
 - 18.1 The Claimant entered into a contract on 2 May 2014 to purchase the solar panels from MyPlanet at a cost of £9,200, funded by a 10 year fixed sum loan agreement of the same date with the Defendant requiring 120 monthly payments of £120.67, an annual cost to the Claimant of £1,448.04.
 - 18.2 The system was installed on or around 15 May 2014, following which the Claimant signed a customer satisfaction note (“the Satisfaction Note”).
 - 18.3 Pursuant to section 56 and/or section 75 of the 1974 Act, the Defendant may be liable for any actionable misrepresentation on the part of MyPlanet.
 - 18.4 Under the FIT scheme, the householder who installed solar panels would be paid a generation tariff for the total amount of electricity generated and an export tariff, based on the assumption that in part the electricity generated was fed into the national grid. They householder would also receive a benefit through a reduction in electricity bills.
19. Following the trial, the parties agreed a document that assists in understanding the FIT scheme. It is annexed to this judgment as Appendix A. In addition, the Defendant produced a table in a spreadsheet which is annexed as Appendix B, subject to minor alterations². That table is in part agreed, in so far as the generation figures of the first 6 years are agreed to reflect the actual electricity generated by the system and the generation figures thereafter are reduced by 0.5% per year to reflect degradation as set out below. In addition, the figures for tariffs and unit electricity prices in the first 6 years are agreed and the figures thereafter are agreed to be a correct calculation of the tariffs and unit electricity prices bearing in mind the assumptions set out at paragraph 135 below. Finally, the benefits columns are agreed to be mathematically accurate calculations from the underlying date. What is not agreed is whether this is a correct approach to the calculation of future benefits. This is considered further below.

² The only alteration of substance is that the electricity price inflation figure is corrected from the figure of 4% on the document as lodged (which was the result of a rounding function in the spreadsheet that was applied to the relevant cell) to the more precise figure of 3.6%. I have deleted the column headed “Payback Year” because, in light of the reasoning below, this is no longer relevant.

20. I have created two further Appendices from Appendix B:
- 20.1 Appendix C which covers the period to May 2021, setting out the actual benefits in years 1 to 6 and the benefit in year 7 based upon the projections.
 - 20.2 Appendix D, which deals with future benefits.

Approach to lay witness evidence

21. In Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560, Leggatt J, as he then was, said in respect of evidence based on recollection:

"15. An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.

16. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.

17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).

18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance

for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been 'refreshed' by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events."

22. Leggatt J went on of say at §22 that:

"The best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable fact."

23. In NatWest Markets v Bilta [2021] EWCA Civ 680 the Court of Appeal reflected further on this:

"51. ... it is important to bear in mind that there may be situations in which the approach advocated in Gestmin will not be open to a judge, or, even if it is, will be of limited assistance. There may simply be no, or no relevant, contemporaneous documents, and, even if there are, the documents themselves may be ambivalent or otherwise insufficiently helpful. The case could be one about an oral promise which turns entirely on the word of one person against another's, and the uncontested facts may well not point towards A's version of events being any more plausible than B's...."

52. Faced with documentary lacunae of this nature, the judge has little choice but to fall back on considerations such as the overall plausibility of the evidence; the consistency or inconsistency of the behaviour of the witness and other individuals with the witness's version of events; supporting or adverse inferences to be drawn from other documents; and the judge's assessment of the witness's credibility, including his or her impression of how they performed in the witness box, especially when their version of events was challenged in cross-examination. Provided that the judge is alive to the dangers of honest but mistaken reconstruction of events, and factors in the passage of time when making his or her assessment of a witness by reference to those matters, in a case of that nature it will rarely be appropriate for an appellate court to second-guess that assessment."

24. This litigation, though brought in the Circuit Commercial Court, is not of the kind that Leggatt LJ is likely to have had in mind when he gave his judgment in Gestmin if only because this is not a case with considerable documentation that is likely to illuminate most of the issues. I therefore have to fall back on the question of the overall plausibility of the evidence but should bear in mind the potential for the litigation process to distort evidence and memory.

The Witness Evidence

25. I start by considering in detail the evidence of Mr Hodgson. Since the Defendant was not able to call the sales representative who attended at their house, his account of what was said was uncontradicted. However, it is important to look with care at his account of matters. I have pointed out the potential distorting effect of litigation, which can mean that even the most honest witness gives evidence that can be unreliable – indeed it is the honest witness who gives rise to

the greater risk that seemingly plausible evidence will be accepted when it is in fact mistaken. In particular, in the context of this litigation, it would be unrealistic to think that the witnesses are unlikely to be affected, whether consciously or unconsciously, with an understanding of what evidence will most support their case.

26. Mr Hodgson's account in his witness statement is that, whilst interested in having solar panels installed, he and his wife were initially resistant to the frequent cold calls that they received from representatives of MyPlanet. Eventually however they agreed to a representative of MyPlanet calling, though Mr Hodgson maintains that they did not intend to have the panels installed.
27. In his witness statement, Mr Hodgson describes the sales representative who attended, including saying that he came over as a "*a bit posh*." He says that the meeting fell into two parts. In the first part, the sales representative described how good the solar panels were and in the second he discussed issues relating to finance.
28. In extolling the virtues of the solar panels, Mr Hodgson said that the panels were the latest design from Germany and would add value to the house. In terms of finances, he is said to have described the decision as a "*no brainer*", that would lead to a significant reduction in electricity bills. Mr Hodgson also recalls the sales representative saying, "*It's all gravy isn't it?*"
29. Mr Hodgson says in his statement that he mentioned that solar panels had previously been said to be unsuitable for their location and the orientation of the house. The sales representative is said to have responded that this was "*nonsense*" and that the system would suit them perfectly.
30. Mr Hodgson's recollection is that the sales representative did not raise the possibility of the panels being bought outright, but rather proposed a finance deal over 10 years. He said, according to paragraph 19 of the Claimant's witness statement, "*the costs of the monthly payments would be met by what that solar panel would produce and there would be a reduction in our electricity bill.*" The sales representative recorded some figures on a pad and used a calculator to work out a first-year return of £602³. Since the annual cost of the finance was £1,448, this suggested a shortfall of about £800, but when Mr Hodgson pointed this out, the sales representative said that the figures were complicated but that it really was a "*no brainer*" and that it would pay for itself so that, after 10 years when the finance was paid off, they would be paying next to nothing for their electricity and they would be getting an income from the FIT.
31. Mr Hodgson confirmed that he was born on 7 July 1956 and therefore is now 64 years old. Thus, when the loan is paid off (2 May 2024), he will be 67 years old. He says at paragraph 13 of his statement:

³ It seems likely that this document is the document headed "SAP Calculations and 1st Year Returns" in the bundle – I shall hereafter refer to that document as "the SAP Calculations"

“At the time of entering into discussions I was 57 years of age. It was therefore of importance that in entering into a 10 year finance agreement that the system would pay for itself. It is my recollection that not only would this happen but that there would be further financial benefits. Had we been told at that point that it would take longer than 10 years to repay the loan and that there would not have been any additional benefits I would not have gone ahead with the purchase.”

32. His account of the decision making process appears at paragraph 22 of his statement:

“Although a little reticent, we went ahead and bought a system based upon what he told us. Our thoughts at the time were that he was the expert and he must know what he is doing, plus the scheme was government backed. He really had us taken in with his presentation.”

33. It would appear that, at this visit, the Sales Representative produced an order form and the Claimant signed it. The order form, headed “MyPlanet” includes on its reverse the following under the heading “Terms and Conditions”:

“2(c) Any performance levels quoted by the Company or its representatives are for illustrative purposes only and are based on average not specific performances that could reasonably be expected under typical conditions. The Company cannot absolutely guarantee the performance of any of its systems as ultimately the performance of its system is dependent on variable climactic condition which are beyond the Company’s control.”

34. In cross examination, Mr Hodgson was pushed on various aspects of his account. He accepted that could not recall the exact words said by the sales representative but repeatedly asserted that they he had been told that the system would pay for itself in 10 years. When questioned about paragraph 22 of his statement, he queried what the word “*reticent*” means but accepted that he was a little suspicious of the sales talk. This obviously gave rise to a concern that the statement was not in his own words and therefore might not reflect his true recollection, although in other respects he stood by what he had said in his statement. He accepted that the figures given were only an estimated calculation.
35. As Mr Hodgson explained in his witness statement, once the solar panels had been installed, on or about 15 May 2014, he signed the Satisfaction Note. That document included the assertion the Claimant accepted that “*that the work carried out by MyPlanet appears to be of satisfactory standard and that this form will release outstanding money due under the above Consumer Credit agreement*” from the Defendant to MyPlanet. It also included:

35.1 The statement, “*The requirement to make repayments to Creation Consumer Finance Limited is not affected in any way by the benefits that the Solar PV System generates.*”

35.2 Figures under the heading “*Year 1 system performance expectations based on the SAP 2009 calculation*” follows:

Predicted Solar PV System Performance 2,464.8 kWh per year

Generation tariff rate: 14.38p per kWh Expected generation tariff income: £354.24

Export tariff Rate: 4.77p per kWh Expected Export Tariff Income: £58.79

Combined total income: £413.03

Assumed Percentage of electricity used: 50% Assumed electricity unit price: 16p

Electricity used: 1,232.4 kWh per year Savings from electricity used: £197.18

Estimated First Year Annual Savings (Generation tariff + export tariff + savings from electricity): £610.21⁴

- 35.3 The Claimant's signature under the words "*Note to customer: please do not sign the form if SAP calculations are not completed.*"
36. Later Mr Hodgson obtained a device that allowed him to measure the electricity produced. This was less than he had expected which led to him complaining to My Planet. Ultimately they fitted 4 more panels though this had limited effect on the performance of the system.
37. It should be noted that, at no point in his written evidence did the Claimant state that he wishes the panels to be removed. Mr Riley Smith QC did not cross examine on the issue for obvious reasons and the result is, as Mr Harper QC concedes, that it is not open to the court to conclude that the Claimant has any such intention.
38. Mrs Hodgson's witness statement purported to confirm her husband's account of what the salesman had said. In cross examination, she said that she could not recall the conversations – on one document, she said "*to be perfectly honest I don't remember.*" Her husband would take a lead in issues such as this, and she said that she did not understand the paperwork. Her only positive recollection was that the sales representative had said the figures were complicated but that it was a "*no brainer.*"
39. The Defendant called Mr David Carson, now its Director of Legal and Regulatory Affairs. His statement verified an earlier statement from Ms Sara Burney. Apart from producing various of the documentation, Ms Burney's statement is significant for what she has to say about the Satisfaction Note:

"19. I believe that in the consumer finance industry, the Note (and documents like it) are widely used. Their purpose is to elicit confirmation from the consumer that they have received, and are happy with, the goods being financed and that they are content for the Defendant to release the funds to the Supplier to pay for them. If the consumer signs, the Defendant releases the funds in reliance on that signature. If the consumer refuses to sign, the Defendant cannot and will not release the funds to the Supplier. This is the Defendant's standard practice. My colleagues have informed me that it was in place in 2014 and it remains in place today.

20. In this case, the Note made clear that it was impossible to guarantee the future performance of the sola panel system but that a reasonable estimate of the pecuniary benefits

⁴ These figures approximately equate to those in the SAP calculations. There are slight differences of rounding, but more significantly a different electricity cost is used.

that it could be expected to generate was around £500 per year (or around £50 per month). The Claimant's signature on the Note would have been taken by the Defendant as a clear representation that the Claimant understood that the system, was estimated (but not guaranteed) to generate pecuniary benefits of around £600 per year (or around £50 per month). The Defendant would have relied on that signature when activating the Claimant's loan account and releasing the finds to the Supplier. Had the Claimant refused to sign that Note, the finds would not have been released to the Supplier. In those circumstances, the Supplier would not have been paid and the Supplier and the Claimant would have needed to discuss the issues between themselves."

40. In cross examination, Mr Carson maintained that the Defendant would not have released the monies unless the signed version of the Satisfaction Note were provided. He maintained that, as part of "due diligence" someone would have checked that it had been provided.

THE ISSUES

41. The issues between the parties have been agreed as follows.

Liability issues

1. What statements did the sales representative make to the Claimant on 2 May 2014?
2. Were they made within the scope of his ostensible authority from My Planet?
3. What would any reasonable person have understood them to mean? What did the Claimant understand them to mean?
4. Were they statements of fact or opinion? If opinion, was it made recklessly or without any reasonable grounds for believing it was true or did it carry an implied representation that there were good reasonable grounds for it?
5. Were the statements false?
6. Were they statements on which the Claimant was intended and entitled to rely?
7. Was the Claimant materially induced by them to enter the agreements? If so, was that reliance reasonable?
8. Was any statement corrected (before the signing of the Finance Agreement or subsequently)?
9. Was the Claimant contributorily negligent? If so, how should any liability be apportioned?
10. Is the Claimant estopped by his subsequent representations to the Defendant?

Quantification issues

11. What is the measure of loss?
12. As to the claim for sums already paid under the Finance Agreement:
 - 12.1 What sums have been paid by the Claimant under the Finance Agreement?
 - 12.2 Should deductions be made to reflect:
 - (a) the value of the Panels at the time of the contract? If so, what was it?
 - (b) the pecuniary benefits generated from the Panels by the time of trial? If so, how much?
13. As to the claim for future sums payable under the Finance Agreement :
 - 13.1 What sums are due and owing by the Claimant under the Finance Agreement?
 - 13.2 Should deductions be made for the anticipated pecuniary benefits that the Panels will generate? If so, how much?

- 14 As to the claim for the cost of removing the Panels:
14.1 Is this cost recoverable in principle?
14.2 If recoverable, what is the likely cost?
15. As to the claim for distress and inconvenience:
15.1 Is this recoverable in principle?
15.2 If recoverable, in what amount?
42. This is a useful way of dividing up the issue in the case and I propose to answer the questions raised, in so far as that is possible on the evidence. However, given the hypothetical nature of some of the points, I will not go beyond summarising the arguments on certain points, identifying how the matters may appropriately be dealt with in other cases.
43. In considering certain of the issue in this case, it is necessary to have regard to the basis of liability under the 1974 Act.
- 43.1 Section 56 provides:
- “Antecedent negotiations***
(1) In this Act “antecedent negotiations” means any negotiations with the debtor or hirer—
(a) conducted by the creditor or owner in relation to the making of any regulated agreement, or
(b) conducted by a credit-broker in relation to goods sold or proposed to be sold by the credit-broker to the creditor before forming the subject-matter of a debtor-creditor-supplier agreement within section 12(a), or
(c) conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement within section 12(b) or (c),
and “negotiator” means the person by whom negotiations are so conducted with the debtor or hirer.
(2) Negotiations with the debtor in a case falling within subsection (1)(b) or (c) shall be deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity.”

- 43.2 Section 75 provides:

“Liability of creditor for breaches by supplier

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 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.”

DISCUSSION

Issue 1 - What statements did the sales representative make to the Claimant on 2 May 2014?

44. I bear in mind the comments of Leggatt J in Gestmin SGPS SA v Credit Suisse (UK) Ltd as to the risks that the process of obtaining evidence risks contaminating that evidence. By the time a case such as this gets to court, the litigant who feels aggrieved is likely to have a good idea as to what evidence will most fit their case. A statement will have been taken by a person whose livelihood

depends in part at least upon claims of this nature being successful. The court repeatedly sees examples of witnesses whose statements and oral evidence is clearly influenced by what it suits them to say. Further, witnesses can be very persuasive, particularly when they are convinced that their account is correct. The obvious danger here is that someone in Mr Hodgson's position might convince themselves that they were told things by the sales representative that would explain the decision to buy the solar panels which with the benefit of hindsight looks ill-judged.

45. One could not want a better example of what can happen than is demonstrated in this case by the evidence of Mrs Hodgson. She signed a statement stating that she could confirm what had been said in a discussion when, in fact, she could not do so at all. Her statement that she was being "*perfectly honest*" when she said that she had no recollection of matters was obviously true. It is however plain that she should not have signed the statement if she could not recall what was said. Further, it is difficult to think that her lack of knowledge or understanding of what had been discussed would not have been obvious to whoever took the statement. Thus, while the primary responsibility for the mistaken statement must lie with the maker, those who obtain evidence for claims such as this must be alert that they are not, even unwittingly, the cause of misleading witness statements being served.
46. Notwithstanding these cautions about the evidence adduced for the Claimant, I find it more probable than not that the Claimant was told that the system would pay for itself in 10 years for the following reasons.
 - 46.1 Mr Hodgson gave his evidence in a straightforward manner. At no point did I see evidence of any attempt to mislead the court.
 - 46.2 It is more probable than not that the Claimant raised with the sales representative the question of the period of time in which the system would pay for itself. The figures on the SAP Calculation of an annual benefit from the system in the first year of £602.99 immediately showed that the system (which would cost £14,480.40 under the fixed sum loan agreement) would take a considerable period of time to pay for itself. Even a cursory look at those figures would indicate that the system might risk not paying for itself in its natural life of 25 years. (In point of fact, at £602.99 per year, it would take over 24 years to pay for itself).
 - 46.3 When this issue had been raised, the sales representative would naturally wish to explain how, notwithstanding the figures on the SAP Calculation, the solar panels were likely to prove a good buy, since it is unlikely that the purchase of a solar panel system that only just paid for itself within its natural life of 25 years would seem attractive to the customer. This could only be achieved by saying that the system would in fact be likely over time to produce far more benefit than contained in the first year figures, by

reason of the escalation both in tariffs payable under the scheme and in electricity prices.

46.4 Accordingly, it is more likely than not that the sales representative persuaded Mr Hodgson not to have much regard to the figures on the SAP Calculation as a pre-requisite to achieving the sale.

46.5 Further, Mr Hodgson's evidence of the sales representative using the phrases "*no brainer*" and "*It's all gravy isn't it?*" has the ring of truth about it⁵. Whilst he could have misattributed these phrases, having heard them used in other circumstances, I see no reason to think that this is the case. Accepting as I do that the sales representative used these words, it is likely that they were in the context of explaining what a good deal was this said to be. This in turn is indicative of the sales representative encouraging the Claimant in the belief that the payback period would be relatively short. Whilst I cannot be satisfied of precisely what the Sales Representative said, I am satisfied he said words to the effect that the SAP Calculation should not be taken as an indication that the system would not pay for itself within 10 years, probably in the context of stating that the figures in the SAP Calculation were only an estimate and that the Tariffs and electricity benefit were likely to increase.⁶

46.6 Once it is accepted that the sales representative encouraged the Claimant not to consider the SAP Calculation to be a realistic indication of the benefits from the system and that he used phrases suggesting a relatively short period for the system becoming profitable, then, in the context of a witness who is otherwise on the face of it credible and in the absence of any other account of what was said, it is more likely than not that his evidence is correct that the sales representative stated that the system would pay for itself within the term of the finance agreement.

47. I bear in mind the submission by Mr Riley Smith QC for the Defendant that the court should bear in mind the alternative explanation for Mr Hodgson entering into the agreement, namely that he was persuaded that it was a good buy since it would pay for itself at some point, albeit not necessarily the 10 year point. Whilst it is the case that the system would pay for itself on the figures on the SAP Calculation, this is only just the case and would suggest that the system was of marginal financial benefit even assuming that nothing interfered with the ability to gain the benefit, be it a breakdown in the system or the inability of Mr Hodgson to continue to live at the

⁵ I am less convinced by Mrs Hodgson's evidence on this issue. Given that she can recall very little of what was said, there is a real risk that her apparent recollection of these words is triggered not by a true memory but by being aware of what her husband has to say on the issue.

⁶ Since the figures in the SAP Calculation show benefits significantly less than those received, anyone predicting this to be the case would have been proved correct.

house and therefore benefit from it. It is inconceivable that the figures on the SAP Calculation would without more have persuaded Mr Hodgson to purchase the system. It is possible that the Claimant was persuaded by the Sales Representative that any representation as to the system paying for itself was a statement that it would pay for itself over time rather than within 10 years, but there is no evidence that this was said, nor do I see any basis for thinking that it was a likely statement. That being so, I am left with the uncontradicted evidence of Mr Hodgson as to what that further discussion was. I can therefore safely reject this explanation.

48. I also bear in mind the Defendant's case that the Claimant had an interest in the practical which fed into an enthusiasm about having solar panels installed. Mr Hodgson was frank in accepting that he was excited about the prospect of having solar panels and it is obvious that this may have meant that he had less concern about the financial benefits of the scheme than the environmental benefits and/or technological interest that he had in it. But I found Mr Hodgson's evidence to the effect that the financial viability of the scheme was an important consideration to be compelling. I consider it unlikely that he would have allowed his interest in solar panels to have overwhelmed his good sense about whether this was a system worth purchasing.

Issue 2 - Were they made within the scope of his ostensible authority from My Planet?

49. The Defendant draws my attention in Bowstead & Reynolds on Agency (at §8-177):

"A principal is liable in tort for loss or injury caused by an agent, whether or not an employee, and if not an employee, whether or not the agent can be called an independent contractor, in the following cases:

- (a) if the wrongful act was specifically instigated, authorised or ratified by the principal;*
- (b) (semble) in the case of a statement made in the course of representing the principal within the actual or apparent authority of the agent: and for such a statement the principal may be liable notwithstanding that it was made for the benefit of the agent alone and not for that of the principal;*
- (c) where the principal can be taken to have assumed a responsibility for the actions of the agent."*

50. The Defendant contends:

- 50.1 There is no evidence of any specific instigation or authorisation i.e. actual authority.
- 50.2 Absent evidence that the sales representative was an employee or an independent contractor of My Planet, the Claimant must prove a representation by the MyPlanet to the Claimant, that was intended to be and was in fact acted upon by the Claimant, that the agent had authority to do what he did, including acts falling within the usual scope of the agent's apparent authority

51. The Claimant contends that the representation was made by the sales representative in the course of his acting for MyPlanet with a view to him persuading the Claimant to enter into a contract with MyPlanet and therefore fell within the scope of his ostensible authority.
52. If the court is satisfied that the sales representative was the employee or independent contractor of MyPlanet, it is clear that this was a representation falling within his ostensible authority – as Lord Millet said in Dubai Aluminium v Salaam [2002] UKHL 48 at paragraph 122, citing Denning LJ in Navarro v Moregrand Ltd [1951] 2 TLR 674, “*the vicarious liability of an employer does not depend on the employee’s authority to do the particular act which constitutes the wrong. It is sufficient if the employee is authorised to do acts of the kind in question.*” A sales representative, whether employed or an independent contractor, plainly has at least ostensible if not actual authority to make statements about the product that is being sold. The Defendant does not dispute this and indeed, in the manner in which it frames this issue, lays emphasis not on whether there was ostensible authority, but on whether the sales representative was the employee or independent contractor of MyPlanet.
53. On the evidence before the court, it is equally clear that the sales representative was the employee or independent contractor of MyPlanet. He had attended following contact from that company, which culminated in an arranged appointment. He produced an order form that had “MyPlanet” printed on it, with relevant details for the company, which he asked the Claimant to sign. Subsequent to his visit, MyPlanet installed solar panels to the Claimant’s house. This is overwhelming evidence that MyPlanet arranged the visit and that the person who attended was indeed the employee or independent contractor of MyPlanet.
54. Accordingly I am satisfied that MyPlanet was vicariously liable for the representations of the Sales Representative.

Issue 3 - What would any reasonable person have understood the representations to mean? What did the Claimant understand them to mean?

55. In *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] 1 CLC 701, Hamblen J (as he then was) said (at §215):

“In order to determine whether any and if so what representation was made by a statement requires (1) construing the statement in the context in which it was made, and (2) interpreting the statement objectively according to the impact it might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee...”

56. The Claimant pleads at §7 of the Particulars of Claim that the statements meant that “*the return/profits to be generated by the panels (by way of FIT returns, Export Tariff Returns and savings on Energy Use) during the 10-year period of the finance agreement would meet/exceed*

the sums due under the agreement such that the cost of acquiring and installing the panels would be 'self-funding'."

57. The Defendant points to the tension between this meaning and the obvious implication of the SAP Calculation that was inconsistent with this meaning.
58. For the reasons identified above, I am satisfied that the sales representative stated that the system would pay for itself within the term of the finance agreement, that is to say 10 years. Given the obvious difficulty with taking the figures on the SAP Calculation at face value (since the saving of £602 must have given rise to a real risk that the system would never have paid for itself), I am satisfied that the sales representative stated words to the effect that the SAP Calculation should not be taken as an indication that the system would not pay for itself within 10 years and that he probably said that the figures on the SAP Calculation were only an estimate and that the Tariffs and electricity benefit were likely to increase.
59. In those circumstances, I conclude the Claimant himself took the meaning to be as pleaded at §7 of the Particulars of Claim. Further, I am satisfied that a reasonable person would so have understood the words. Whilst the reasonable person is likely to be somewhat cautious in accepting the assertions of a Sales Representative where those statements are contradicted by other material, that other material here is in fact not an accurate statement of the likely benefits from the system. It would be perverse to find that it was unreasonable for a purchaser to rely on a statement from a sales representative that the figures were only estimates and were likely to be inaccurate when it was always probable, by reason of the known escalation in tariffs and electricity prices that the estimate was inaccurate.

Issue 4 - Were they statements of fact or opinion? If opinion, was it made recklessly or without any reasonable grounds for believing it was true or did it carry an implied representation that there were good reasonable grounds for it?

60. The Defendant accepts in its submissions that, if the statements were made by the Claimant as a duly-authorized sales representative, they carry the implication that he believed facts which reasonably justified the statements he made. Given my finding on issue 2, this issue also must be resolved in favour of the Claimant.

Issue 5 – Were the statements false?

61. The Defendant accepts that, if the Court finds that the true meaning of the words used was as pleaded in paragraph 7 of the Particulars of Claim, the statements were false. I have so found.
62. The Defendant makes the point that, if the true meaning of the words used were that the system would pay for itself in its natural lifetime, they would not be false. Given my primary findings of fact, I do not need to determine this issue, but had I found that the words had this alternative

meaning, I agree with the Defendant's submission that they would not be a false statement. It is more likely than not that the system would pay for itself over its full natural lifetime.

Issue 6 - Were they statements on which the Claimant was intended and entitled to rely?

63. The Defendant concedes that statements by a sales representative are usually to be taken as statements on which the customer is intended and entitled to rely. However, in light of condition 2(c) on the MyPlanet Order Form, the Defendant says that this is not the case here. The order was signed by the Claimant and he can be taken to be bound by its terms. The clause is said not to be particularly onerous or unusual, nor does it abrogate a statutory right, therefore specific notice of its content is not needed.
64. The Claimant respond that this is not a relationship in which one would expect the consumer to refer to the terms and conditions on the back of an order form to determine whether to enter into the contract. Rather, the Claimant was the recipient of a specific representation. Nothing in this clause calls into question either whether he was entitled to rely on that representation or whether he did so.
65. Again, the Claimant's argument is to be preferred. The language of clause 2(c) cannot be taken as casting doubt on the sales representative's statement that the system would pay for itself within 10 years. Indeed, the words used in condition 2(c) might be taken to suggest that any such statement was for an "illustrative" purpose namely illustrating the potential benefits. The reasonable person would not consider that there was any guarantee of performance, but would take from the representation that the sales representative had material upon which he could reasonably make that statement. Thus, the statement was not a guarantee of performance but it was clearly intended to be illustrative and to be relied on and the Claimant was entitled to rely on it.

Issue 7 - Was the Claimant materially induced by them to enter the agreements? If so, was that reliance reasonable?

66. It is the Defendant's case that the Claimant must have known that the representation which I have found proved was untrue, since the annual benefits were likely to be in the region of £600 and the annual cost around £1,440. It relies on the judgment of Lord Clarke in Zurich Insurance v Hayward [2017] AC 142:

"43 As to ... knowledge of falsity, as I understand it, it is accepted on behalf of Zurich that, where the representee knows that the representation is false, he cannot succeed. There is some support in the authorities for this view. So, for example Chitty on Contracts, 32nd ed, vol 1, para 7-036 says,

"The burden of proving that the claimant had actual knowledge of the truth, and therefore was not deceived by the misrepresentation, lies on the defendant; if

established, knowledge on the part of the representee is of course a complete defence, because he is then unable to show that he was misled by the misrepresentation.”

Spencer Bower & Handley on Actionable Misrepresentation, 5th ed (2014), p 122, para 11.07 says:

“A representee cannot be misled by a statement which he knew to be false....The representee’s knowledge of the truth must normally be full and complete. Partial and fragmentary information, or mere suspicion, will not do, ‘suspicion, doubt and mistrust do not have the same consequence as knowledge’. A representee who knows that the representation was false to some extent, but acts on it, may establish inducement if the departure from the truth was significantly greater than expected.”

See also Gipps v Gipps [1978] 1 NSWLR 454, 460, per Hutley JA.

44. As I said earlier, it cannot fairly be said that Zurich had full knowledge of the facts here. It follows that it is not necessary to express a final view on the question whether it always follows from the fact that the representee knows that the representation is false that he cannot succeed. As explained earlier, questions of inducement and causation are questions of fact. It seems to me that there may be circumstances in which a representee may know that the representation is false but nevertheless may be held to rely upon the misrepresentation as a matter of fact.”

67. The Defendant contends that the Claimant’s knowledge that the statement was untrue does not allow a finding that he was in fact induced to enter the agreements by the representation.
68. The Claimant responds that he understood the representation in exactly the manner that he was intended to understand it and that this led him to enter into the finance agreement.
69. In my judgment, the evidence supports the conclusion that the Claimant acted in reliance on the representation. As is said on his behalf, he understood what was said in exactly the manner in which it was intended. Not only did the statements of the sales representative persuade him that the SAP Calculation did not represent an accurate forecast of the likely benefits of the system, but that was also in fact the case – there is no material before me from which I could conclude that the SAP Calculation was anything more than it on their face, namely an estimate of the benefits in the first year. The fact that one is told that the benefits in the first year will be £X cannot be taken as a representation that they will be £X in all future years. If anything, the unreasonable conduct would be to have taken the SAP Calculation as an estimate of future benefits beyond year 1, rather than taking as an accurate prediction of those benefits, given that the calculation is headed “SAP Calculations and 1st Year Returns” (my emphasis). In those circumstances, the Claimant is not prevented from relying on the actual representation made.

Issue 8 - Was any statement corrected (before the signing of the Finance Agreement or subsequently)?

70. The Defendant contends that the evidence supports the conclusion that any misrepresentation about the likely benefits from the system were corrected by one or both of:

70.1 The Sales Representative explaining to the Claimant not that the system would pay for itself over 10 years, but that it would pay for itself over its lifetime;

70.2 The provision of the figures as to estimated savings and benefits that showed that the representation could not be correct.

71. I do not accept either of these arguments.

71.1 For reasons I have identified above, I have considered but rejected the argument that the sales representative may have corrected what he had said about the period over which the system would pay for itself.

71.2 As I have indicated, it is more likely than not that the sales representative explained the figures as being the estimate in the first year and that in fact better returns would be achieved (as in fact proved to be the case). This is not evidence of a correction of the representation so as to amount to a statement that the system would not pay for itself within 10 years.

Issue 9 - Was the Claimant contributorily negligent? If so, how should any liability be apportioned?

72. Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 (“the 1945 Act”) provides:

“Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage”.

73. The authors of Charlesworth and Percy on Negligence at §4-28 state:

“A claimant’s share in responsibility for the damage is approached by way of an overall appreciation of blameworthiness, taken with the causative potency of any fault.

“Whilst causation is the decisive factor in determining whether there should be a reduced amount payable to the plaintiff, nevertheless, the amount of the reduction does not depend solely on the degree of causation. The amount of the reduction ... involves a consideration, not only of the causative potency of a particular factor, but also of its blameworthiness.” (Davies v Swan Motor Co Ltd [1949] 2 KB 291 at 236)

In Stapley v Gypsum Mines Ltd [1953] AC 663 at 682, Lord Reid said:

“A court must deal broadly with the problem of apportionment and in considering what is just and equitable must have regard to the blameworthiness of each party, but ‘the claimant’s share in the responsibility for the damage’ cannot, I think, be assessed without considering the relative importance of his acts in causing the damage apart from his blameworthiness.”

74. The Defendant contends that a plea of misrepresentation may be maintained where there is a claim for damages for negligent misrepresentation under section 2(1) of the 1967 Act and there would be concurrent liability under the principle in Hedley Byrne & Co v Heller & Partners - see Gran Gelato Ltd v Richcliff (Group) Ltd [1992] Ch 560 where, at page 573H-574B, Sir Donald Nicholls VC said:

“...the conduct of which Gran Gelato complains founds a cause of action both in negligence at common law and under the Act of 1967. As already noted, under the Act of 1967 liability is essentially founded on negligence. By parity of reasoning with the conclusion in Forsikringsaktieselskapet Vesta v Butcher [1989] AC 852 regarding concurrent claims in negligence in tort and contract, the Act of 1945 applies in the present case where there are concurrent claims against Richcliff in negligence in tort and under the Act of 1967.”

75. Whilst Gran Gelato is a decision of the High Court and therefore not strictly binding upon me, I find the reasoning in that case to be persuasive and, were I to be dealing with a situation in which the claim as pleaded both under the 1967 Act and in common law for negligence (as was the case in Gran Gelato), I would have reached the same conclusion as Sir Donald Nicholls in that case for the same reasons. However, the Claimant points out that a claim in common law negligence is not pleaded here and therefore in any event the principle in Forsikringsaktieselskapet Vesta v Butcher cannot be applied by way of analogy. It is correct that a common law tort is not pleaded here and therefore the situation is at least in theory different to that in Gran Gelato, I am unpersuaded that a different principle as to the availability of the plea of contributory negligence should apply, dependent upon whether a plea common law negligence is raised in circumstances where it could have been. Just as Sir Donald Nicholls found it odd if contributory negligence were to be available as a partial defence to a claim for damages based on the common law duty but not to a claim under the 1967 Act in respect of the same misrepresentation, I would find it odd if the availability of the plea turned on whether a particular cause of action had been pleaded. It follows that, in my judgment, a plea of contributory negligence is available to a Defendant in response to a claim for damages for misrepresentation under the 1967 Act where the same facts would found a claim in negligent misstatement at common law, even if the common law claim is not expressly pleaded.
76. The Defendant raises two arguments in support of the plead of contributory negligence:
- 76.1 That the Defendant itself is not the person responsible for the representation. The Defendant’s liability arises by virtue of Sections 56 and/or 75 of the 1974 Act. Whilst

that is not relevant to liability, it is relevant to the issue of contributory negligence, in so far as the determination of what is just and equitable involves the question of the Defendant's knowledge of and/or involvement in the making of the false representation. In this case, it had neither knowledge nor involvement.

76.2 By requiring the Defendant to sign the Customer Satisfaction note before authorising transfer of the money to MyPlanet, the Defendant was doing all that it could to bring to the customer's attention the evidence as to the likely return on the solar panels.

77. On the first of these issues, the Claimant denies that the nature and character of the Defendant is relevant to the finding of contributory negligence. The creditor is being sued for the like claim that could have been brought against the supplier. It is therefore not the characteristics and/or conduct of the Defendant which is relevant to the plea of contributory negligence, it is those of the supplier, MyPlanet. To find otherwise would be to blunt the effect of the 1974 Act which is intended to focus on the protection of the consumer.
78. On the second issue, the Claimant says that, since MyPlanet was by definition responsible for the misstatement of its servant or agent here, a finding of contributory negligence would be surprising. It would, to use the words of Sr Donald Nicholls V-C in Gran Gelato, be "*a very special case before carelessness by Gran Gelato, the representee, would make it just and equitable to reduce the damages payable to compensate Gran Gelato for loss suffered by it in consequence of doing the very thing which, in making the representation, Richcliff intended should happen.*" As between the Claimant and MyPlanet, the same principle is said to apply here.
79. The reference in Stapley v Gypsum Mines to having regard to "*the blameworthiness of each party*" might appear to suggest a reference to the blameworthiness to each party to the action or each party to the transaction that gives rise to the action. The latter interpretation might be thought more consistent with the "rule of identification" referred to by the authors of Charlesworth & Percy on Negligence at 4-37. Having regard also to the policy of the 1974 Act to protect the interest of consumers⁷, I agree with the Claimant's interpretation that it is the characteristics and action of the alleged representor (or its agent) that should be focused on when considering a plea of contributory negligence in a claim by a finance company which has statutory liability for the misrepresentation pursuant to section 56 and/or 75 of the 1975 Act. Indeed, the "deemed agency" created by section 56 of the 1974 Act may have the consequence that, at least in respect of that claim, the court must focus on the position of the supplier rather than the finance company.

⁷ The introductory text to the Act describes it thus.

80. As to whether the Claimant's is guilty of blameworthiness sufficient to lead to a finding of contributory negligence, I would consider such a finding to be unusual in a case where the court has already found that the Claimant has reasonably entered into a contract in reliance upon a representation from a party which is in fact false. I agree with Sir Donald Nichols V-C in Gran Gelato that such a finding would require some special features to explain why there was blameworthiness notwithstanding a finding of reasonable reliance. I can find no such factors here.

Issue 10 - Is the Claimant estopped by his subsequent representations to the Defendant?

81. The principle of estoppel by representation is not controversial. As is put in Halsbury's Laws of England (Vol 47) at §355:

"In order for estoppel by representation to operate, there must have been a representation made by the person to be estopped to the person claiming the benefit of the estoppel. To form the basis of an estoppel a representation may be made either by statement or by conduct; and conduct includes negligence and silence. Certain general propositions are, however, applicable, in whatever manner the representation is made. The representation must be made voluntarily; if made apparently on another's behalf, it must be made by a person having the authority to do so; it must be communicated to the person to whom it was addressed; and only the person to whom it was addressed may use it to support a plea of estoppel.

82. The Defendant contends that, by signing the Satisfaction Note, the Claimant represented to the Defendant his understanding of the system's performance prospects, intending the Defendant to act upon that representation to its detriment by releasing funds to the Claimant. The Defendant acted upon the representation by releasing the funds to MyPlanet and therefore the Claimant is estopped from seeking to prove that his understanding of the system's performance was other than set out in the Satisfaction Note.
83. The Defendant concedes that, since the Satisfaction Note was signed after the Claimant entered into the agreements, it could not raise an argument of estoppel in respect of issues of reliance, inducement or correction. However, the Defendant contends that the Claimant is estopped from saying that he understood the statements made by the sales representative in any way other than how the Satisfaction Note represented the prospective benefit from the solar panels, namely the figure of £610.21.
84. The Claimant raises several responses to this argument:
- 84.1 As a matter of fact, the Satisfaction Note did not amount to the alleged representation;
 - 84.2 There is no evidence that the Defendant relied on the Satisfaction note to its detriment;
 - 84.3 There is no evidence that the Claimant intended the Defendant to rely on the representation;
 - 84.4 As a matter of law the, the Defendant is not entitled to rely on an estoppel that the supplier could not have relied on.

85. On the first point, the Claimant says that, if the court accepts that the sales representative stated that the system would pay for itself within 10 years, there is nothing within the Satisfaction Note that either expressly or impliedly represents that the Claimant understood the system's performance prospects to be otherwise. At best, the Satisfaction Note is about the first year's performance, yet once one accepts that the sales representative spoke, at least in general terms, of the benefits to be gained from the system in the longer term, it is not possible to draw from the signing of the Satisfaction Note any representation by the Claimant about his understanding of the performance of the system and the returns to be made from it beyond the first year. That in my judgment is a good argument which is fatal to the Defendant's case on the estoppel issue, and hence the remaining issues are academic.
86. On the second issue, the Defendant relies on the evidence of Mr Carson. For the Claimant, Mr Harper QC contends that there is inadequate evidence of reliance on the Note. Whilst I accept that Mr Carson's statements in paragraph 20 of his witness statement amount to no more than assumption, those in paragraph 19 are evidence of system from which the court could properly conclude that it was more likely than not that the Satisfaction Note was reviewed before that payment to the Supplier was made and that that payment would not have been made absent a completed Satisfaction Note that was signed by the customer.
87. On the third issue, it is not in fact necessary for an actual intention to rely to be proved in order to make out an estoppel. The authors of Phipson on Evidence 19th Edition, put it thus at §5-29:
- “There must have been an intention, or some conduct giving rise to a reasonable presumption of an intention, that the other party was to act in reliance on the truthfulness of the representation.”*
- In any event, however, I would have considerable difficulty in finding that it either was or can be presumed to be the case that Mr Hodgson was making a representation of his understanding of the operation of the statement from having signed this note. The Satisfaction Note is, understandably, hedged with caution as to how the householder should understand the figures. It seems to me that, in signing the Satisfaction Note, the consumer does no more than represent that he has been told those figures. There is a lack of clarity sufficient even to support a representation that he understood those figures to amount to the expected performance in the first year.
88. On the fourth point, I do not consider that the wording of Section 56 or Section 76 of the 1974 Act preclude reliance by the Defendant on a representation, even if that argument could not be advanced by the supplier. Estoppel is a rule of evidence – it is about what matters the court might be prevented from taking into account in the present case. As Mr Riley Smith QC rightly points out, the mere fact that the claims against the Finance Company under Section 75 is a “*like claim*” to that against the Supplier, does not mean that it is an identical claim – the liability of the creditor is a concurrent but separate liability from that of the Supplier (see Durkin v DSG Retail

Ltd [2014] 1 WLR 1148 at p.1155B). Further, he is supported by a passage from Goode on Consumer Credit Law and Practice in relation to a creditor's right of set-off at §33.163:

"It is thought that a creditor sued under the CCA 1974, s75 or s75A can exercise any right of set-off vested in the supplier, as well as any right of set-off available to the creditor in his own right."

89. In this regard, the position is different when dealing with a defence of substance (contributory negligence) than it is when dealing with an evidential or procedural bar (for example estoppel).

Issue 11 – What is the measure of loss?

A. General principles

90. It is common ground that the relevant principle to apply in assessing the loss is to put the Claimant in the position that he would have been had the representation not been made. This flows from Section 2(1) of the 1967 Act, which provides:

"Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true."

91. The applicable principles to be applied in the case of fraudulent misrepresentation were summarised by Lord Browne Wilkinson in Smith New Court Securities v Scrimgeour Vickers [1997] AC 254 at pp 266H to 267C:

"[I]n my judgment the following principles apply in assessing the damages payable where the plaintiff has been induced by a fraudulent misrepresentation to buy property: (1) the defendant is bound to make reparation for all the damage directly flowing from the transaction; (2) although such damage need not have been foreseeable, it must have been directly caused by the transaction; (3) in assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction; (4) as a general rule, the benefits received by him include the market value of the property acquired as at the date of acquisition; but such general rule is not to be inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered; (5) although the circumstances in which the general rule should not apply cannot be comprehensively stated, it will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset or (b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property. (6) In addition, the plaintiff is entitled to recover consequential losses caused by the transaction; (7) the plaintiff must take all reasonable steps to mitigate his loss once he has discovered the fraud"

92. Lord Browne Wilkinson referred with approval to the case of Doyle v Olby (Ironmongers) Ltd [1969] 2 QB 158 and said at pp 264H to 265E:

"Doyle v Olby (Ironmongers) Ltd establishes four points. First, that the measure of damages where a contract has been induced by fraudulent misrepresentation is reparation for all the actual damage directly flowing from (i.e. caused by) entering into the transaction. Second,

that in assessing such damages it is not an inflexible rule that the plaintiff must bring into account the value as at the transaction date of the asset acquired: although the point is not adverted to in the judgments, the basis on which the damages were computed shows that there can be circumstances in which it is proper to require a defendant only to bring into account the actual proceeds of the asset provided that he has acted reasonably in retaining it....

In my judgment Doyle v Olby (Ironmongers) Ltd was rightly decided on all these points. It is true, as to the second point, that there were not apparently cited to the Court of Appeal the 19th century cases which established the "inflexible rule" that the asset acquired has to be valued as at the transaction date: the successful appellant was not legally represented. But in my judgment the decision on this second point is correct. The old "inflexible rule" is both wrong in principle and capable of producing manifest injustice. The defendant's fraud may have an effect continuing after the transaction is completed, e.g. if a sale of gold shares was induced by a misrepresentation that a new find had been made which was to be announced later it would plainly be wrong to assume that the plaintiff should have sold the shares before the announcement should have been made. Again, the acquisition of the asset may, as in Doyle v Olby (Ironmongers) Ltd itself, lock the purchase into continuing to hold the asset until he can effect a resale. To say that in such a case the plaintiff has obtained the value of the asset as at the transaction date and must therefore bring it into account flies in the face of common sense: how can he be said to have received such a value if, despite his efforts, he has been unable to sell."

93. Since damages are assessed on the basis that, but for the misrepresentation, the Claimant would not have entered into the contract, the parties agree that the amount either paid or to be paid by the Claimant under the contract must be the basis of the assessment of damage, against which a discount must be made. The amount already paid is a question of past fact. That to be paid is a future event which inevitably has a hypothetical aspect to it. However, in reality, the Claimant's liability (or that of his estate) to make the repayments is such that the court can treat as certain the fact that the payments will be made.
94. The Claimant is also entitled to consequential losses though, as will be seen in respect of this issue, there is a dispute as to whether the court has to consider remoteness. For reasons explained below, that question is hypothetical in the light of the evidence in this case, but in deference to the work put in by counsel on this issue as well as the potential for it to arise in other cases, I deal with the matter below.
95. The normal starting point then is to deduct the value of the property acquired as at the date of acquisition. The Defendant suggests that this could be taken as the capital cost of supply and installation funded by the credit agreement, namely £9,200. However the Defendant goes on to concede that this may well be a case where the Claimant is "locked in" to the asset and so an alternative measure applies.
96. I do not take it as self evident that the solar panels had the stated or indeed any market value to the Claimant as at the date of acquisition. He bought solar panels that were fixed to his house. To have any value to him, he would first of all have to remove them from his property, presumably incurring cost in so doing. He would then have the equipment which he would need to sell. He would be unable to arrange finance for any purchase so he would be dependent on a cash buyer or

someone who arranged their own finance. I strongly doubt that he would receive much for them, though it would be difficult to obtain the relevant evidence to test this proposition.

97. An alternative measure might be to measure damages by the amount by which his house increased in value because of the installation of solar panels. The obvious difficulty with this is that there is no evidence before the court to indicate what, if anything, was the increase in value. It might be possible to get such evidence, though the cost might well be disproportionate to the benefit.
98. A more realistic approach, certainly where there is no evidence of an immediate intention to move from the property is that taken by both the parties as the starting position here, that is to treat the Claimant as locked into this asset such that the market value (even if established in evidence) would be an inappropriate measure and instead to look to the benefit that the Claimant has and will achieve as a result of the installation of the solar panels. The past benefits are a matter of past fact, though as will be seen their calculation is not entirely straightforward. However, the future benefits are far less certain.
99. Two questions of controversy arise about the measure of loss:
 - 99.1 How should the court deal with the uncertainty of the loss?
 - 99.2 Does foreseeability operate as a limit to the recovery of losses for misrepresentation under Section 2(1) of the 1967 Act?

B. Uncertainty of loss

100. On the first point, the court is of course familiar with the problem of uncertainty of loss. There is no dispute between the parties that the court must here engage with the evidence to seek to determine the benefit received so as to calculate the true loss. But there is a difference as to how the court should deal with the uncertainty in this case.
101. The Claimant contends that, once he has proved his loss through his liability to pay for the solar panels, the burden shifts to the Defendant to show that there is some benefit to be set off and, if so, what the extent of that benefit is. The evidence here is so uncertain as not to permit of calculation so no deduction should be made. The Defendant on the other hand contends that, since the burden of proving the amount of recoverable loss lies on the Claimant and that the recoverable loss may be so uncertain as not to permit of calculation, the court should award no damages.
102. It is trite law that the burden of proving an act normally lies on the person asserting it. It follows that the Claimant must prove that he has incurred some loss because of the misrepresentation. He can easily do that – he has a liability under the finance contract. He does not need to go on to prove the negative that he has not received any benefit from the contract. The burden of proving

that lies on the person asserting it, the Defendant. To hold otherwise would be contrary to the fundamental principle that the party who asserts an act or matter must prove it.

103. This easily deals with the question of where the burden of proof lies in proving that the Claimant has benefited. In point of fact, it is not in dispute that the Claimant here has benefited to some extent from the installation of the solar panels. The issue is the amount of that benefit. The application of the burden of proof in this sense does not assist in determining that issue. However, three other principles then come into play:

103.1 *The fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages*” (per Vaughan Williams LJ in Chaplin v Hicks [1911] 2 KB 786);

103.2 *“In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry”* (per Bowen LJ in Ratcliffe v Evans [1892] 2 QB 524 at pp 532-533).

103.3 *“[I]t is fair to resolve uncertainties about what would have happened but for the Defendant’s wrongdoing by making reasonable assumptions which err if anything on the side of generosity to the Claimant where it is the Defendant’s wrongdoing which has created those uncertainties* (per Leggat J, as he then was, in Yam Seng Pte Ltd v International Trade Corporation Ltd [2013] EWHC 111 at §188).

104. In my judgment, the application of those principles allows the issue in play here to be fairly resolved. The court must make the best judgment it can from the available evidence and having regard to common sense on the quantification of the past and probable benefit to the Claimant from the system, having regard to the uncertainties and resolving matters where there truly is uncertainty in favour of the wronged Claimant.

105. In supplemental submissions, the Claimant has reminded me of the following:

105.1 The guiding principle is that the damages to be awarded to the Claimant in this case are compensatory and therefore should be the *“sum of money which will put the party who has...suffered in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation”* – see Livingstone v

Rawyards Coal Co (1880) 5 App Cas 25 at 39, cited in McGregor on Damages 20th Edition at §2-002;

105.2 Provided that the Court is satisfied that a Claimant has suffered substantial loss, difficulties in calculating loss and damage do not preclude the Court from assessing that loss – see; Morris Garner v One Step (Support) Limited [2018] 2 WLR 1353 at §37 and §38;

105.3 The need for the court to undertake “informed speculation” cannot replace the need for expert evidence in appropriate cases so that the Court does not proceed on an ill-informed basis – see Huntsworth Wine Company Limited v London City Bond Limited [2021] 3 WLUK 293.

106. The Defendant complains that this approach offends against the supplemental submission that I permitted following the draft judgment being circulated. I do not agree. The argument being raised by the Claimant is one as to whether the evidence is adequate to persuade the court that any deduction should be made for a contingency is part of the issue of “*the proposed deductions from the anticipated benefits of the system to reflect contingencies*”.

107. Following on from these submissions, the Claimant points to the lack of evidence before the court on matters relevant to the calculation of contingencies. As Mr Harper QC puts it in his supplemental submissions, “*The Court had (for example) no evidence as to degradation, life expectancy of the roof, self-usage, repairs, part replacements and maintenance, intentions of the claimants (e.g. as regards property), health of the Claimant.*”

108. Whilst it is indeed correct that the court did not have evidence on these submissions, I reject the suggestion that it should not attempt to reach a view on the quantification of those contingencies for the following reasons:

108.1 Some of the factors relevant to the quantification of contingencies, such as the health of the Claimant or his wife, are matters that are peculiarly within the knowledge of the Claimant or at the very least are matters that could only be investigated with the consent of him or his wife. Many a person in the position of the Claimant or his wife might be reluctant to permit investigation of their medical history in order to deal with what is only a relatively small issue in a case of limited value. It might be reasonable to take that view. But it would be indeed hard on the Defendant if the Court simply disregarded contingencies as to which the Claimant could provide relevant information just because such information had not been provided.

108.2 Unlike the position in Huntsworth Wine Company Limited v London City Bond Limited, the court here is not dealing with issues that are readily dealt with by expert

evidence. Whilst degradation or the risk of the roof or the solar panel system requiring replacement might be capable of some kind of quantification by an expert engineer, other issues such as the implications of the Claimant's (or his wife's) health to his future plans to use the system, would require evidence of an entirely different kind. But in any event, such evidence would be only part of the larger picture. So for example the question of whether a change in the Claimant's or his wife's health might affect their decision as to whether to remain in the property would be influenced by factors beyond the question of their health. It is inevitable that such issues can only be determined by the court taking an overview of the available material and reaching some kind of judgment, bearing in mind how different people might behave in the various circumstances that can be contemplated.

108.3 In this case, the certainty and the particularity required is tempered by the fact that the court is dealing with a large number of contingencies, the effect of which it almost impossible to predict. By way of example, assume that the Claimant became restricted in his mobility such that he could not ascend the stairs in the normal fashion. In the first place, the chance of this happening is difficult to assess. In the second, the consequence of it is itself unpredictable. Many people in such circumstances would choose to move to single storey accommodation. Some would persevere with remaining in their own homes, even if it meant going upstairs on their hands and knees. By way of another example, say the roof could be predicted to require extensive repairs in 5 years time. This would increase the chance of the solar panel system being removed and not put back. But it would not answer whether in fact this is what the Claimant and his wife would choose to do. Their decision would be likely to be affected by other matters such as the cost of putting it back in place, the benefit that the system was certain at that time and their plans at that time as to their future accommodation needs, which could themselves be affected by issues of health that are difficult to predict now. This then becomes a classic example of the principle stated by Bowen LJ in Ratcliffe v Evans that “*As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done.*”

109. In its supplemental submissions, the Defendant argues that the principle referred to by Leggat J, as he then was, in Yam Seng Pte Ltd v International Trade Corporation Ltd [2013] EWHC 111 as the “*principle of reasonable assumptions*” stems from the decision in Armory v Delamire (1722) Str. 505, but is of narrow application, as demonstrated by decisions such as Zahihi v Janzemini [2009] EWCA Civ 851 and Blaney (t/a Aardvark Jewellery v Gloagu St David's Gold Mines Ltd [2002] EWCA Civ 1007, citing with approval paragraph 87 of the judgement of Rimer J in SPE

international Ltd v Professional Preparation Contractors (UK) Ltd [2002] EWHC 881 (Ch).

Whilst I accept that there are clear limits to the “*principle of reasonable assumptions*,” I see nothing in those authorities to undermine the application of the principle here for exactly the same reasons as are identified at paragraph 108 above.

110. The Defendant complains that the contingencies referred to, relating to the system’s current condition, the Claimant’s life plans and the state of the Claimant’s health (to which one might also add with equal force the condition of the roof of the house) are “*matters that only the Claimant could plead and prove*.” In so far as those are matters that are capable of knowledge or at least prediction from existing fact, I accept the force of this point. Such matters would require pleading and proof by the Claimant. So, for example, it would be wrong for the court to have regard, in assessing the contingencies, to an assumption that the Claimant’s current intention were to move house to a smaller single storey property, unless there were evidence to this effect from the Claimant, since such an intention would be a matter in his own knowledge. But the potential events to which I have had regard are not the known or the predictable, but rather that which cannot be known or predicted such as an unexpected change in his or his wife’s health that makes living in the house impracticable or storm damage to the roof that renders its replacement necessary. These are not matters that the Claimant can plead and prove because they are not based on current facts (or are so distantly connected to current facts), such that it is not possible to say what evidence might assist in determining the level of risk.
111. The Defendant further contends that, in the draft judgement, I have wrongly applied the well established principle that calculation of damages based on hypothetical events is to be determined on the balance of probabilities where the future event turns on what the Claimant would have done - see the clear exposition of the principle by Andrew Burrows QC as he then was at paragraph 27 of his judgment in Palliser Ltd v Fate Ltd [2019] EWHC 43, considering amongst other cases Mallet v McMonagle [1970] AC 166.
112. The difficulty with this aspect of the Defendant’s approach is that it wrongly identifies the hypothetical matters as relating to the conduct of the Claimant:
 - 112.1 The risk of the Claimant incurring maintenance costs is, indeed, neither related to the hypothetical acts of the Claimant nor the hypothetical acts of third parties. It is simply an inherent risk in operating the system. This is exactly the kind of risk referred to by Lord Diplock in Mallet v McMonagle at paragraph 176 that justifies the making of an award of damages based on the estimate of the risk. It does not fall within that distinction considered by Lord Burrows JSC in Palliser Ltd v Fate Ltd, which is concerned with the particular problem of future contingencies that are dependent upon the acts of the Claimant as opposed to the acts of others.

- 112.2 The risk of the Claimant dying prematurely or his or his wife suffering ill health that prevents them from continuing to live in the house is, with due respect, simply not a matter that depends on the hypothetical conduct of the Claimant (or his wife). It is true that, if one wishes to break down all of the risks to a person's health into constituent parts, their conduct would affect some of them. For example, if the hypothetical Claimant was a smoker in so far as the risk of that Claimant being ill or dying early was assumed to flow from continuing to smoke, that would be a matter relating to the hypothetical conduct of the Claimant to be decided on the balance of probabilities. It may be possible in respect of any person to identify aspects of future hypothetical conduct that may affect their health. But to make a sensible assessment of the real risks of death or ill health that would affect the ability of the Claimant to remain in the house would involve considering many factors, such as their genetic make-up and the past and future vicissitudes of life that are entirely out of their control. I do not see that this could be reduced to balance of probabilities decisions about future conduct. It is true that one can postulate factual circumstances, such as ill health that might realistically be said to leave the Claimant with a choice as to whether to move or to remain in the house. But to assess such a prospect on the balance of probabilities is impossible, since one would have to consider every possible scenario of future ill health and determine whether it left the Claimant in a position as to whether they had a choice about remaining in the house or moving and then, in respect of those cases where they could be said to have a choice, to assess what they probably would do. This is not a realistic way to approach the calculation of future losses. In truth, it is the chance of the ill health occurring that will largely determine the decision, albeit that there is a range of responses to ill health from those who keenly move to a new accommodation to those who are only willing to be leave their current home in a coffin. All the court can do is to take a broad brush approach to such chances. That said, I should emphasise the point that, where matters are within the Claimant's knowledge he is required to prove them. Thus I do not assume that there is any aspect of his health that makes him more likely to die or be seriously ill than the next person; I simply assume that such risks exist and seek to assess them.
- 112.3 The chance of the Claimant deciding to remove the system prematurely because it is not working or because the condition of the house requires it is outside of his control and clearly a risk to be decided on the basis of an assessment of the possibilities. The chance of his choosing to remove the system even though it is working is correctly characterised as a matter of his hypothetical conduct. It is a contingency which I reject in any event as being perverse (see paragraph 139 below).

C. Foreseeability

113. On the second controversial issue of principle relating to quantification, that of foreseeability, this issue has become academic since the Claimant does not contend that there is any evidence from which the court can conclude that the Claimant will probably remove the solar panels. Had the Claimant so contended, it is doubtless the case that he would have been subject to intense cross examination as to why he should want to pay money to remove the solar panels from his house when he is in fact benefitting from their presence, unless his sole motivation as to maximise his damages in this case. The Defendant would doubtless have argued that the cost of removing the panels and any increase in the damages payable as a result of the fact that the Claimant no longer had the benefit of solar panels led to losses that were not caused by the misrepresentation for which the Defendant is liable and/or were losses caused by the Claimant's own failure to mitigate his loss.
114. However, the Defendant indicates that it would raise a further argument, namely that such loss would be too remote to be recoverable. As Mr Riley Smith QC acknowledges, this gives rise to an argument as to whether remoteness is in fact a bar to recovery in damages under Section 2(1) of the 1967 Act. In deference to his impressive argument (and to the fact that neither Mr Harper QC nor I could identify an argument that showed his reasoning obviously to be wrong), I record that argument briefly.
115. Section 2(1) of the Misrepresentation Act 1967 provides:

“Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true.”

If “*so liable*” means that the fraudulent measure is applied in cases of innocent or negligent misrepresentation brought under the 1967 Act the consequence, as the editors of McGregor on Damages point out (at §49-059), is that the “*fraud rules overtake those appertaining to negligence so as to give more in damages where the action is brought under the statute*”. A claim brought under the 1967 Act for negligent misrepresentation arguably qualifies for damages on the fraudulent measure, whereas damages for the same conduct in a common law claim do not. Under the former, the claimant is entitled to any loss which flowed directly from the representation; under the latter, that loss is limited to that which was reasonably foreseeable.

116. This issue was addressed by the Court of Appeal in Royscot Trust v Rogerson [1991] 2 QB 297. The claimant finance company had bought a car from the defendant motor dealer, and had then hired it to the dealer's customer under a hire-purchase agreement. The dealer was guilty of

an innocent misrepresentation to the finance company. Balcombe LJ (with whom Ralph Gibson LJ agreed) concluded that, even though the statement was innocent, the assessment of damages under section 2(1) of the 1967 Act had to be calculated as if it was an award of damages for fraudulent misrepresentation; and that the claimant was entitled to recover “*all the losses which it suffered as a result of entering into agreements with the dealer and the customer, even if those losses were unforeseeable, provided that they were not otherwise too remote*” (at p. 307A). The decision in Royscot is a controversial one. For example, in Smith New Court (decided only six years after Royscot), Lords Steyn and Brown-Wilkinson declined to express a view on the correctness of the decision and the authors of McGregor on Damages describe it as “*unfortunate.*”

117. Mr Riley-Smith QC goes on to consider whether the decision in Royscot is in fact binding on this court. He notes:

117.1 In Avon Insurance Plc v Swire Fraser Ltd [2000] Lloyd’s Rep IR 535, the claimants appear to have conceded that Rix J (as he then was) was bound by *stare decisis* to follow the decision in Royston (see §6).

117.2 In Yam Seng Pte v International Trade Corp [2013] EWHC 111 (QB), the principle of *stare decisis* does not appear to have been the subject of argument before Leggatt J (as he then was) (see §296).

117.3 The doctrine of precedent was seemingly not the subject of argument in other key cases citing Royscot Trust (see Monde Petroleum SA v Westernzagros Limited [2016] EWHC 1472 (Comm) at §214, Pankhania v London Borough of Hackney [2004] EWHC 323 (Ch) at §17, and Spice Girls Limited v Aprilia World Service BV (No.2) [2001] EMLR 8 at §13). The point always appears to have been the subject of a concession.

118. However the Defendant in this case, does not concede that Royscot Trust is binding on this court:

118.1 In Royscot Trust (which appears to have gone unnoticed in Yam Seng and other subsequent cases) the loss in question was not found to be unforeseeable. It was, in fact, expressly found to be foreseeable (see p 307F).

118.2 Strictly, therefore, the question as to whether a lack of foreseeability could place a limit on the recoverability of that loss under section 2(1) of the 1967 Act did not arise for decision on the facts of the case before Balcombe LJ.

118.3 Balcombe LJ’s interpretation of section 2(1) of the 1967 Act is therefore properly classified as *dicta* which does not form part of the *ratio decidendi* of the case.

119. Given the distinguished names that appear in cases where it has been conceded that the High Court is bound by Royscot Trust to find that even unforeseeable losses are recoverable in claims

under Section 2(1) of the 1967 Act for even innocent misrepresentation, Mr Riley-Smith QC showed understandable caution in advancing the argument. As I have indicated, neither Mr Harper QC nor I considered the argument to be obviously wrong, but I leave strictly to another day the question of whether it is right.

120. I should however add this. It is not self-evident that in fact the cost of removing the solar panels and the loss of benefit flowing from that would be outside the scope of that which is reasonably foreseeable. It is foreseeable that the solar panels may need to be removed before the end of their natural life – an example would be if the state of the roof of the house was such that necessary repairs could not be carried out without its removal. Admittedly removal without good reason (as seemed to be posited by the Claimant in his schedule of loss) might not be considered to be reasonably foreseeable, but I consider it at least arguable that in such circumstances the Claimant could pray in aid the doctrine in Hughes v Lord Advocate [1963] AC 837 to argue that that it is only the loss itself and not the mechanism of the loss that need to be foreseeable. I equally leave that argument to another day. Given the formidable challenges that arguments as to the causation and mitigation would present to the Claimant who proposed removal of the solar panels without good reason, I suspect that neither of these two issues will in fact require resolution within litigation arising from solar panels,.

D The Financial Benefits of Solar Panels under the FIT Scheme

121. I turn to the calculation of the benefits to be gained from the solar panels. This is not wholly straight forward to assess. To do so, it is necessary, to understand how the FIT scheme works.
122. The FIT scheme was created under sections 41 to 43 of the Energy Act 2008 (“the 2008 Act”) through the Feed-In Tariffs (Specified Maximum Capacity and Functions Order) 2010/678 (“the 2010 Order”) and modifications to Standard Condition 33 of Electricity Supply Licences. On 1 December 2012, the 2010 Order was revoked and replaced by the Feed-In Tariffs Order 2012/2782 (“the 2012 Order”) (see Schedule 3, paragraph 1 of the 2012 Order). As noted above, the scheme involves the payment of generation payments and export payments.
123. The electricity generated by solar panels is used both in the location where it is generated and when fed into the national grid. Unfortunately, there is no evidence of this in the material before the court, nor have the parties been able to agree a statement explaining this. My explanation below is deduced from the material before the court as well as matters of common knowledge:

- 123.1 The electricity generated by domestic solar panels is applied first to the demand within the house to which they are fitted, thereby reducing the householder's electricity bill⁸;
- 123.2 Any excess electricity generated is fed into the national grid;
- 123.3 Whilst it is possible to instal an export meter to measure the amount of electricity generated, this in fact often does not happen in the domestic setting⁹ (and did not happen here);
- 123.4 Where no export meter has been fitted, the effect of Article 37(1) of the 2012 Order is to deem that 50% of the electricity that is generated is exported.
124. It follows that, with knowledge of the amount of electricity generated and the relevant tariffs, one can work out the amount to which a householder is entitled by way of generation and export payments. This will come as little surprise, since it is of course how those payments are worked out.
125. However, this does not deal with the valuation of the further benefit from the installation of solar panels, namely the electricity saving consequent upon some of the energy being fed into the house.
126. One approach to the calculation of the electricity savings is to compare electricity bills before and after the installation of solar panels. One might naturally think that the, so long as one were comparing averages over a reasonably long period of time, this might be a viable approach. This was the initial line taken by the Defendant.
127. In fact there are significant difficulties with this, some of which might be capable of being addressed by more detailed evidence than was adduced in this case, but some of which are probably imponderable:
- 127.1 The consumption of electricity is likely to change with the passage of time. The most obvious example of this at the moment, is the consequence of COVID-19 and the orders and guidance in respect of working from home and indeed at times staying at home, that have been in place since March 2020. Domestic electricity bills are likely to have been significantly higher than normal in the past 15 months. But it is easy to see why, even in

⁸ Somewhat surprisingly, there is no direct evidence of this before the court. However, the parties have worked on the assumption that this is correct and indeed the all important document "SAP calculations and 1st year returns" refers to "electrical saving" which only makes sense as an attempted calculation of such a saving consequently upon the solar generated electricity being fed into the house. Further, this is an assumption made by Mr Roberts, who apparently works in this field and has provided opinions to others on the correct calculation of benefit.

⁹ Article 37(1) of the 2012 Order anticipate that, in smaller installations, an export meter may not be fitted. Paragraph 6 of Appendix A to this judgment refers to paragraphs 131 and 132 of the Government's response to its pre-enactment consultation in relation to the FIT scheme.

more normal times, consumption patterns may vary. The number of people living in a house may change as young people move away from home to others move in. Working patterns and social habits may change. These factors could be addressed in witness evidence from the householder(s) but one can see that, even in dealing with changes in the past, the detail may be difficult to capture; in so far as potential future changes are concerned, the evidence is clearly speculative.

127.2 Consumption of electricity is greatly influenced by the age and efficiency of appliances. It is I think widely accepted that many modern domestic appliances are more efficient than their predecessors. Thus one might expect a gradual reduction in householder electricity consumption with the passage of time.

127.3 In the other hand, households typically have more electrical appliances now than they did even 10 years ago.

128. It is almost impossible to see how one could accurately capture these varied factors so as to make a meaningful comparison in electricity consumption over a period of time in order to assess any savings as a result of the installation of solar panels. This view is fortified by two further points made by the Claimant:

128.1 Mr Harper QC pointed out in submission that the Hodgson household's estimated annual usage in a bill dated 18 December 2013 was 16,214 kWh, whereas the estimated annual usage in a bill dated 14 September 2020 was 7,444.8 kWh (5,845.9 kWh daytime usage and 1,598.9 kWh night-time usage). This huge discrepancy was unexplained but suggests that great care would be required in predicting future usage from past bills.

128.2 A passage from an expert report, apparently commissioned by the Defendant and referred to in an Ombudsman decision relating to a lady called Mrs F that "*Comparison of electricity bills before and after the installation of PV (and to a lesser extent FIT statements) is an extremely unreliable method of valuing the benefit of self-generation for a number of technical behavioural and logistical reasons.*"

129. During the course of the trial, it became apparent that there was an alternative and probably much more reliable approach to the calculation of the electricity saving. As noted above, the calculation of the export tariff is based on a provision that deems 50% of the electricity generated to be exported. It would appear likely that a deeming provision such as this is based on an assumption as to the quantity of electricity exported and that such an assumption has at least some evidential basis. I am conscious that there is no direct evidence to support this, but it is likely that the Government, in fixing the rate for the export tariff would want to use a figure that so far as possible reflected an estimate of the true situation, so as to meet the conflicting needs to give appropriate incentives to install solar panels but not to overcompensate

householders. If 50% is a reasonable estimate of the quantity of electricity exported, the corollary is that 50% of the electricity is used internally within the house and that this therefore represents the best evidence of the saving to the householder.

130. I am fortified in this conclusion by noting that:

130.1 The calculation in the document SAP Calculation makes this very same assumption about the electricity saving;

130.2 Mr Roberts has used the same approach in advising others.

131. It follows that the best estimate of the past benefit received from solar panels operating under the FIT scheme is calculated by adding together:

Total electricity generated x generation tariff

50% of electricity generated x export tariff

50% of electricity generated x tariff that householder pays for electricity

132. In terms of the calculation of future benefits, this formula can be used as the basis also for the calculation. In particular, the assumption as to the apportionment of electricity generated between that deemed exported and that used locally remains the best available assumption. However, a number of contingencies come into play. Whereas the amount of electricity already generated and the tariffs payable for that electricity are matters of past fact, the calculation of future benefits requires assumptions to be made as to the following:

132.1 What electricity should be generated if it the householder continues to use the system;

132.2 What tariffs will be payable for such electricity;

132.3 What if any cost will be incurred in maintaining the system;

132.4 Whether in fact the householder will continue to use the system.

133. As regards the first of these, the obvious starting assumption is that the future generation will reflect past generation. If one looks at Appendix B, one can see that during the first 6 years¹⁰ of the system's life that the electricity generation has change from year to year, with the highest year (year 5) being nearly 20% higher than the lowest (year 4). As luck would have it, year 6 is almost exactly at the average of the first 6 years. This therefore is a suitable figure with which to start in forecasting the generation in years to come. Were the most recent year for which the generation figure is known to be some way from the average (as would have been the case if, on the facts here, the court had been projecting figures with only the first 4 or the first 5 years past

¹⁰ I exclude the seventh year because, although the electricity has already been generated and therefore the amount is capable of being known, in fact the seventh year figure is an estimate because the true figure is not known.

generation before it), it would have been more suitable to take the average of the years rather than the most recent figure.

134. It is likely that there will be some degradation in the system that will lead to a gradual reduction in efficiency. The manufacturer's specification gives an estimated lifetime of "25 years less power decrease" which seems to point to this risk. The Defendant concedes a 0.5% per annum degradation and, in the absence of expert evidence, this seems the best available figure. It is possible that expert evidence could be justified on this issue, though if degradation is as low as 0.5% per annum, it is likely that the costs of obtaining the evidence would be grossly disproportionate to the benefit to be gained from a small tweak in the figure, especially given the effect of other contingencies referred to below.

135. The likely tariff has been the subject of agreement between the parties. It is common ground that annual savings are likely to increase by 3.6% each year; and annual payments are likely to increase by 2.9% each year. Paragraph 105 of the Defendant's skeleton argument record the Defendant's reasoning for these percentages as being:

135.1 *"Future electricity bill savings will increase in line with electricity prices. This is because, as prices increase, the Claimant will save more (in monetary terms) per kWh generated by the system. Government figures show that the average annual increase in electricity prices over the period 2009 to 2019 was 3.6%."*

135.2 *"Future FIT payment rates will increase in line with the Retail Price Index ("RPI"). Under article 16(4)(a) of the Feed-in Tariffs Order 2012/2782, FIT payment rates must be determined in line with Annexes 3, 4, 4A and 5 to Schedule A to Standard Licence Condition 33. Under paragraphs 28 and 29 of Annex 4 to Standard Licence Condition 33, FIT payment rates are required to be adjusted in line with the RPI. ONS figures show that the average annual increase in the RPI over the period 2010 to 2020 was 2.9%."*

The Claimant does not agree the reasoning for the figures, but on the face of it appears convincing. It is likely that similar assumptions would be appropriate in other cases.

136. Accordingly, I am satisfied that, on the first two of the uncertainties identified in paragraph 132 above, the material allows a confident and reasonably accurate calculation.

137. There is no evidence before the court on the cost of maintaining a solar panel system. Given that the system is not mechanical, one might suppose that maintenance costs would not be high.

There is material that suggests that the inverter¹¹ may be subject to the need for periodic replacement. However, there is no material to suggest that the costs would be considerable. Again this is an area in which expert evidence could be of assistance, but again I suspect that the cost of such evidence would be out of proportion to the benefit to be derived from it. My approach is to factor what seems to be a relatively low risk into the wider discount for the contingencies set out at paragraph 138 below.

138. The risk that the householder will not in fact continue to use the system can be broken down into three separate risks:
 - 138.1 That the system is removed and not replaced even though it is continuing to work or could work with maintenance;
 - 138.2 That the solar panel system stops working and is beyond economic repair;
 - 138.3 That the householder ceases to live in the house.
139. The first of these possibilities is relatively unlikely. One would not expect the householder to remove the system if it continues to work and produce a return unless they were acting in a perverse way, which, for reasons identified above, would probably lead to any consequent loss of benefit not being recoverable. There is a small chance that the system would need to be removed for reasons relating to the repair of the roof or other building work to the house that made it necessary. However, if this were a realistic prospect in the foreseeable future, one could reasonably expect the householder to have adduced evidence on the point. No such evidence has been adduced here. I would therefore consider this as no more than a low chance that should be reflected in the overall discount for contingencies that should be applied but that plays a small part in it.
140. The second issue raises the question as to the lifetime of the system. I have noted above that the manufacturer refers to a lifetime of 25 years. In the absence of any better evidence, a lifetime of 25 years seems the proper starting point. However, the risk of the system failing inevitably increases with time and, having regard to the combined risk of the system failing and of the Claimant for some other reason not being able to benefit from the system, I do not in fact give credit for any benefit beyond the 20th year of the system's life in the calculations below.

¹¹ The inverter is the device which converts the DC electricity generated by the solar panel to AC electricity as is delivered by the national grid. The Defendant complains that there is no evidence to support the assertion that the inverter may need replacement. It is correct that there is no admissible evidence of this, but the risk is referred to in a report of a complaint to the Financial Ombudsman Service relating to Mr S, contained in the Supplemental Bundle. I should point out that there is equally no admissible evidence that the system "*operates through non-mechanical processes*" as the Defendant asserts. Nevertheless, I have accepted that to be so from common knowledge and from reading the background material in this case..

141. As to the third issue, there are two obvious reasons why the householder would cease to get the benefit of the solar panels, namely removal to another home or death. On the first of these, any Claimant who contend that this was likely could be expected to adduce evidence of that. There is no such evidence here. Further, if one accepts (as I do) that Claimant entered into the agreements on the basis of a representation that the panels would pay for themselves over 10 years, it is clear that, at least historically, the Claimant must have anticipated staying in the house for some time.
142. That said, people's circumstances may change as I have noted above. In the case of an older person approaching retirement (the position with the Claimant here), circumstances may arise which make removal desirable or even necessary, for example the desire to "downsize", the need for single storey occupation or the wish to live in an area considered more suitable for retired people. Equally, it may be that younger people are more likely to move for reasons relating to job opportunities or the schooling of their children or just because they can afford a larger house.
143. It is always possible for a Claimant to adduce evidence of such possibilities, though it must be borne in mind that the court may treat such evidence with considerable caution where a householder gives evidence of a plan to move to a new house without there being any obvious reason for such a move.
144. Further, there is inevitable the risk that the householder cannot enjoy the benefits of the system for its full life on account of premature death. The life expectancy of a male aged 64 is, according to the most recent data set in the National Life Tables for the UK issued on 24 September 2020 by the Office for National Statistics¹², a further 26.2 years to age 90. However, that does not mean that all 64 years will survive to that age. One can tell from looking those tables that there is a not insignificant risk that a man of the Claimant's current age will not survive till the presumed life expectancy of the solar panels, the risk being greater if the life of the system is taken to be 25 years rather than 20 years. This of course coincides with experience of life. Some healthy 64 year olds (the Claimant's current age) sadly do not survive to the age 82 (25 years from the date of installation) or even to age 77 (20 years from the date of installation). Absent expert evidence, it is not possible to use the life tables to work out an appropriate contingency deduction to be applied to the whole of a future period to reflect that risk, not least because although the tables can be used to calculate what percentage of males

¹² See <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/lifeexpectancies/datasets/nationallifetablesunitedkingdomreferencetables>.

aged 64 can be expected to have died by age 82¹³, that figure does not factor in the obvious point that most of those people will survive for at least some of the period (and therefore in so far as is relevant to the calculation in this case, will get some of the future benefit) and therefore without more would give a misleading answer.

145. The Defendant in supplemental submissions raises the argument that life tables referred to in the above give a life expectancy of 26.2 years, that is until 2047. That is correct. It asserts that, the corollary of this is that “*he is expected to live until 2047*”. That is incorrect. The life tables do not provide a prediction of the date at which a person will die. Rather they provide the material to determine average dates of death but for people of a particular age. The point can be tested by considering a group of 100 men aged 64. If the Defendant’s analysis is correct, each of the 100 men on the balance of probabilities will live to age 90.2. That is patently wrong.
146. Of course, the corollary of the Claimant not being able to gain the benefit of the presence of the solar panels is that someone else is able to do so. Whether he is alive but has sold the property or has died and one is concerned with the value of the property to his estate, it is possible that the solar panels would have some residual value that should be brought into the equation. However, for the reasons identified above in respect of the value of the solar panels immediately after acquisition, it is not self-evident that they have any significant value beyond their ability to generate electricity and it equally follows that they may have little if any affect on the valuation of the house, especially as they age.
147. The prospect of the system failing/requiring repair or of the Claimant moving or dying is of course at its lowest in the short term and highest in the long term. In assessing the risks, it seems to me most realistic to divide the future period into three terms and to apply to each of those periods a discount to reflect the chance that the potential benefit from the solar panels is not in fact achieved for one reason or another. Doing the best I can, I have come to these figures
 - 147.1 The remainder of the term of the loan (the next 3 years). The risks are low and any deduction would be relatively minimal, balancing the chance that that the Claimant in fact benefits from the system beyond age 77 (as to which see below).
 - 147.2 Between 2024 and 2034 (the period from the end of the loan to the 20th anniversary of installation, the Claimant being 67 years old to being 77), that he will not continue to benefit from the solar panels for all of part of this period for one reason or another at 40% of the total potential benefit for the period.

¹³ The most recent data set in the National Life Tables anticipates that, of 10,000 male live births, 87,743 are still alive at age 64 and 52,230 are still alive at age 82. Thus 35,513 men die between those ages, about 40% of those alive at age 64. The corresponding calculation for those still alive at age 77 shows that 67,122 would still be alive at the age of age 64, the numbers dying being 20,621, that is 24% of those alive at age 64.

147.3 From 2034 to 2039, when the system would be 25 years old and Mr Hodgson 84 years old, the chance of his continuing to benefit from the system are minimal. That chance is most easily dealt with as simply being equal to the chance that something in the next 3 years will affect Mr Hodgson's ability to continue to benefit from the system, offsetting the one risk/chance against the other.

148. Thus I make the following deductions from the anticipated benefits from the system to reflect the contingencies referred to at paragraphs 137 and 138 above:

148.1 Date to 2 May 2014: 0%

148.2 2 May 2014 to 2 May 2024: 40%

148.3 2 May 2024 to 2 May 2029: 100%.

It must be made absolutely clear that these figures are not intended to be a calculation of the risk of the adverse event happening during the particular period; rather they are a discount intended to have regard to the chance of the adverse event over the various periods of time stated.

149. The figures above reflect the assessment of risk on this particular case. There might be particular facts reflecting the risk in different cases. For example, a younger householder would likely have less of a mortality risk during the lifetime of the system. This would tend to reduce the contingency discount. On the other hand, it may well be that such a person has a corresponding longer working life, with a higher chance of needing to relocate for work related reasons or because changed circumstances (for example size of family) lead to a wish to move. It is not possible to factor all of the uncertainties in, but in the broad run of case, I anticipate that these percentage discounts would reflect a reasonable assessment of the risk. As Mr Riley Smith QC urged, it is particularly necessary to have regard to proportionality when one is dealing with cases of low value. Whilst these discounts might be thought somewhat arbitrary and lacking in a detailed evidential basis, the parties should bear in mind that, unless they are wildly out in a particular case, the overall calculation of loss is likely to be affected only to a minor extent.

150. In the context of personal injury litigation, where the court is concerned with future loss, it is normal for the court to calculate future loss by looking at the return on future investment and applying discount tables, the so-called Ogden Tables. The Damages Act 1996 established the proper basis for setting that rate. It would be possible similarly to use the Ogden Tables to set appropriate multipliers for the periods of future loss, both as to the current equivalent to the Claimant's future outlay and the current equivalent of his future benefit, using Table 35 (Discounting Factor for Term Certain) or 36 (Multipliers for Pecuniary Loss for Term Certain) of the Ogden Tables,. However the current discount rate of -0.25% has little effect on

multipliers for relatively short periods of loss¹⁴. Neither party argued for the application of such principles to her period of future loss/benefit and in my judgment it is an unnecessary complication. Were there to be considerable change in discount rates in the future, this issue might merit being revisited.

151. I have considered the Defendant's complaints that, even if my approach is wrong, the deductions are too large. I accept that the risks of the system failing so as to cease working and/or being removed are low. They are not however *de minimis*. I accept that a deduction to reflect the likely costs of maintenance should be modest, though I have no material to justify the Defendant's suggested figure of a 10% chance of £500 being incurred. I tend to agree with the Defendant's approach as to the level of risk based on the Claimant's mortality alone. The figures suggested by the Defendant using Table E to the Introduction to the Ogden Tables are though I think erroneous. The risk with which the court is concerned is the risk of the Claimant dying between now and 2034, in other words the chance that a man aged 64 surviving for 13 years,. Table E is not well suited to that calculation, not least because the maximum period dealt with in that table is 10 years, whereas the period with which we are concerned is 13 years although the figure arrived at by the Defendant is not greatly different to mine. The methodology suggested at paragraph 144 above is more likely to reach an accurate figure.
152. However, I substantially disagree with the Defendant's approach to the risk of moving house, for two reasons:
- 152.1 Whilst I accept that, on the evidence before the court, I should not assume any current intention on the part of the Claimant to move house, it is a simple fact of life that many people of all ages find that their circumstances change requiring them to move to other accommodation. In younger people this is more often for work reasons; in older people it is more often for health reasons - either way the risks are real.
- 152.2 I do not accept that any loss of benefit flowing from the move would be compensated by the value of the system or its potential to generate pecuniary benefit for the purchase. There is no evidence on the former issue, save a passing comment from the Claimant in evidence that if anything the presence of the solar panel system tended to depress rather than increase the value of the property. As to the latter, any benefit to the purchaser would simply not be a benefit to the Claimant for which he ought to give credit.

¹⁴ For example, the multiplier for loss of a term certain of 13 years is 13.21.

Issue 12 - As to the claim for sums already paid under the Finance Agreement:

- **What sums have been paid by the Claimant under the Finance Agreement?**
- **Should deductions be made to reflect:**
 - **The value of the Panels at the time of the contract? If so, what was it?**
 - **The pecuniary benefits generated from the Panels by the time of trial? If so, how much?**

153. In light of the analysis and findings above, the calculation of past figures is relatively straightforward. For the sake of convenience, I take the past period of loss to be the 7 year period from installation on 15 May 2014 to 15 May 2021. The payments due under the finance agreement for this period have been £120.67 per month x 84 months = £10,136.28. The Defendant concedes that, given the financial benefits both past and future should be deducted from the costs, both past and future, the Claimant is entitled to interest on that sum. That appears to be to be a correct concession. I would allow interest for a householder who has not had money available to him because of the need to repay debt that he should not have incurred to be reasonably estimated at 2% per annum, absent evidence of any specific circumstances. Given that the loss was incurred evenly over the 7 year period, I allow 2% per annum from the mid point, giving an interest claim of 7%, that is £709.54.

154. As to the benefits from the system, these can be taken from the Table at Appendix B. The first 6 years of figures are actual benefits, based upon known electricity generation and tariffs. Year 7 and following are estimated figures, applying the formulae referred to at paragraph 134 above (relating to degradation) and paragraph 135 above (relating to the assumed increases in tariffs and electricity prices).

155. The total benefit for the period is then £4,433.97.

Issue 13 - As to the claim for future sums payable under the Finance Agreement :

- **What sums are due and owing by the Claimant under the Finance Agreement?**
- **Should deductions be made for the anticipated pecuniary benefits that the Panels will generate? If so, how much?**

156. The approach set out above indicates that the correct approach to the figures is as follows:

156.1 Sums due and owing under the Finance Agreement - £120.67 x 36 = £4,344.12

156.2 Deduction for anticipated pecuniary benefit that the panels should generate:

	Theoretical benefit	Anticipated benefit
Years 8 – 10 (100% of the theoretical benefit)	£2,248.36	£2,248.36
Years 11 - 20 (60% of the theoretical benefit)	£8,911.85	£5,347.11
Years 21 – 25 (0% of the theoretical benefit)	£1,803.76	£ 0.00
Total		£7,595.47

Issue 14 - As to the claim for the cost of removing the Panels:

- **Is this cost recoverable in principle?**
- **If recoverable, what is the likely cost?**

157. As I have indicated above, the Claimant has not pursued this case at trial and therefore it is not necessary to determine the issue. I have recorded above:

157.1 the Defendant's argument as to the effect of Royscot Trust; and

157.2 the likely scepticism with which the court would approach a stated intention to remove the panels unless there was good cause.

Issue 15 - As to the claim for distress and inconvenience:

- **Is this recoverable in principle?**
- **If recoverable, in what amount?**

158. Whilst the Claimant's schedule of loss claims damages for distress and inconvenience, this claim was not pursued at trial. It is therefore not necessary to deal with it in detail, but the Defendant invites me to record what it says are the likely to be the difficulties in bringing such a claim.

159. Within its skeleton argument, the Defendant contends that following limits should apply to the recover of such damages should be in misrepresentations cases:

159.1 If such damages are recoverable by analogy with the position in contract (as held by Peter Pain J in Archer v Brown [1985] QB 401, it ought to be a requirement (just as much as it is in the contractual context) that a major or important object of the defendant's duty was (a) to give pleasure or peace of mind (Farley v Skinner [2001] UKHL 49) or (b) to avoid the claimant's distress (Heywood v Wellers (A Firm) [1976] QB 446).

159.2 In order to recover for inconvenience, it ought to be a requirement that some physical inconvenience must have been caused (e.g. where there is a failure by a landlord to repair a tenant's home - see Wallace v Manchester City Council [1998] 3 EGLR 38).

159.3 In any event, damages for inconvenience should only be recoverable where the inconvenience is of acute kind. The Defendant points out the exceptional nature of cases where such an award has been made (see for example Shelley v Paddock [1979] 2 QB 120 where the Claimant was deprived of title to a property that she thought she had acquired due to the defendant's fraudulent misrepresentations; Archer v Brown [1985] QB 401, where the Claimant became heavily in debt and deeply upset as a result of the misrepresentation; East v Maurer [1991] 1 WLR 461, where the claimant lost their livelihood as a result of the misrepresentation; A v B [2007] EWHC 1246 (QB), where the misrepresentation led the claimant to (wrongly) believe that he had fathered the

defendant's child; and in Kinch v Rosling [2009] EWHC 286 (QB), the claimant fell into bankruptcy as a result of the misrepresentation.

160. Whilst I would not exclude the possibility of a claim for distress and inconvenience being made out in particular circumstances, it is unlikely to be the case that such claims are commonplace.

CONCLUSION

161. For the reasons set out above, I am satisfied that:

- 161.1 The Claimant is entitled to recover in respect of payments already made and to be made under the finance agreement the following:

Past payments under finance agreement	£10,136.28
Interest on past payments under finance agreement	£709.54
Future payments under finance agreement	£4,344.12
Total	£15,189.94

- 161.2 The Claimant must give credit for past and anticipated future benefits from the solar panels as follows:

Past benefits from solar panels	£4,433.97
Future anticipated benefits from solar panels	£7,595.47
Total	£12,029.44

162. This leaves a net loss to the Claimant of £3,160.50 and he is entitled to judgment in that sum. I invite the parties to agree an order consequential upon this.
163. As this is a case within the capped costs pilot, costs should be the subject of summary assessment (see paragraph 3.2 of PD51W, which continues to apply by virtue of paragraph 1.2 of PD51W). If the parties cannot agree the amount and/or incidence of costs, it may be necessary to hold a further hearing, though if the only question in issue is that of summary assessment, I invite the parties to consider whether the matter might be better dealt with on paper.
164. Since both parties have submitted written submission that seek to persuade me to revise my draft judgment, there have been no substantial alterations to the judgment as a result of those submissions but I have handed down written judgment without further notice and an opportunity for the parties formally to apply for permission to appeal, I treat each party informally as having made such an application based on their written submissions. I adjourn those applications on condition that by 4pm on 20 August 2021, any party wishing to pursue the application for permission to appeal lodge written confirmation to this effect, coupled with any further written submissions relied on. Since those written submissions are directed to the parts of the draft judgment that are said to merit clarification or correction, it may well be that any

application for permission to appeal is broader in ambit than the current written submissions. It is not my intention to limit the matters that can be raised should any party seek permission from me.

165. I propose to deal with any application for permission that are pursued on paper unless the relevant party persuades me that an oral hearing should take place. I correspondingly extend the time for the service of an Appellant's notice to 21 days from the later of 20 August 2021 or the date on which I determine any application for permission to appeal which is pursued beyond that date.

APPENDIX A - AGREED FACTS IN RELATION TO PECUNIARY BENEFITS

Two sources of the pecuniary benefits

1. The Claimant's solar panel system is capable of generating pecuniary benefits from:
 - a. savings to his electricity bills; and
 - b. payments under H.M. Government's Feed-In Tariffs ("**FIT**") scheme.
2. The electricity generated by the system is first made available for use in the Claimant's home to the extent required at the time of generation; any surplus is exported to the grid. This type of self-consumption (i.e. of the electricity generated by the system) reduces the Claimant's need to import electricity from the grid which, in turn, reduces the amount of his electricity bills.
3. The FIT scheme was created under sections 41 to 43 of the Energy Act 2008 ("the 2008 Act") through the Feed-In Tariffs (Specified Maximum Capacity and Functions Order) 2010/678 ("the **2010 Order**") and modifications to Standard Condition 33 of Electricity Supply Licences. On 1 December 2012, the 2010 Order was revoked and replaced by the Feed-In Tariffs Order 2012/2782 ("**the 2012 Order**") (see Schedule 3, paragraph 1 of the 2012 Order).
4. Under the FIT scheme, the Claimant is entitled to two types of payment (see the definitions in the pre-ambule and see paragraphs 3 and 7 of Part 1 of Schedule A to Standard Condition 33):
 - a. Generation Payments (which are calculated by applying the applicable tariff to the number of kWh generated by the system during the relevant period); and
 - b. Export Payments (which are calculated by applying the applicable tariff to 50% of the number of kWh generated during the relevant period).

The deeming provisions under the FIT scheme

5. The Claimant's system (as is common for other small-scale installations receiving payments under the FIT scheme) has been fitted with a generation meter but it has not been fitted with an export meter. Therefore, while it has been possible (using the generation meter) to measure the actual number of kWh generated by the system, it has not been possible (without an export meter) to measure the number of those kWh that were self-consumed/exported.
6. For the purposes of the FIT scheme, the number of kWh exported is deemed to be a percentage of the number of kWh generated during the relevant period. That percentage is determined annually by the Secretary of State under article 37(1) of the 2012 Order (and, previously, article 14 of the 2010 Order). Under article 37(4) the percentage "must be based on an estimate of the proportion of electricity generated by the category of installation that would be exported". It has

been 50% since inception of the FIT scheme. The rationale for these deeming provisions is clear from paragraphs 131 and 132 of the Government’s response to its pre-enactment consultation in relation to the FIT scheme (*Feed-in tariffs: Government’s response to the summer 2009 consultation, Department for Energy and Climate Change, February 2010*):

“We believe that there is a strong case for ensuring that all electricity flows benefiting from FITs, including exports, should be subject to accurate measurement. This will be particularly important as exports from small scale generation becomes a larger part of the electricity market. We note however the points raised in regard to the economics of providing export meters for small scale generators and potentially stranded costs arising from the installation of export meters in advance of the roll-out of smart meters. We therefore propose that, strictly as an interim measure, that at the very small scale, the amount of exports for the payment of export tariffs can be deemed...”.

The deeming provisions have been confirmed as only an interim measure. The FIT Scheme closed on 1 April 2019 (see Article 7A(1) of the 2012 Order). Its closure does not affect the Claimant (or any other consumer whose installation was accredited under the FIT scheme before that date). It has been replaced by the Smart Export Guarantee (“**SEG**”) scheme which was also created under sections 41 to 43 of the 2008 Act, through the Smart Export Guarantee Order 2019/1005 (“*the 2019 Order*”) and modifications to Standard Condition 57 of Electricity Supply Licences. Under the SEG scheme, eligible installations must now be fitted with an export meter (see paragraph 2.1.3 of Schedule A to Standard Condition 57).

APPENDIX B – BENEFITS CALCULATOR

Default Values		
Average annual energy in years 1-6	2490	kWh
Total Amount Payable	£14,480.40	
Starting FIT Export Rate	4.77	p
Assumed Export		
Self-Consumption Savings = 100% - Export%	50%	
Electricity Unit Price	14.22	kWh
Electricity Price Inflation	3.6%	
PV Module Degradation	0.5%	
Retail Prices Index	2.9%	

Results	A	B	C	D	E	F	G	H	I	J
Year	System Generation	FIT Generation Tariff Rate	Generation Payable	FIT Export Tariff Rate	Export Payable	Total FIT Income	Electricity Unit Price	Savings Achieved	Total Financial Benefits	Cumulative Benefits
1	2345	14.38	£ 340.48	4.77	£ 56.31	£ 396.79	13.56	£ 158.99	£ 555.78	£ 555.78
2	2454	14.61	£ 359.88	4.85	£ 59.74	£ 419.62	12.69	£ 155.71	£ 575.33	£ 1,131.11
3	2586	14.79	£ 384.25	4.91	£ 63.78	£ 448.03	13.25	£ 171.32	£ 619.35	£ 1,750.46
4	2296	15.16	£ 350.67	5.03	£ 58.19	£ 408.86	14.66	£ 168.30	£ 577.16	£ 2,327.62
5	2734	15.78	£ 434.55	5.24	£ 72.19	£ 506.74	14.09	£ 192.61	£ 699.35	£ 3,027.97
6	2525	16.20	£ 412.36	5.38	£ 68.48	£ 480.84	17.04	£ 215.13	£ 695.97	£ 3,722.94

7	2512	16.67	£ 418.81	5.54	£ 70.47	£ 489.27	17.65	£ 221.76	£ 711.03	£ 4,410.00
8	2500	17.15	£ 428.80	5.70	£ 72.51	£ 501.31	18.29	£ 228.59	£ 729.90	£ 5,100.00
9	2487	17.65	£ 439.03	5.86	£ 74.61	£ 513.64	18.95	£ 235.64	£ 749.28	£ 5,900.00
10	2475	18.16	£ 449.50	6.03	£ 76.78	£ 526.28	19.63	£ 242.90	£ 769.18	£ 6,600.00
11	2463	18.69	£ 460.22	6.21	£ 79.00	£ 539.23	20.34	£ 250.39	£ 789.61	£ 7,400.00
12	2450	19.23	£ 471.20	6.39	£ 81.29	£ 552.50	21.07	£ 258.11	£ 810.60	£ 8,200.00
13	2438	19.79	£ 482.44	6.57	£ 83.65	£ 566.09	21.83	£ 266.06	£ 832.15	£ 9,100.00
14	2426	20.36	£ 493.95	6.76	£ 86.08	£ 580.03	22.61	£ 274.26	£ 854.29	£ 9,900.00
15	2414	20.95	£ 505.73	6.96	£ 88.57	£ 594.31	23.43	£ 282.71	£ 877.02	£ 10,800.00
16	2402	21.56	£ 517.80	7.16	£ 91.14	£ 608.94	24.27	£ 291.43	£ 900.37	£ 11,752.00
17	2390	22.19	£ 530.15	7.37	£ 93.78	£ 623.94	25.14	£ 300.41	£ 924.34	£ 12,677.00
18	2378	22.83	£ 542.80	7.58	£ 96.50	£ 639.30	26.05	£ 309.67	£ 948.97	£ 13,626.00
19	2366	23.49	£ 555.75	7.80	£ 99.30	£ 655.05	26.99	£ 319.21	£ 974.26	£ 14,601.00
20	2354	24.17	£ 569.00	8.03	£ 102.18	£ 671.19	27.96	£ 329.05	£1,000.24	£ 15,602.00
21	2342	24.87	£ 582.58	8.26	£ 105.15		28.96	£ 339.19	£ 339.19	£ 15,942.00
22	2330	25.60	£ 596.47	8.50	£ 108.20		30.01	£ 349.64	£ 349.64	£ 16,292.00
23	2319	26.34	£ 610.70	8.75	£ 111.33		31.09	£ 360.42	£ 360.42	£ 16,653.00
24	2307	27.10	£ 625.27	9.00	£ 114.56		32.21	£ 371.53	£ 371.53	£ 17,025.00
25	2296	27.89	£ 640.19	9.26	£ 117.88		33.37	£ 382.98	£ 382.98	£ 17,408.00

APPENDIX C – ACTUAL BENEFITS IN YEAR 1 TO YEAR 6

	A	B	C	D	E	F	G	H	I
Year	System Generation	FIT Generation Tariff Rate	Generation Payable	FIT Export Tariff Rate	Export Payable	Total FIT Income	Electricity Unit Price	Savings Achieved	Total Financial Benefits
1	2345	14.38	£ 340.48	4.77	£ 56.31	£ 396.79	13.56	£ 158.99	£ 555.78
2	2454	14.61	£ 359.88	4.85	£ 59.74	£ 419.62	12.69	£ 155.71	£ 575.33
3	2586	14.79	£ 384.25	4.91	£ 63.78	£ 448.03	13.25	£ 171.32	£ 619.35
4	2296	15.16	£ 350.67	5.03	£ 58.19	£ 408.86	14.66	£ 168.30	£ 577.16
5	2734	15.78	£ 434.55	5.24	£ 72.19	£ 506.74	14.09	£ 192.61	£ 699.35
6	2525	16.20	£ 412.36	5.38	£ 68.48	£ 480.84	17.04	£ 215.13	£ 695.97
7	2512	16.67	£ 418.81	5.54	£ 70.47	£ 489.27	17.65	£ 221.76	£ 711.03
Total									£ 4,433.97

APPENDIX D – PREDICTED BENEFITS FROM YEAR 8 TO YEAR 25

	A	B	C	D	E	F	G	H	I
Year	System Generation	FIT Generation Tariff Rate	Generation Payable	FIT Export Tariff Rate	Export Payable	Total FIT Income	Electricity Unit Price	Savings Achieved	Total Financial Benefits
8	2500	17.15	£ 428.80	5.70	£ 72.51	£ 501.31	18.29	£ 228.59	£ 729.90
9	2487	17.65	£ 439.03	5.86	£ 74.61	£ 513.64	18.95	£ 235.64	£ 749.28
10	2475	18.16	£ 449.50	6.03	£ 76.78	£ 526.28	19.63	£ 242.90	£ 769.18
TOTAL FOR YEARS 8 - 10									£ 2,248.36
11	2463	18.69	£ 460.22	6.21	£ 79.00	£ 539.23	20.34	£ 250.39	£ 789.61
12	2450	19.23	£ 471.20	6.39	£ 81.29	£ 552.50	21.07	£ 258.11	£ 810.60
13	2438	19.79	£ 482.44	6.57	£ 83.65	£ 566.09	21.83	£ 266.06	£ 832.15
14	2426	20.36	£ 493.95	6.76	£ 86.08	£ 580.03	22.61	£ 274.26	£ 854.29
15	2414	20.95	£ 505.73	6.96	£ 88.57	£ 594.31	23.43	£ 282.71	£ 877.02
16	2402	21.56	£ 517.80	7.16	£ 91.14	£ 608.94	24.27	£ 291.43	£ 900.37
17	2390	22.19	£ 530.15	7.37	£ 93.78	£ 623.94	25.14	£ 300.41	£ 924.34
18	2378	22.83	£ 542.80	7.58	£ 96.50	£ 639.30	26.05	£ 309.67	£ 948.97
19	2366	23.49	£ 555.75	7.80	£ 99.30	£ 655.05	26.99	£ 319.21	£ 974.26
20	2354	24.17	£ 569.00	8.03	£ 102.18	£ 671.19	27.96	£ 329.05	£1,000.24
TOTAL FOR YEARS 11 - 20									£8,911.85
21	2342	24.87	£ 582.58	8.26	£ 105.15	£ 0	28.96	£ 339.19	£ 339.19
22	2330	25.60	£ 596.47	8.50	£ 108.20	£ 0	30.01	£ 349.64	£ 349.64
23	2319	26.34	£ 610.70	8.75	£ 111.33	£ 0	31.09	£ 360.42	£ 360.42
24	2307	27.10	£ 625.27	9.00	£ 114.56	£ 0	32.21	£ 371.53	£ 371.53
25	2296	27.89	£ 640.19	9.26	£ 117.88	£ 0	33.37	£ 382.98	£ 382.98
TOTAL FOR Years 21 - 25									£1,803.76