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Gough Square Chambers' consumer credit column: August 2021

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Status: **Published on 31-Aug-2021** | Jurisdiction: **United Kingdom**

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Ruth Bala, Lee Finch, Sabrina Goodchild and Thomas Samuels are all specialist consumer credit counsel at Gough Square Chambers. On a regular basis, they will share their views with Practical Law Financial Services subscribers on topical developments or key issues relating to consumer credit.

In the August 2021 column, Sabrina Goodchild considers the recent decision in *Hodgson v Creation Consumer Finance Ltd [2021] EWHC 2167 (Comm)*. The case concerns alleged misrepresentation, in the context of a fixed-sum loan agreement to purchase solar panels, which resulted in a claim for damages against the defendant lender under sections 56 and/or 75 of the Consumer Credit Act 1974 (CCA).

Solar panel misselling: an effective test case?

Introduction

In *Hodgson v Creation Consumer Finance Ltd [2021] EWHC 2167 (Comm)*, HHJ Pearce, sitting as a judge of the High Court, considered the numerous and extensive arguments raised on liability and quantum in solar panel misselling cases.

Although the decision is of significant importance to claimants on liability, this column focuses on the decision on quantum, in particular the measure of loss, in circumstances where the benefits received by claimants from the solar panel systems requires assessment by the courts, usually without the assistance of expert evidence.

Background to the litigation

The claimant contracted to purchase a solar panel system (System), funded by a fixed sum loan agreement for a term of ten years with the defendant lender (Loan Agreement). The claimant's case was that he entered into both agreements in reliance on a representation from the supplier's representative that the solar panel system would pay for itself within ten years through savings on energy bills and feed-in-tariff (FIT) payments (constituted by generation and export payments) received from the government. The alleged misrepresentation resulted in a claim for damages against the defendant lender under sections 56 and/or 75 of the Consumer Credit Act 1974 (CCA).

When viewed in comparison to the thousands of similar claims, historically and currently, faced by various lenders in relation to representations allegedly made by multiple different solar panel suppliers, the case was notably unremarkable. However, it was effectively treated, at least by the claimant and the judge, as a test case, following an unsuccessful application by the defendant lender to transfer the case to the County Court.

The issues on liability ranged from whether the alleged representation was in fact made, to whether the alleged representation was a statement of fact or opinion, contributory negligence and estoppel. In relation to quantum, the parties put in issue the appropriate measure of loss, what to award in relation to past and future sums payable under the Loan Agreement, whether the cost of removing the System was recoverable and the recoverability of damages for distress and inconvenience.

High Court's analysis

Following concessions by the defendant lender that the alleged representation was a statement of fact and was false, HHJ Pearce found for the claimant on all issues of liability. Expressly intended to guide County Court first instance decisions, the decision on liability should be closely considered for distinguishing features in advance of any contested trial. However, of most interest is HHJ Pearce's judgment on the quantification of loss and precisely what payments must be made by the defendant lender to put the claimant in the position that they would have been in had the representation not been made, as required by section 2(1) of the Misrepresentation Act 1967.

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The judge held that the appropriate measure of damages was the amount paid (and to be paid if full repayment had not yet taken place) under the Loan Agreement, minus the benefit that the claimant had received, and in the future will have, as a result of installation of the System, with necessary deductions. The burden of proving benefit was placed firmly on the defendant lender.

Past benefit

Departing from the process commonly adopted by County Courts of comparing pre- and post-installation energy bills and FIT statements to identify past benefit, the judge favoured the following mathematical calculation: ((total electricity generated from installation to date in KwH x generation tariff) + (50% of electricity generated from installation to date x export tariff) + (50% of electricity generated x tariff claimant pays for electricity)).

The calculation assumes that claimants will use, within the home, 50% of electricity generated. This assumption was used by the judge as:

> "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" (para 129).

Future benefit

Adopting as a starting point the same mathematical calculation for future benefits, the judge considered that the calculation should also take into account a number of contingencies. These contingencies were:

> "not the known or the predictable [which would require separate pleading and proof by the claimant], 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" (para 110).

In summary:

- **Electricity generation.** Starting from the average electricity generation, the electricity generation should be reduced by 0.5% each year to reflect degradation of the system.
- **Electricity tariffs.** Electricity savings, based on government figures for annual increases in electricity prices, to increase by 3.6% per year. FIT payments (which are index-linked), based on average annual increases in RPI, to increase by 2.9% per year.
- **Maintenance costs.** Noting that there was no evidence before the court on the cost of maintaining the system, this was a "relatively low risk" to be incorporated into the factor identified below.
- **Continuation of use of the System by household.** Factoring in the following, the judge divided future benefit into three periods:
  - the low chance that the System is removed and not replaced even though it is continuing to work, or could with maintenance continue to work;
  - the System stops working and is beyond economic repair; and
  - the householder ceases to live in the house.

  Having regard to the chance of the adverse event over the three periods, the judge made no deduction from the date of trial to the end of the Loan Agreement term, a 40% deduction from the end of the Loan Agreement to the 20th year post-installation, and a 100% deduction from the 20th year to the 25th year post-installation. HHJ Pearce envisaged that different facts may increase or decrease the contingency discount. However:

  > "in the broad run of case, I anticipate that these percentage discounts would reflect a reasonable assessment of the risk [...] Whilst these discounts might be thought somewhat arbitrary and lacking in 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" (para 149).

Applying the above formula, and with the assistance of multiple Excel spreadsheets annexed to the judgment, the claimant was left with a judgment sum, inclusive of 2% interest, of just £3,160.50.

Comment

HHJ Pearce intended to offer a "practical framework" (para 11), which would "provide the greatest assistance" (para 17) for resolving solar panel misselling claims, including by providing extensive obiter dicta. With the prevalence of bulk litigation increasing, this case is an important example of how such litigation can be managed and what can be achieved when a single case is placed before the High Court for consideration.

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Whilst an admirable attempt to devise a formula of universal application, HHJ Pearce's decision on quantum has potential to disproportionately complicate quantum submissions. County Court judges will now surely face arguments that the methodology itself should not be applied, perhaps due to distinguishing features such as evidence from the supplier on how to calculate benefit, and arguments from both sides that the various assumptions adopted in calculating the contingencies should be varied. Indeed, claimants are likely to add further contingencies for consideration by judges that are "capable of knowledge". In circumstances where such claims are often listed for three hours or one day, such complexity is unwelcome.

It remains to be seen how County Courts will manage such submissions and the extent to which they are persuaded to depart from HHJ Pearce's judgment. Further, as Hodgson did not consider rescission, parties will be unaided by the decision if such a remedy is pursued by claimants.

Gough Square Chambers' consumer credit columns

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