Neutral Citation Number: [2023] EWHC 1018 (Ch)

Case No: BL-2021-CDF-000008

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
BUSINESS LIST (ChD)

Cardiff Civil and Family Justice Centre 2 Park Street Cardiff CA10 1ET

Date: 5 May 2023

Before:

MR JUSTICE ZACAROLI

- -

Between:

ERYL ROSSER **Claimant**

- and –

PACIFICO LIMITED **Defendant** **(FORMERLY BRONTE CAPITAL LIMITED)**

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- -

Catherine Collins (instructed by **Lewis Lewis & Co Ltd**) for the **Claimant**
Mr Jason Jones-Hughes, the sole director, represented the **Defendant**

Hearing dates: 18, 19 and 20 April 2023

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JUDGMENT

Mr Justice Zacaroli:

Introduction

1. The claimant ("Mrs Rosser") claims damages for alleged misrepresentations made by or on behalf of the defendant ("Pacifico") prior to the purchase by Mrs Rosser from Pacifico of a leasehold property, apartment 1 at 15 Hamilton Street, Pontcanna, Cardiff (the "Property") on 8 July 2016.

2. Mrs Rosser claims that the Property was marketed and sold with the benefit of two bedrooms on the second floor, one at the front and one at the back, and with the benefit of a velux rooflight window (the "Velux Window") in the front bedroom. In fact there was no planning consent for the Velux Window, which subsequently had to be removed, leaving the front room on the second floor without any source of natural light or ventilation. As such it was unsuitable to be used as a bedroom.

3. The claim is brought under s.1 of the Misrepresentation Act 1967, 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 that the facts represented were true".

4. Accordingly, it is for Mrs Rosser to establish that:

   (1) an actionable representation or representations was or were made to her;

   (2) one or more of those representations was untrue;

   (3) she relied on it or them in entering into the contract to purchase the Property; and

   (4) as a result she suffered loss.

5. If Mrs Rosser establishes those matters, then the burden falls on Mr Jones-Hughes, as the controlling mind of the defendant, to prove that he had reasonable grounds to believe, and did believe up to the time the contract was made, that the representation or representations was or were true.

The Parties

6. Mrs Rosser provided a witness statement and attended for cross-examination. Pacifico appeared by its sole director, Mr Jason Jones-Hughes ("Mr Jones-Hughes"). Due to the fact that he and members of his family were suffering from Covid, and live in Sydney Australia, the trial was conducted remotely via CVP (apart from opening argument, where Mrs Rosser and her Counsel, Ms Collins, were present in court, because Mr Jones-Hughes's request that the trial be dealt with wholly remotely was received too late).

7. I found both Mrs Rosser and Mr Jones-Hughes to be honest witnesses, doing their best to assist the Court.

The facts in more detail

8. In 2016 Mrs Rosser was seeking to buy an investment property, with a minimum of two bedrooms, in Cardiff. She was introduced to the Property, which had recently been renovated by Pacifico, by estate agents, Jeffrey Ross (the "Agents"). There were no particulars provided, but she visited the Property and immediately liked it.

9. 15 Hamilton Street was originally one house. It was developed by Pacifico in 2015, by turning it into two apartments, one at the front and one at the rear. Planning permission was sought on Pacifico's behalf by MTS Surveyors. It was granted on 5 February 2015. The plans accompanying the permission show the apartment spread over three floors: a kitchen area and a living area on the ground floor; one large room on the first floor, described on the plans as a bedroom, with a bay window and a bathroom; and on the second floor a further room that extends across the whole floor into the eaves at the front and into a dormer window at the rear, described as a bedroom, with an ensuite bathroom to the rear.

10. As built, however, the Property was configured differently. As shown on the plans that accompanied the lease of the Property (and which later accompanied the draft sale and purchase agreement provided to Mrs Rosser), the ground floor is configured as a kitchen and dining area, the first floor comprises a lounge plus bathroom, and the second floor is divided into two rooms, one at the front and one at the rear, divided by an internal wall. Both rooms are described as bedrooms. There is no suggestion that any of these alterations constituted a breach of planning permission, apart from the installation of the Velux Window.

11. When Mrs Rosser viewed the Property, she had not seen any of the plans (either those accompanying the planning permission or those accompanying the lease). She believed, however, that the first floor was intended to be a lounge, having a TV socket and power points configured, she said, as she expected to find in a lounge or other living area. She also believed that the two rooms on the second floor were intended to be bedrooms, as they were carpeted and had power points in places where one would expect beds to be placed so as to accommodate bedside lamps.

12. It is common ground that, following the division of the second floor into two rooms, the only light source to the front room was the Velux Window. The other bedroom benefitted from the dormer window to the rear.

13. Although Mr Jones-Hughes does not recall precisely when the Velux Window was installed, he now accepts that it was installed during the development of the Property in 2015. He also accepts that he now understands that it needed planning permission, and that no permission had been obtained. He says that he did not understand this at the time. The plans accompanying the planning permission showed the external elevation from the rear and sides, but not the front, suggesting that no permission was given for any works affecting the front external elevation. That is confirmed by condition 6, which states that the permission did not extend to any works to the front elevation that may require planning permission, and that no details of any such works had been submitted.

14. The relevant building regulations were, however, complied with. A certificate of completion in respect of building regulations was received on 6 July 2016, giving the

date of completion as 5 July 2016. This refers to the conversion of 15 Hamilton Street into one two-bedroom apartment and one three-bedroom apartment, the latter referring to the Property. This certificate is irrelevant so far as planning permission is concerned. At the bottom, the following appears: "This Certificate does not cover clearance of planning conditions". It is common ground that the front bedroom on the second floor complied with building regulations because, as a result of the Velux Window, it had its own source of natural light and ventilation. Without the Velux Window, however, it would not have complied with building regulations and could not lawfully have been used as a bedroom.

15. On the Monday (13th June 2016) following Mrs Rosser's visit to the Property, she received an email from Ms Jessica Taylor of the Agents. Ms Taylor referred in this email to the front room on the second floor as a bedroom, noting that there were no built in wardrobes in it, but that she could arrange to put Mrs Rosser in touch with the builder if she wished to discuss it with him.

16. Subsequently, Mrs Rosser's solicitors received lease plans from Pacifico's solicitors. These labelled the first floor room as a lounge, the front second floor room as "Bed 01", and the rear second floor room being labelled "Bed 02".

17. During the conveyancing process, Mr Jones-Hughes signed, on behalf of Pacifico, a Law Society Information Form, in which he confirmed, relevantly, that:

    (1) the seller was not aware of any breaches of planning permission conditions, or work that did not have all necessary consents; and

    (2) there were no planning issues to resolve.

18. Mrs Rosser was satisfied and went ahead with the purchase, completing on 8 July 2016. She paid the asking price, £299,950.

19. In October 2017, she received a letter from the Council notifying her that there was an unauthorised rooflight installed in the roof of the Property, and warning her of potential enforcement action.

20. While ordinarily the installation of a rooflight might be undertaken as a permitted development, the right to do so had been removed by an Article 4 Direction as a result of the Property being in a conservation area Accordingly, planning permission had been required, but had not been obtained.

21. Mrs Rosser was advised that she would be unable to obtain retrospective planning consent. Accordingly, to avoid enforcement action she had the Velux Window removed, and – in order to maintain the Property as a two bedroomed apartment – converted the living room on the first floor to a bedroom, and installed a bathroom in the front room on the second floor.

Representations

22. Mrs Rosser contends that, on the basis of the above matters, the following representations were made to her:

(1) That the front room on the second floor was capable of being used as a bedroom; and

(2) That the seller believed, and had reasonable grounds for believing, that there were no breaches of planning permission conditions or any work that did not have all necessary consents.

23. Whether and, if so, an actionable representation is made is to be judged objectively, according to the impact that whatever is said may be expected to have on a reasonable representee in the position and with the known characteristics of Mrs Rosser: *MCI WorldCom International Inc v Primus Telecommunications INC* [2004] EWCA Civ 957, per Mance LJ at §30.

24. In the special conditions in the sale agreement, at §6, it was agreed that neither party could rely on any representation made by the other unless made in writing by the other or his conveyancer (although this did not exclude liability for fraud or recklessness).

25. The first alleged representation is based (insofar as it was a representation in writing) on the fact that the front second floor room was referred to as a bedroom in Ms Taylor's email of 13 June 2016 and in the plans of the Property provided to Mrs Rosser by being appended, first, to the lease and, second, to the draft contract.

26. Mr Jones-Hughes submitted that referring to the room in this way does not convey a representation that it *is* a bedroom or that it is intended to be, or be used as, a bedroom. He pointed to the fact that the plans submitted for planning permission purposes, and which are annexed to the permission as granted, identified the room on the first floor as a bedroom, and that the second floor comprised one large space, designated as a bedroom, without a dividing wall down the middle. He rightly submitted that the fact that the second floor was, as developed, divided into two rooms was not a breach of planning permission, that there was an inherent flexibility in the internal configuration of the rooms, and that it would have been up to whoever purchased the Property to decide how to configure the rooms.

27. I accept those points. They do not, however, answer the case advanced on behalf of Mrs Rosser. In my judgment the fact that the front room on the second floor was referred to as a bedroom in the plans supplied to Mrs Rosser, and in Ms Taylor's email, would reasonably lead a person in the position of Mrs Rosser to believe that the room was at least capable of lawfully being used as a bedroom. That is reinforced by reference to the context in which these statements were made, which includes the fact that the Property, as viewed by Mrs Rosser, included two rooms on the second floor, each carpeted, with their own separate natural light and ventilation source, and with electrical fittings at least consistent with their being used as bedrooms.

28. There was a debate between the parties as to which are the more important plans: those accompanying the planning permission, or those annexed to the lease. Mr Jones-Hughes maintained that the latter are by far the most important, because it is those that define what was permitted as part of the development, and because they indicated a proposed development into a two bedroom apartment with two bathrooms. He submitted, rightly, that the differences between the proposed development, and the Property as built, did not involve any breach of the planning permission, and that it

was up to whoever purchased the property to decide on the internal configuration of rooms, e.g. as bedrooms or living rooms.

29. In my judgment, both sets of plans are important, but for different purposes. The planning permission plans are of most importance in defining what was in fact *permitted*. But they are of no relevance at all in determining what was represented between Pacifico and Mrs Rosser, because they were not referred to at all in that context. For that purpose, it is the lease plans, alone, that are important. Those *were* provided to Mrs Rosser, as part of the communications designed to enable Mrs Rosser to decide whether to purchase the Property. What was conveyed to her by – among other things – those lease plans is of central relevance in determining what representations were made to her.

30. The second alleged representation is based on the express statement in the Law Society Property Information Form, that the seller was not aware of any breaches of planning permission conditions, or of work that did not have all necessary consents. It is well established that such an express statement is capable, where the facts are not equally known to the representor and representee, of carrying with it a further implied statement by the person making it, that there are reasonable grounds for that belief: see *Smith v Land and House Property Corporation* (1884) 28 ChD 7, per Bowen LJ at p.15.

31. In *Brown v Raphael* [1958] 1 Ch 636, which involved the sale of an absolute reversion in a trust fund, the vendor's solicitors represented that the annuitant was "believed to have no aggregable estate." The Court of Appeal, in upholding the decision of Upjohn J, concluded that it is enough for the principle identified in *Smith's* case to apply that as between the two parties, one is "better equipped with information or the means of information than the other." On the facts of that case, the vendor's solicitors were said to be (at its lowest) in a far stronger position to ascertain the relevant facts. In those circumstances, and because it related to a matter of vital importance to the value of the reversion being sold, an implied representation was imported that there were reasonable grounds for the opinion.

32. I note that *Brown v Raphael* has been applied in the case of standard conveyancing enquires, for example in *William Sindall Plc v Cambridgeshire County Council* [1994] 1 WLR 1016, per Hoffmann LJ, at p.1025 (where he noted that the statement by a vendor that he is not aware of defects in title implies that he has taken reasonable steps to ascertain whether any exists).

33. Mr Jones-Hughes objected that he had no greater access to information than Mrs Rosser. If anything, it was the other way around. That was because, although he owned Pacifico, who had developed the Property, he was – for most of the time during the development of the Property – in Australia, and it was carried out through the agency of others. Subcontractors carried out the development, and MTS acted on Pacifico's behalf in obtaining planning permission and buildings regulations consents. He himself has never even seen the Property until some way through the development process.

34. He submitted that Mrs Rosser, on the other hand, saw the Property before deciding to purchase it and had conveyancing solicitors acting for her who could, and indeed did, make enquiries on her behalf. Mr Jones-Hughes points in particular to the fact that

Mrs Rosser's solicitors asked, by email of 27 June 2016, to see a copy of the plans referred to in the planning consents and that, in their reply, Pacifico's solicitors said that, while they were not available, they could be viewed on Cardiff Council's Planning Portal. Mrs Rosser did not know whether her solicitors followed up on this, and she did not present any evidence directly from them. Mr Jones-Hughes submitted, however, that it was within Mrs Rosser's power to ascertain what planning permission had been obtained, and to compare it with the features of the building she visited.

35. I do not accept these submissions. If Mrs Rosser's solicitors had seen the planning permission plans, those would merely have revealed that no planning permission had been sought or obtained for the installation of the Velux Window as part of the development in 2015. That was of no consequence, however, if the Velux Window had merely replaced one that was already there. Mr Jones-Hughes said himself that other properties in the road did have velux windows installed.

36. Mrs Rosser's solicitors could, of course, have sought clarification of this from Pacifico, but that just reinforces the point that, as between purchaser and vendor in this case, it was the vendor that had access to superior information. It was Pacifico that originally purchased 15 Hamilton Street and carried out the development, engaged the necessary agents to assist in ensuring that requisite consents had been obtained, and that knew what features already existed on the Property prior to the development. None of this was known to Mrs Rosser.

37. Mr Jones-Hughes complained that it seemed that the burden for discovering the true position in relation to planning consents was being put unfairly on him, in circumstances where Mrs Rosser had experienced conveyancing solicitors acting for her, who could and should have investigated the position more fully. I understand how it appears that way to Mr Jones-Hughes, but his complaint misses the point that the conveyancing process operates on the basis that the purchaser is entitled to ask questions of the vendor – rather than having to make its own enquiries from scratch – and is entitled to rely on a vendor who has the greater knowledge about what has been done, with what permissions, to the property having made its own reasonable enquiries before answering those questions. The Information Form itself contains a clear warning to the vendor of the importance of providing accurate answers.

38. Accordingly, I consider that the answer "no" given by Mr Jones-Hughes to question 4.4 in the Information Form carried with it the implied representation that Pacifico had reasonable grounds for believing that (among other things) there was no work that did not have all the necessary consents.

Falsity

39. The front bedroom on the second floor was not lawfully capable of being used as a bedroom, because there was no planning permission for the Velux Window and, without it, there being no natural light or ventilation, the use of the room as a bedroom would not have complied with building regulations. I understood this to be common ground but even if not, it was the clear, unequivocal and unchallenged view of the claimant's expert, Mr Davies, to whom I refer in more detail below. Accordingly, the first representation I have identified above was false.

40. In relation to the second representation, it is not alleged that Mr Jones-Hughes was in fact aware of work for which the requisite consents had not been obtained. Mrs Rosser's case is advanced solely on the basis that Pacifico did not have reasonable grounds for believing that planning consent had been obtained in respect of the Velux Window.

41. Mr Jones-Hughes accepted that in answering the questions in the Information Form, he had not gone back to the planning permission documents, but relied on his memory as to what was in them, and as to what work had been carried out. He did not make enquiries of anyone else in answering question 4.4.

42. Mr Jones-Hughes contended that there had been nothing to put him on notice of the need to obtain planning permission in respect of the Velux Window, so that his answer "no" to question 4.4 in the Information Form was based on reasonable grounds. He said that he was unaware even that the Velux Window had been installed. He said that although Pacifico is essentially just him, there being no other directors or employees, it largely operated through agents, in particular the subcontractor who carried out the development. He maintained that he had not been personally involved in the decision to install the Velux Window, and that this was the sort of matter which he would have delegated to the sub-contractor to deal with.

43. I accept that the decision to install the Velux Window was likely taken by the subcontractor. This reflects the fact that, for all but about a couple of weeks, Mr Jones-Hughes was in Sydney and necessarily much more reliant on the local contractor than if he had been present in the country.

44. I do not accept, however, that he was unaware – at least by the time of the sale to Mrs Rosser – of the existence of the Velux Window. He said in evidence that he was certainly aware of the decisions made to install a dividing wall on the second floor, and to abandon the original plan for a bathroom to the rear of the second floor. He also said that he visited the Property when plaster boarding was in process. When first asked about this, he accepted – although he has no recollection of seeing the Velux Window – that this would have been done only after the Velux Window and first fix electrics had been installed.

45. He later suggested that at the time of his visit the plaster boarding may have been taking place only in the rear property, so that it was not necessarily the case that the Velux Window had already been installed. I prefer, however, the answer he first gave, which was untainted by having considered the implications of accepting that he had seen the Velux Window. Moreover, he accepted that the dividing wall was in place when he visited the Property. Had the Velux Window *not* been in place by that time, the front room on the second floor would have had no light source. That would in itself have been memorable, and would be bound to have led to a discussion with the subcontractor about how it might be remedied (the decision already having been taken that there would be no bathroom on the second floor). His evidence – which I accept – that he does not actually recall focusing at all on the presence of the Velux Window is more consistent, therefore, with the Velux Window having been there at the time.

46. This is also reinforced by the fact that, as he accepted, he saw the lease plans at the time, which described the front room as "Bed01". He said that this was clearly a

typo, because the bedroom at the rear, with the dormer window, was clearly intended to be the principal bedroom. That does not detract, however, from the fact that the plan indicated, at the least, the possibility of the front room being used as a bedroom. Given the presence of the dividing wall which was also shown on the plans, that was only possible if there was a light source to the front bedroom.

47. Mr Jones-Hughes nevertheless relies on the fact that as he was, for most of the time, thousands of miles away and had not played any part in deciding to install the Velux Window, and that no-one, including his subcontractor, had brought to his attention that it might give rise to planning complications, it was reasonable for him to believe that there was no issue here. He also relies on the fact that planning issues in a conservation area are not at all straightforward so he could not be expected to have realised there was an issue.

48. Both the fact that he was far away when the development was being done, and so was not close to the detail as to what had been done, and the fact that planning issues in a conservation area are complicated, reinforce in my judgment, however, the need to make appropriate enquiries before answering question 4.4 in the Information Form.

49. Accepting (in Mr Jones-Hughes' favour) that the Velux Window was installed without planning permission due to an innocent mistake – probably because responsibility for installing it, on the one hand, and for ensuring that it complied with planning requirements, on the other, fell between two stools, the fact remains that the sort of reasonable enquiries which the second representation implies included checking the actual work done against the planning permission which had been granted.

50. Accordingly, while not calling into question in any way Mr Jones-Hughes' integrity, skill or expertise in developing properties, I conclude that he did not in the circumstances of this case have reasonable grounds for believing that there was no work that lacked a requisite consent.

Reliance

51. Mrs Rosser's evidence was that she was particularly taken with the flexibility of the accommodation at the Property afforded by having two rooms on the second floor that were capable of being used as bedrooms. That was because she was considering a number of longer term options for the Property, including a possible future home for her children to use, or a place for her to retire to, and because she intended to let it out on either short or long term lets in the meantime. Accordingly, the representations that the front room on the second floor was capable of being used as a bedroom and that there were reasonable grounds for believing that no work had been carried out without all requisite consents were matters which she relied on in entering into the contract to purchase the Property.

52. She said that if she had known that the Velux Window was installed illegally, such that the front room on the second floor could not be used as a bedroom, then she would not have proceeded with the purchase.

53. I accept this evidence. The extent to which the flexibility afforded by the fact that the front room on the second floor could be used as a bedroom materially affected the

value of the Property is a matter I consider below. Irrespective of that, however, I accept Mrs Rosser's evidence that, to her, it was an important consideration, as it meant that the Property could be used by her or her family, and offered to tenants, with the benefit of an additional living space on the first floor.

Loss

54. In claims under s.1 of the Misrepresentation Act 1967, a claimant is entitled to the tortious (not contractual) measure of loss, namely the claimant is to be put in the position they would have been in had the misrepresentation not been made.

55. On the basis of Mrs Rosser's evidence (which I accept) that had the representations not been made she would not have proceeded with the purchase of the Property, the damages are to be assessed in the first instance as the difference between the amount she paid for the Property and its value at the time without the benefit of the Velux Window and thus without the ability to use the front room on the second floor as a bedroom.

56. I address the quantum of the loss suffered below, but merely note here that I am satisfied that some loss was caused to Mrs Rosser by reason of the misrepresentations made to her.

57. Pacifico is accordingly liable under s.2(1) of the 1967 Act unless it can establish that it had reasonable grounds for believing that the representations made were true.

Reasonable grounds

58. I have already concluded, in determining that the second representation was false, that Mr Jones-Hughes did not have reasonable grounds for believing that the work carried out had been done with all requisite consents. It necessarily follows that Pacifico cannot discharge the burden of proving that it had reasonable grounds to believe that the second representation was true.

59. It also follows that Pacifico cannot discharge that burden in respect of the first representation. The failure to make the same enquiries as in relation to the second representation, means that he did not have reasonable grounds to believe that the front room on the second floor was capable of being used as a bedroom.

60. Mr Jones-Hughes contends that Mrs Rosser's solicitors could have downloaded the planning permission plans for herself, and could therefore have discovered the lack of permission for the Velux Window. I have already concluded that even if Mrs Rosser's solicitors had seen those plans, although they would have indicated that no planning permission had been sought for a Velux Window, they would not have revealed that the Velux Window was installed for the first time as part of the development to which the planning permission related.

61. In any event, it is no defence that Mrs Rosser could, through her own enquiries have discovered the true position: see *Laurence v Lexcourt Holdings Ltd* [1978] 1 WLR 1128. In that case, there was a representation that the premises could be used as offices during the period of a 15 year lease, whereas the planning permission was limited to a two year period. The question arose whether it was a defence that the decision of the planning authority, which limited the permission to use as offices to two years, was

available to anyone who went looking for it. Mr Brian Dillon QC, sitting as a deputy High Court Judge, held at p.1137A-E, that there was no such defence. At p.1137D-E he said:

> "where there has been a misrepresentation it is well established that it is no defence to the person who has made the misrepresentation to say "Oh well, the party who was misled could have checked and found out the facts for himself, and he really has only himself to blame that he relied on me and did not make the inquiries that he might have made." I think that that is covered by the well known decision in *Redgrave v. Hurd* (1881) 20 Ch.D. 1."

Quantum of damages

62. The parties were permitted to adduce expert valuation evidence. The claimant served a report of Mr Timothy Davies, a Chartered Building Surveyor and RICS Accredited Valuer. He records his instructions as being to provide his opinion on:

(1) The market value of the subject property in July 2016 had the correct position of risk of enforcement proceedings requiring the removal of the roof light to the front roof plane, been made aware to the purchaser (i.e no front bedroom at second floor level).

(2) The market value of the subject property based on the revised layout as it now stands (i.e a one bedroom apartment, with two bathrooms).

(3) Whether the attic room (which is now a second bathroom) at the front of the property (2nd floor level), could have been utilised as a second bedroom in the absence of a roof light/window.

63. The defendant has not served any expert report of its own. At the pre-trial review, I directed that the defendant should indicate in writing to the claimant whether it required Mr Davies to attend trial to be cross-examined, and in the absence of such indication Mr Davies' report would stand as his evidence in chief, and he would not be required to attend court to be cross-examined.

64. No such indication was given by the defendant. Mr Davies has not, therefore, attended trial to be cross-examined.

65. During the course of the trial, however, I raised with Ms Collins a concern in respect of Mr Davies' report, namely that he appeared to have based his opinion on the premise that if the front room on the second floor could not be used as a bedroom, then the Property was to be valued as a one bedroom apartment:

(1) He recited (as I have noted above) that he was instructed to value the Property *as it now stands* as a one bedroom apartment with two bathrooms;

(2) Insofar as he expressly valued the Property as at July 2016 had the risk of enforcement proceedings in relation to the Velux Window been made aware to the purchaser, he said (at para 5.1 of the report) he did so on the basis that it had only one bedroom (on the second floor), with a kitchen/diner on the ground floor and a

shower room and lounge on the first floor. Again, this appeared to be a valuation of a one bedroom apartment.

(3) He said that it was an accepted principle of property valuation that, generally, additional bedrooms equate to an increase in value (provided there is not a significant imbalance of accommodation).

66. This concern was exacerbated by the fact that although Mr Davies said (at para 18.3) that the valuation was based on "comparable information and our knowledge of the property market locally", no details were provided of any comparables relied on. In fact, the only potentially comparable property referred to in the report was the sale at about the same time of the rear apartment at No.15 Hamilton Street. According to the lease plans for this property, it comprised a kitchen/diner/lounge area on the ground floor, and two bedrooms on the first floor, each with their own bathroom. That was the same basic configuration as the planning permission plans outlined for the Property, except that the bedrooms in the Property were on the first and second floors. Even without the use of the front room on the second floor as a bedroom, therefore, the Property was capable of being configured in a way that was similar (though not identical) to the rear apartment. The rear apartment sold for £295,000 in July 2016.

67. The conclusion that Mr Davies valued the Property on the basis of it being a one bedroom apartment is reinforced by the fact that, having noted, at para 16.5, that the rear apartment benefited from having two double bedrooms, he went on immediately, at para 16.6, to refer to the general principle that additional bedrooms generally equate to an increase in value. It appears, therefore, that the reason he did not regard the price achieved on the sale of the rear apartment at about the same time as a relevant comparable, was because it had two bedrooms.

68. Ms Collins accepted that although Mr Davies' report was the only expert evidence before the Court, and although Pacifico was not entitled to require Mr Davies to attend Court to be cross-examined, the Court is not bound to accept Mr Davies' evidence. His evidence is to be weighed in the balance with all other evidence: see *Coopers Payen Limited v Southampton Container Terminal Limited* [2003] EWCA (Civ) 1223. That case involved the evidence given by a single joint expert, but the same principles must apply where the only expert evidence is that adduced by one party. At §42, Clarke LJ, with whom the other members of the Court agreed, said:

> "All depends upon the circumstances of the particular case. For example, the joint expert may be the only witness on a particular topic, as for instance where the facts on which he expresses an opinion are agreed. In such circumstances it is difficult to envisage a case in which it would be appropriate to decide this case on the basis that the expert's opinion was wrong. More often, however, the expert's opinion will be only part of the evidence in the case. For example, the assumptions upon which the expert gave his opinion may prove to be incorrect by the time the judge has heard all the evidence of fact. In that event the opinion of the expert may no longer be relevant, although it is to be hoped that all relevant assumptions of fact will be put to the expert because the court will or may otherwise be left without expert evidence on what may be a significant question in the case. However, at the end of the trial the duty of the court is to apply the burden of proof and to find the facts having

> regard to all the evidence in the case, which will or may include both evidence of fact and evidence of opinion which may interrelate."

69. This, and the concurring judgment of Lightman J in the same case, need to be seen in light of the more recent Court of Appeal decision in *Griffiths v TUI (UK) Ltd* [2021] EWCA Civ 1442, pe Asplin LJ at paras 46-50, where she pointed out that when Clarke LJ said that it was difficult to envisage circumstances when a trial judge would reject an expert's opinion based on facts which were agreed, he was not contemplating a case where the expert's conclusion was unsubstantiated by the reasoning, or the reasoning was inadequate or incomplete.

70. My concerns at the report having been raised during the trial, enquiries were made to see whether Mr Davies was available to attend remotely. He was not, and nor did he have the time to provide a supplemental report in answer to some further questions put to him by Mrs Rosser's solicitors (as supplemented by me). Mrs Rosser did not wish to apply to adjourn the trial.

71. Ms Collins accepted that it appeared, from para 19.1 and the cross-reference to para 5.1 of his report, that Mr Davies had arrived at his valuation of the apartment, as at July 2016, on the basis that it was a one-bedroom apartment, but with living accommodation on the first floor. She submitted that I should nevertheless take note of the fact – as was agreed between Mr Jones-Hughes and Mrs Rosser – that the internal configuration of a property is a matter of choice, so that the living room could have been used as a bedroom. This is true, but the likely impact of this on the value of the Property is a matter of expert opinion, and there is nothing in Mr Davies' report that addresses the point. All that there is, is that the valuation is expressed to be of a Property with only one bedroom (given the loss of the front room on the second floor), and his view that, generally, adding additional bedrooms equates to an increase in value. This strongly suggests that the rationale for the decrease in value is linked, primarily at least, to the reduction in the number of bedrooms.

72. Ms Collins said that in the alternative I should be satisfied that the value of the Property in 2016 was no less than its value in November 2020, as valued by Mr Davies at para 19.2 of his report (£250,000). That was because it was his evidence that prices had generally increased since 2016, so that whatever value it had in 2020 could not be *less* than its value in 2016. I accept that proposition, as a matter of principle but, as I have already noted, Mr Collins' valuation as at 2020 suffers from the same apparent flaw as his valuation as at 2016.

73. Ms Collins submitted that I should assume that, although Mr Davies was expressly instructed to value the Property as a one bedroom apartment, he was aware from his visit to the Property that it is currently being used as a two bedroom apartment, with the second bedroom being on the first floor. She also submitted that this is apparent from paragraph 3.8 of his report, where he noted that what was the first floor lounge is "now being utilized as a bedroom", and paragraph 3.10 of his report, where he referred to Mrs Rosser's view that the Property would have been of lower value with the room configuration as it now stands, i.e. "1 bedroom and bathroom at second floor level", as opposed to what she thought she was buying, namely two double bedrooms of similar size at second floor level.

74. Ms Collins also submitted that in the absence of any contrary expert evidence adduced by Pacifico, and in light of the fact that Pacifico has not challenged Mr Davies' evidence or required him to be cross-examined, I should be slow to reject his conclusions.

75. As was made clear in *Griffiths v TUI*, however, it is the Court's role to assess the weight to be given to the evidence and consider whether it proves what needs to be proved (see, for example, Nugee LJ at para 82). Although Mr Davies knew how Mrs Rosser was utilizing the Property at present, that does not alter the fact that, on the face of his report, he expressly based his valuation on it being a one bedroom apartment, and appears to have dismissed the sale of the rear apartment at about the same time as a relevant comparable because it has two bedrooms.

76. For these reasons, I am not persuaded that Mr Davies' report provides me with reliable evidence as to the value of the Property in 2016 on the basis that it was a two bedroom, one bathroom apartment, but with living space only on the ground floor. I stress that this is not to cast any doubt on Mr Davies' expertise or the validity of the views that he has expressed. It is because he was asked to provide, and has provided, a valuation of the Property, both in 2016 and as of 2020, on the basis that it is a one bedroom apartment.

77. It is therefore necessary for me to do the best I can on all the available evidence to determine whether, and if so by how much, the value of the Property was less than the amount paid for by Mrs Rosser, as a result of the loss of the use of the front room on the second floor as a bedroom.

78. The available evidence includes those parts of Mr Davies's report which are not premised on the Property being a one bedroom apartment, specifically his opinion that the addition of bedrooms generally equates to an increase in valuation, provided there is not a significant imbalance of accommodation. It is in this context that Ms Collins' submission as to the flexible nature of the Property is relevant. With the benefit of the front room on the second floor as a bedroom, then the Property *could* be configured as a three-bedroomed apartment (as indeed was reflected in the buildings regulation completion certificate).

79. I accept that this flexibility would have been reflected in *some* additional value. I note, however, that it would also have resulted in a greater imbalance in accommodation. If the bedrooms were fully occupied, then that would have meant that six people would be sharing the small kitchen/dining/living space on the ground floor, and also sharing only a single bathroom. As against that, however, the flexibility offered by having the use of two bedrooms on the second floor was that there was a much greater living space available, which was wholly separate from the kitchen/dining space on the ground floor. I am satisfied that, even without the assistance of expert evidence addressing that point specifically, the loss of such flexibility would have been reflected in some loss of value of the Property.

80. The evidence also includes, as the only reference to a potentially comparable property, the sale of the rear apartment at about the same time for £295,000. As Ms Collins rightly pointed out, although the configuration of the rear apartment (comprising kitchen/diner/living space on the ground floor, with two double bedrooms on the floor, or floors, above) is similar to that which was permitted for the Property, there are nevertheless significant differences. These include: (1) the size and layout of the

ground floor in the rear apartment is better suited to a separation between kitchen, dining and living areas; (2) there appears to be a greater outdoor space associated with the rear apartment; (3) the second floor bedroom in the Property suffers from reduced ceiling height, which is not a problem affecting the two bedrooms on the first floor of the rear apartment; and (4) the rear apartment was sold with the benefit of two bathrooms, whereas the Property had only one bathroom at the time it was sold to Mrs Rosser.

81. This last point alone would be likely, in my view, to have been reflected in a difference in valuation. While (as Ms Collins submitted in a different context) the cost of installing a bathroom may not all be reflected in an increase in the value of the property, I note that the cost of doing so in the Property was in fact approximately £17,500.

82. Ms Collins took me to other evidence contained in the bundle, comprising an appraisal of the Property, carried out in 2019 by the Bryan Long Partnership. This was not prepared with a view to providing expert evidence, and Mrs Rosser in any event does not have permission to rely on any other expert evidence. In a letter dated 31 July 2019 to Mrs Rosser, the Property was valued as at that date at £275,000 (with the benefit of two bedrooms and two bathrooms). The letter also concluded that the Property, as a three bedroom apartment was "fairly represented in the sum of £320,000". That would imply a difference in value of approximately £45,000 as a result of the addition of a third bedroom. There is, however, no consideration given to the imbalance in accommodation, as I have noted above, that this would give rise to.

83. There is also in the bundle a letter from Bryan Long Partnership to Mrs Rosser's solicitors dated 29 July 2019. This stated that it attached a letter to Mrs Rosser. Although the only letter to Mrs Rosser is the one to which I have referred, and which was dated two days later, I infer that it was this letter that was attached. That is because the letter to Mrs Rosser of 31 July 2019 does not refer to any earlier appraisal or correspondence. It appears, therefore, to have been the only appraisal carried out by Bryan Long Partnership. In the letter of 29 July 2019, Byron Long Partnership expressed the view that the difference in value between a one-bedroom and twobedroom apartment was in the region of £35,000.

84. Doing the best that I can with the above evidence, I consider that the value of the Property without the ability to use the front room on the second floor as a bedroom was undoubtedly less than the amount Mrs Rosser paid for it. I also consider that it was less than the value of the rear apartment, the best evidence of which is the price paid for it at about the same time. In reaching a view as to the amount by which the Property was reduced in value by the loss of the use of the front room on the second floor as a bedroom, I take into account, in particular: (1) the fact that the Property could have been configured as having three rooms usable as bedrooms, if the Velux Window had remained; (2) the expert evidence of Mr Davies that the addition of a bedroom would generally lead to an increase in value (as corroborated by the appraisals carried out by Bryan Long Partnership); (3) this needs to be set against the imbalance in accommodation that this would have given rise to in relation to the Property; (4) the disadvantages which the Property had as compared to the rear apartment, including that it had only one bathroom as opposed to two.

85. In light of these matters, and recognising that this is necessarily an imprecise evaluation doing the best I can with the available evidence, I conclude that the Property had a value

as at July 2016 in the region of £270,000. The capital loss suffered by Mrs Rosser on purchasing the Property (rounding up to the nearest £100) was therefore £30,000.

86. Ms Rosser also claims for the additional stamp duty she was required to pay on purchasing the Property, as a result of the inflation in the purchase price. I accept that this forms a head of loss, being something that would not have been incurred had the representations not been made. Because this was a second home, stamp duty was paid at a higher rate. The total amount paid, based on a purchase price of £299,950 was £13,996. On the basis of my conclusion that the capital loss was £30,000, which is (rounding up) 10% of the price paid, then the same percentage of the stamp duty paid represents recoverable loss. Accordingly, I award under this head £1,399.60.

87. Mrs Rosser is also entitled to recover as loss flowing from the misrepresentation the costs associated with the removal of the Velux Window and making good the roof and ceiling. That cost was £2,535 inclusive of VAT. In addition, Mrs Rosser paid £208.32 for professional advice in relation to the enforcement notice.

88. Subject to one point, these are in my judgment recoverable heads of loss. Mr JonesHughes contends that Mrs Rosser ought not to be able to recover for the cost of replacing the Velux Window and making good the roof and the ceiling because she unreasonably refused to accept his offer to do so for no charge.

89. Mr Jones-Hughes did indeed offer to do this work at his own expense, in a letter from his solicitors dated 14 November 2017. Following this, Mrs Rosser reasonably explored alternative ways in which ventilation and natural light might be accessed by the front room on the second floor, and this formed the basis of discussions with Mr Jones-Hughes. On 8 December 2017, his solicitors relayed to Mrs Rosser's solicitors a message from Mr Jones-Hughes that he was happy to help regarding the request for an air conditioner and "sun shute", and offered to commence work in the early part of 2018. Mrs Rosser's solicitors responded on 11 December 2017 to say that in principle she was happy to proceed on the basis of Mr Jones-Hughes' solicitors' letter of 8 December, but there were a couple of points to make. On 15 December 2017, Mr Jones-Hughes' solicitors wrote back, to say he would agree to the proposals in the letter of 11 December 2017, but that "prior to commencing works however we will require your acknowledgment that by completing these works to your Clients reasonable satisfaction your client acknowledges that this is in full and final settlement of any responsibility on my Client's part for the alleged breach of planning regulations." The proposals canvassed in that correspondence were not taken forward, as Mrs Rosser decided to put a bathroom in the front room on the second floor. It was her evidence, which I accept, that she decided that it would be easier and less disruptive overall for the works in relation to the Velux Window to be carried out at the same time as, and by the same people who undertook, the work in relation to the bathroom.

90. In my judgment, in light of this correspondence as a whole, Mrs Rosser did not fail reasonably to mitigate by not accepting Mr Jones-Hughes' offer to replace the Velux Window. Although it was not expressly said on Mr Jones-Hughes' behalf that the initial stand-alone offer to remove the Velux Window was offered in full and final settlement of any claims, that was undoubtedly said in relation to the works that it was tentatively agreed would be carried out as a result of the discussions following the initial offer. It was certainly not made clear that the initial offer remained without being coupled with a full and final settlement. Mr Jones-Hughes suggested that the full and final settlement

language in his solicitors' letter only related to liability arising out of the alleged breach of planning regulation, so would not have prevented Mrs Rosser from pursuing a claim in misrepresentation against him. I do not agree that the language was limited in that way. More importantly, it was reasonably read by Mrs Rosser as excluding any such claim. Moreover, I consider it was reasonable for Mrs Rosser to employ the same person to instal the bathroom and to replace the Velux Window, given they related to the same room.

91. Finally, Mrs Rosser also claims the cost of installing the bathroom in the front room on the second floor, in the sum of approximately £17,300. Ms Collins submitted that this fell within the principle applied in *East v Maurer* [1991] 1 WLR 461. In that case, the defendant hairdresser sold one of two salons in neighbouring areas, and falsely represented to the purchaser that he would not personally be working at the other salon. The claimant sought to run the salon notwithstanding that the defendant was continuing to work nearby but failed. He could only sell the premises at a loss, some three years later. The primary damages awarded by the judge were for the capital loss on the purchase of the business. The claimant was also, however, awarded damages equal to the loss of profits during the period he owned the premises.

92. The Court of Appeal agreed that damages were recoverable under this head, although they reduced the amount payable. Beldam LJ, with whom the other members of the Court agreed, cited with approval Lord Denning MR in *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158, at p.167, a case in which the facts were similar to those in *East v Maurer*:

> "The person who has been defrauded is entitled to say: I would not have entered into this bargain at all but for your representation. Owing to your fraud, I have not only lost all the money I paid you, but, what is more, I have been put to a large amount of extra expense as well and suffered this or that extra damages. All such damages can be recovered: and it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen. For instance, in this very case Mr. Doyle has not only lost the money which he paid for the business, which he would never have done if there had been no fraud: he put all that money in and lost it; but also he has been put to expense and loss in trying to run a business which has turned out to be a disaster for him. He is entitled to damages for all his loss, subject, of course to giving credit for any benefit that he has received."

93. I reject this head of claim. The cost of putting in a new bathroom does not flow from either misrepresentation (whereas in *East v Maurer* the loss incurred in running the business that was rendered loss making by the seller's misrepresentation could be seen as loss flowing from the misrepresentation). I do not think that the cost of installing a bathroom is properly seen as a loss at all. Mrs Rosser knew that she was buying an apartment with only one bathroom (and my valuation of the Property in 2016 is premised in part on the fact that it had only one bathroom). In return for spending money on installing a bathroom she received something of value, i.e. the bathroom once installed. Whether that (as Ms Collins doubted) was reflected in an increase in value in the Property by the same amount is irrelevant.

Conclusion

94. For the above reasons, I find that Pacifico is liable to compensate Mrs Rosser for the misrepresentations made in the course of the sale of the Property to her, and that Mrs Rosser is entitled to damages quantified as follows:

(1) £30,000, being the difference between the value of the Property in 2016 and the amount paid by her for it;

(2) £1,399.60, being the increased amount of stamp duty paid by her referable to that difference;

(3) £2,535, being the cost of removing the Velux Window and making good in relation to the roof and ceiling; and

(4) £208.32, in respect of the cost of obtaining advice.

95. The total amount recoverable is therefore £34,142.92.

96. I re-iterate (as did Ms Collins in closing) that neither Mrs Rosser's claim, nor this judgment, calls into question in any way the quality of the work carried out by Pacifico under Mr Jones-Hughes' direction, nor the personal integrity of Mr JonesHughes. My conclusion that misrepresentations were made is based on the steps that I consider Pacifico ought to have taken, as the entity which developed the Property and offered it for sale, in order to ensure that planning permission had in fact been obtained for the Velux Window which it was decided to install during the development.