Neutral Citation No. [2012] NIQB 12

Ref:	**McCL8419**
Delivered:	**28/02/12**

*Judgment: approved by the Court for handing down (subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISON

BETWEEN:

FRANK McBREARTY
and
PATRICIA McBREARTY

Plaintiffs:

and

AIB GROUP (UK) PLC,
Trading as FIRST TRUST BANK
and
FIRST TRUST INDEPENDENT FINANCIAL ADVISERS LIMITED

Defendants:

McCLOSKEY J

Introduction

[1] This judgment determines the liability issues in two inter-related actions, which have been conjoined. Mr. and Mrs. McBrearty, who are husband and wife, are the Defendants in the first action and the Plaintiffs in the second action. I shall describe them as "the Plaintiffs" throughout this judgment. I remind myself at the outset that the onus rests on the Plaintiffs in their action (which is the crucial one) and that this behoves them to establish their case on the balance of probabilities. The two Writs were issued, in quick succession, in September and October 2009. In the first action, AIB Group (UK) PLC ("*the Bank*") seeks to recover loans allegedly due and owing by the Plaintiffs in the amounts of approximately £87,000 and €173,000. There is no discernible dispute between the parties regarding the calculation of these

amounts. In the second action, the Plaintiffs allege that the Bank and First Trust Independent Financial Advisers Limited ("*IFA*") were guilty of breach of contract, negligence and breach of fiduciary duty in the investment of the Plaintiffs' monies of €1,000,000. The Plaintiffs claim damages of some €342,000 accordingly. This deceptively simple framework gave rise to a trial of twelve days' duration. This discrete fact prompts some reflection on the attempted compromise, ultimately unsuccessful, among the parties prior to the initiation of proceedings and the repetition of this failure at the beginning of the trial, following the court's strong exhortations. One is inevitably left with the thought that the engagement of an experienced, imaginative and persistent mediator at a much earlier stage of the disputes in which the parties have been embroiled – coupled with the absolutely indispensable elements of mutual goodwill, flexibility and preparedness to be guided by experienced legal representatives - might have been productive.

[2] While the Bank and IFA are legally separate entities, each has manifestly strong connections with the other. IFA is the Bank's financial investment arm and both entities were at all material times operating from the same premises. It is common case that the whole of the Plaintiffs' investment was placed with ASI. In very brief compass, the Plaintiffs make the case that this investment was effected following the execution of certain advisory and brokerage functions on the part of the two Defendants. Ultimately, the case made by the Plaintiffs against both Defendants was, further to the pre-trial directions of the Commercial Judge, detailed in the form of a statement of case signed by the first-named Plaintiff, Mr. McBrearty. Each of the Plaintiffs gave evidence at the trial. The evidence received by the court included a report prepared by one Mr. Peelo, a chartered accountant. The court heard evidence from seven defence witnesses in total.

<u>The Plaintiffs' Case</u>

[3] The Plaintiffs' statement of case contains the following basic allegations:

(a) They were assured that following an investment period of five years "*… we would walk away with the capital amount of €1,000,000 plus €80,000 and that the fund would increase by a minimum of 5% per annum*".

(b) Hand in hand with investing the €1,000,000, the Plaintiffs would receive a "back to back" loan of €675,000 (which was deployed by the Plaintiffs for sundry purposes) from the Bank to facilitate a USA property investment.

(c) The Plaintiffs' monies were to be invested in separate funds - €700,000 in the "ASI Fully Guaranteed Fund, together with an €80,000 allocation" and €300,000 in a "low to medium risk fund … [which] … could be moved at any time if it was losing money".

(d) The Plaintiffs emphasized at all times that they were not prepared to expose their money to any risk.

(e) The Plaintiffs trusted the Bank at all times.

(f) The post-investment advice, information, management and level of service generally provided by the Defendants were highly unsatisfactory.

[4] Certain facts are not in dispute between the parties. These include the following:

(a) The total amount which the Plaintiffs had available to invest was around €800,000. A loan of €675,000 from the Bank to them (*infra*) augmented this figure to €1,000,000.

(b) The Plaintiffs' monies of €1,000,000, duly enlarged further by a so-called "allocation" – effectively an inducement, or enticement - of €80,000, provided by the Bank, were invested by IFA in the twofold manner set out immediately above, in May 2006. The total investment fund was €1.08M.

(c) This total fund of €1.08M was invested in the so-called "ASI Selective Investment Bond" ("*the Bond*"). Within the Bond, there were three separate funds. Some €700,000 was invested in two separate "*guaranteed*" fund, with the balance invested in a "low to medium risk" fund. All three were American Security International Limited ("ASI") funds and were offshore investments.

(d) In the language of the financial services industry, the Bond was described in the formal investment documents as a life assurance policy. In the Policy Schedule, the Plaintiffs were described as the policyholders and theirs were the lives assured. The commencement date was 27th April 2006 and the policy term was described as "*whole of life*". The total amount invested was fractionally under €1.08 million.

(e) The arrangements among the parties included a "back to back" loan of €675,000 from the Bank to the Plaintiffs. It was not in dispute that this loan was part and parcel of the arrangements in their totality.

(f) In June 2006, the Bank made a further loan of €200,000 to the Plaintiffs, secured by an assignment of their investment, the Bond. This increased the Plaintiffs' gross borrowings from the Bank to €875,000 and this new loan agreement superseded its predecessor.

(g) In May 2007, the Plaintiffs withdrew €200,000 from the Bond.

(h) In June 2007, the Plaintiffs closed the smallest of the three funds, transferring the balance to the larger fund.

(i) In February 2008, the Plaintiffs made a formal complaint to IFA regarding their investment and the charges being levied.

(j) Between April and December 2008, the Plaintiffs rejected a series of compromise proposals put to them by the Defendants.

(k) In September 2008, the Plaintiffs withdrew a further €200,000 from the Bond, which was applied to reduce their indebtedness to the Bank.

(l) In January/February 2009, the Plaintiffs surrendered the balance of their investment fund (some €548,000) and, following surrender charges of some €30,000, the net balance of approximately €518,000 was lodged in a new Bank loan account. At this stage, the Plaintiffs' indebtedness to the Bank was around €800,000.

[5] The Plaintiffs' case hinges critically on promises and representations which they say were made to them by the Defendants' servants and agents before the arrangements described above were finalised among the parties. The Plaintiffs claim that they were thereby induced into making these arrangements. The arrangements struck among the parties had two basic elements:

(i) The investment by the Plaintiffs of €1.08 million through the Bank's investment wing, IFA.

(ii) An initial loan of €675,000 (later rising to €875,000) by the Bank to the Plaintiffs.

I proceed on the basis that these were two inseparable elements of a single whole, which crystallised following extensive interaction amongst the three parties. The bridge which forged the link between these two elements was the investment advice and services provided, in tandem, by the two Defendants to the Plaintiffs. The evidence establishes to the satisfaction of the court that during this initial, unmistakably critical, period the protagonists were the following:

(a) Mr. McBrearty, the first-named Plaintiff.

(b) Mr. Crossan of the Bank.

(c) Mr. Scullion of IFA.

The investment option selected by the Plaintiffs was, self-evidently, a most important facets of the arrangements. The alleged promises and representations by

the Defendants' servants and agents on which the Plaintiffs claim to have relied and which form the foundation of their case belong to the period January to June 2006 and, in particular, the first half thereof. The trial was occupied by a substantial quantity of evidence pertaining to events *post dating* the two fundamental arrangements which were executed among the parties, namely the investment and the borrowing. While such evidence served to highlight the progressive acrimony afflicting the various relationships and the outright polarisation which, ultimately, eventuated, it has, logically and by definition, less significance than the evidence bearing on the events belonging to the period January to June 2006. The final chapter in the saga was not written until the beginning of February 2009. Some of the evidence bearing on the intervening period of around two-and-a-half years helps to illuminate events during the critical period of January to April 2006 and is to be viewed particularly through this lens. The evidence belonging to the initial, critical period is of two varieties. Firstly, there is significant documentary evidence. Secondly, there is the sworn evidence of the parties at the trial, during which a lengthy series of claims and counterclaims, allegations and counter-allegations, was energetically traded.

The Documentary Trail

[6] While the evidence ultimately assembled during the litigation was of impressive paper bulk quantities, I do not propose to rehearse this exhaustively. There was a veritable abundance of formal investment documents, records of meetings, letters, e-mails, statements of account, handwritten notes, policy valuations and other materials. I have considered these in full. The most significant items of documentary evidence included the following:

(a) The "Personal Financial Appraisal" ("PFA") prepared by Mr. Scullion of IFA, progressively, during the period January to March 2006.

(b) The "Key Features of the ASI Selective Investment Bond" document [a quotation], dated 8th February 2006.

(c) The Bank's "suitability" letter addressed to the Plaintiffs, dated 10th March 2006.

(d) The loan agreement (€675,000) between the Plaintiffs and the Bank, dated 15th March 2006 (with a draw down date of 23rd March 2006).

(e) The Bank's internal appraisal, dated 15th March 2006, of the proposed arrangements with the Plaintiffs.

(f) The Bank's internal record, dated 20th March 2006.

(g) The Plaintiffs' written application for the bond, dated 21st March 2006.

(h) The opening of the Euro Loan Account of the Plaintiffs in the Bank (€100,000), on 23rd March 2006.

(i) The letter from the Plaintiffs' accountants, dated 24th March 2006.

(j) The IFA internal appraisal of the Plaintiffs' investment application, dated 28th March 2006.

(k) The ASI letter dated 4th May 2006 to the Plaintiffs, accepting their investment application.

(l) The ASI letter dated 9th May 2006 to the Plaintiffs, confirming the commencement of the investment with effect from 27th April 2006.

(m) The bond itself.

(n) The "Key Features" document.

(o) The Bank's internal record dated 5th June 2006.

(p) The second "facilities" letter/agreement between the Plaintiffs and the Bank (€875,000), dated 6th June 2006.

The components of the above menu of documents are a reflection of my earlier observation that the crucial events in these proceedings unfolded during the first half of 2006 and, in particular, the period of January to March.

[7] One can extract from the events and documents belonging to the period January to June 2006 three readily identifiable contracts:

(i) An initial loan contract between the Plaintiffs and the Bank in March 2006 (€675,000).

(ii) An investment contract between the Plaintiffs and ASI (€1.08 million), brokered by IFA, commencing on 27th April 2006.

(iii) A further, separate loan agreement, superseding the first, between the Plaintiffs and the Bank (€875,000) in June 2006.

In simple terms, making no allowance for interest accrued during the brief intervening period, the position of the parties pursuant to the aforementioned arrangements at the beginning of June 2006 can be summarised thus:

(a) The Plaintiffs had invested a gross sum of €1.08 million.

(b) The Bank had made loans totalling €875,000 to the Plaintiffs.

The contents of all of the documents listed above – and certain others – were exposed and explored exhaustively during the trial and have been considered by me in full. Most of these documents have some bearing on the court's resolution of the issues in dispute between the parties. In general terms, the Plaintiffs make the case that the documents in question neither reflect nor govern fully the legal relationships which were brought into existence by the arrangements struck among the parties. This is reflected in the Plaintiffs' reliance on oral representations and promises allegedly made by the Defendants' servants and agents and their related claim that certain documents were not fully or properly read or explained to them. In contrast, it is appropriate to observe, as testified by the cross-examination of the Plaintiffs, that the Defendants' case entails a significant measure of reliance on certain key documents. The Defendants' notable reliance on various documents was reinforced markedly in the evidence of some of their witnesses at the trial.

The Plaintiffs' Evidence

[8] Bearing in mind the contents of the foregoing paragraphs, I do not set myself the task of rehearsing the evidence of the parties and their witnesses *in extenso*. What follows is an outline of the salient features thereof. The central tenets of Mr. McBrearty's evidence were that he trusted the Defendants' representatives with whom he was dealing at the outset (Messrs. Scullion and Crossan) and, as he said, "*took their words at face value*". He emphasized that he was seeking a risk free investment of his money and that he would need access to the fund annually. Ultimately, the "product" proposed by him had two components: a guaranteed fund of €780,000 and a very low/medium risk fund of €320,000, from which the money could be moved at any time. He was promised a return/profit of at least 5% annually. The Bank agreed to a "back to back" loan to facilitate Mr. McBrearty's proposed USA property investment and certain other financial liabilities. He was promised that the investment would always be "*ahead of*" the loan: the Bank was adamant about this. He was to be permitted to withdraw 5% per annum from his investment fund. The latter would enjoy a rate of interest outstripping the interest charged on the Bank's loan to the Plaintiffs. As far as Mr. McBrearty was concerned, Messrs. Crossan and Scullion were acolytes of Mr. Dowdall. He claimed that, by September 2008 (when he made a second withdrawal of €200,000 from the fund) the Bank obviously knew that the fund was not guaranteed and was attempting to cut its losses. While the Bank offered in late 2008 to repay the Plaintiff's capital investment in full, Mr. McBrearty that this did not address the issue of their indebtedness to the Bank. By this stage, the Plaintiffs' indebtedness to the Bank exceeded the value of their investment fund. Mr. McBrearty claimed that if the Plaintiffs' investment monies had simply remained in the deposit account where they were placed from around September 2005 the Plaintiffs would, ultimately, have been better off financially. ASI informed him (at some stage) that the investment fund was at no time guaranteed and that the Defendants were aware of this from the outset. Mr. McBrearty claimed that he relayed this to the Defendants'

representatives during the latter stages of their relationship, receiving no satisfactory response.

[9] In cross-examination, Mr. McBrearty acknowledged that he had some familiarity with legal documents, instancing a land purchase agreement, a guarantee and a mortgage. He was also familiar with the process of compiling statements for the purpose of legal processes. He asserted his belief that he had invested his money in a guaranteed fund, having been led to believe that the growth rate would be 5% to 9% over a five-year period and that, on the worst case scenario, his investment would cover his borrowings from the Bank. The Plaintiffs' actual contribution to the investment was €826,000, with the Bank loaning the balance to increase the figure to €1,000,000. The Bank, he claimed, was adamant about the need to invest a full €1,000,000. He accepted that he had agreed to the borrowing arrangements. He suggested that if the USA property investment had been successful, this would have realised $400,000 profit, having taken an accountant's advice. In the event, the return on his investment of $485,000 was less than the amount invested. As regards the Defendants, he invested €700,000 in two "guaranteed" funds and the balance of €300,000 in a "non guaranteed" fund. He claims to have been deliberately misled by the Defendants when making the investment, as the first two of these funds were "*never guaranteed*". Mr. McBrearty maintained steadfastly that the Defendants represented to him that his borrowings from the Bank would be covered by the investment. He claimed to have been "*totally misled*" from beginning to end. He asserted that neither Plaintiff had been "*taken through*" the documents, particularly by the Independent Financial Adviser ("*IFA*") concerned, Mr. Scullion. The Plaintiffs, he claimed, signed documents "*at face value*", on the basis of what had been represented to them. It had been represented to the Plaintiffs that their fund would grow by a minimum of 5% per annum – 5% "*on the worst case scenario*". The Plaintiffs were content to invest the smaller sum of €300,000 in a low to medium risk fund in consequence. Mr. McBrearty asserted that deductions for commission and charges had not been explained to the Plaintiffs ("*the PFA*"). He agreed that no guarantee of 5% growth of the larger fund had been provided in any document. He also acknowledged that the Plaintiffs had received some services from an accountant (Mr. Devine).

[10] The Bank's "suitability" letter, dated 10th March 2006, contains Mr. Scullion's investment advice to the Plaintiffs. It bears the signatures of both Plaintiffs, dated 21st March 2006, purporting to acknowledge that the contents had been explained to them. Mr. McBrearty stated in evidence initially that he read this letter, Mr. Scullion explained it to him and he signed it. [Mrs. McBrearty, in contrast, claimed that she did not read it and it was not read to her prior to signature – I shall comment further on this discrete issue presently]. Furthermore, Mr. McBrearty did not dispute having received the "Key Facts" document, but could not recall either reading it or being escorted through it line by line. He confirmed that he had signed the PFA, also on 21st March 2006. He questioned the accuracy of some of its contents. He contested the accuracy of the claim in a letter dated 24th March 2006 from his accountants that he was earning a salary of €60,000 per annum. He confirmed that

this letter had been written by the accountants at his instigation and that he was aware of its contents at the time. He was unemployed when he made the impugned investment/borrowing arrangements with the Defendants. He did not dispute either receipt or the contents of the ASI "Quotation", dated 20th March 2006. He contended that the ASI "Key Features" document was too complicated for him to fully understand and asserted that its contents had not been explained to the Plaintiffs properly. He confirmed having received the various ASI documents generated by his investment. He asserted, however, that he had at no time been escorted through these documents.

[11] Mr. McBrearty further agreed that his assertion of a 5% growth guarantee was nowhere recorded, whether in his e-mails or letters or elsewhere. He suggested that he had made this case during meetings with representatives of the Defendants and rejected the suggestion that he had done so for the first time in January 2009. He questioned whether certain of the Defendants' records of meetings were comprehensive of what had been transacted and discussed. He could not explain why his letter dated 28th January 2009 to the Defendants made no distinction between the two basic funds (€700,000/€300,000) and asserted a guaranteed annual growth rate of 4/5%, rather than 5/9%. He placed some emphasis on the following passage in the same letter:

> "*We were advised to borrow the money from the Bank on a back to back basis as our money was being invested with them. We expressed to the Bank that the growth of our investment would have to be enough to cover the borrowings plus any interest incurred, in case the USA venture was not a success…*
>
> [The Defendants] *incorrectly presented a product as guaranteed. The product recommended was not a guaranteed product.*"

In the Plaintiffs' statement of case the guaranteed growth rate asserted is 5%, rather than 5/9%. Mr. McBrearty described the "allocation" sum of €80,000 as an enticement. His understanding was that the additional €80,000 was to be invested together with the €1,000,000, rather than utilised for the purpose of paying commission and charges. He disputed the description of him as a "*property developer*" in the completed PFA, signed by both Plaintiffs on 21st March 2006 . Before committing himself to the investment arrangement with the Defendants Mr. McBrearty had ascertained from his own enquiries that growth rate of around 5% per annum was available from "*good deposit accounts*". He had considered a range of other investment products. Mr. McBrearty suggested that the Defendants' proposed "premium" of 8% was the best on offer to the Plaintiffs.

[12] Mr. McBrearty testified that on the date when the Plaintiffs signed both the PFA and the "Selective Investment Bond Application", Mr. Scullion was on holidays. The Plaintiffs signed these documents at home and delivered them to the

Defendants' premises in Derry. His evidence about these matters was not challenged. The promise (or representation) which he attributed to the Defendants was a guaranteed growth of 5/9% per annum on the total investment of €1,000,000. His letter dated 2nd February 2009 to the Bank complained, *inter alia*, that the Defendants "*missold us a package and led us to believe it was 100% guaranteed … the guaranteed fund was structured to cover our loan at all times*". The allegations contained in this letter are directed mainly against Mr. Dowdall of the Bank. The Plaintiff testified that Mr. Dowdall was "*to blame*". He claimed that the "back to back" loan arrangement had surfaced on the Bank's initiative, in response to his disclosure of the USA property investment plan. This proposal he attributed to Mr. Crossan of the Bank. The proposal to lend him €675,000 was made by the Bank and not vice-versa as he trusted the Defendants' representatives so fully he had no need to obtain independent advice. According to the Plaintiff, Mr. Crossan of the Bank described as "*fantastic*" the overall "deal" to which the Plaintiffs committed themselves in 2006. Both the provision of loan facilities and the 8% "enticement" were designed to induce the Plaintiffs to enter into these arrangements. The Plaintiffs committed themselves to these arrangements because the Defendants assured them that this was "*a great investment*".

[13] With regard to subsequent events, Mr. McBrearty testified that in May 2007 he purchased five properties in Portugal off plan, at a total cost of €1.26 million. He expected to pay for these properties within fifteen to twenty years and asserted that three of them had a guaranteed rental income. He did not consider this a risky investment. Mr. McBrearty suggested that his communications with representatives of the Defendants in April 2007 had been prompted by a lack of information emanating from ASI in relation to the performance of the Plaintiffs' investment. This was followed by a meeting attended by Mr. McBrearty and representatives of the Bank, on 2nd May 2007. He suggested that this had been arranged on account of his forthcoming investment trip to Portugal. He attributed to Mr. Dowdall a representation that he could borrow up to €300,000 against his extant investment, to finance this further investment. He claimed that following his return from Portugal Mr. Dowdall reneged, giving rise to heated discussions between them. He agreed that this was not reflected in his e-mail dated 24th May 2007 to Mr. Dowdall. He suggested that he first became aware of this refusal to advance him further loans on this date. This was followed by Mr. Dowdall bringing forms to the Plaintiffs' home for signature. Mr. McBrearty remains the owner of three investment properties in Portugal.

[14] Mr. McBrearty suggested that a later meeting attended by representatives of the Defendants on 13th February 2008, was arranged at his instigation, to discuss why his investment fund was losing money and his ensuing concerns. He claimed to have discovered at this stage that the 8% "allocation" amount had not been invested on the Plaintiff's behalf and was simply a device to entice him to make the investment. According to the Defendants' record of this meeting, their representatives explained to the Plaintiff –

> "*… that* [the 8%] *… was not guaranteed but was effectively recouped from annual account management charges totalling circa €132,000 over the five years.* [Mr. McBrearty] *was shocked at this because if the investment fails to grow in the next three years he could end up with less than his initial capital investment … he believed this was not properly explained to him at the initial investment and he maintained that if he knew that at the time he would not have made the investment. He pointed out that if he had just placed the fund in a regular deposit account he would get 5/6%, have the capital invested safe and have no management fees … he would have been happy with just enough interest earnings to contribute towards a back to back Euro loan …*"

Mr. McBrearty claimed that at this meeting he also complained about the level of post-investment services he had received from the Defendants. He confirmed that in September 2008 he withdrew €200,000 from his investment to reduce his indebtedness to the Bank. He suggested that in October 2008 he requested that the remainder of the investment be converted into cash (i.e. deposit). The Plaintiff accepted that from around April 2008 the Defendants had made certain compromise proposals to him, which he had rejected. He testified that he had demanded repayment of all commission and charges levied on his investment. He was also seeking a "balancing" outcome which would reflect 5% growth on the full investment of €1.08 million. He acknowledged that all encashments made by him would have to be reckoned. In his words, the "*bottom line*" was that the management fees and other deductions were not explained to the Plaintiffs until February 2008. During this period of "negotiations" with the Defendants, he was also seeking an arrangement whereby interest paid on the Plaintiffs' loans would be credited or reduced. Ultimately, when the Plaintiffs' investment fund was surrendered at the end of January 2009, its value was some €518,000. There was a dispute between the parties about how the surrender was to be managed, in particular the destination of the monies

[15] The evidence of Mrs. McBrearty, in essence, basically corroborated that given by her husband in many respects. She asserted an understanding of the investment which was that €700,000 would be invested in a fully guaranteed fund, with a minimum return of 5%, rising to 9%, while the balance of €300,000 would be assigned to a fund which was not secured but was performing very well. The latter fund was described by Mr. Scullion as having the potential to both make and lose a lot of money. However, every three months, there was the option of transferring the balance of the smaller fund to the guaranteed fund. Mrs. McBrearty testified that whereas she signed certain documents in Mr. Scullion's office in the Bank premises she received no advice about their contents and did not read them before signing. When the possibility of the Chicago investment deal arose, the Plaintiffs informed the Bank's representatives. Mr. Crossan of the Bank represented that the arrangements struck constituted "*the best deal possible for you*", insisting that the

Plaintiffs would be making money on their IFA investment. Mrs. McBrearty was aware that the loan attracted a rate of interest of 3½%, whereas the larger part of the investment fund had a guaranteed minimum return of 5% per annum. From an early stage, she understood the loans to be provided by the Bank to be "back to back" in nature. The Plaintiffs had no fear of suffering any loss arising out of the overall deal. In late May/early June 2006, after Messrs. Crossan, Dowdall and Scullion had visited the Plaintiffs at home, their borrowings were increased by €200,000 (to €875,000) to service personal debts and a bridging mortgage.

[16] According to Mrs. McBrearty, the essence of what the Plaintiffs were promised – and agreed to – was that their investment would stay ahead of their borrowings at all times. There would never be any shortfall. The investment would pay off the loans. Even when the Plaintiffs withdrew some €200,000 from their investment in June 2007, Mrs. McBrearty's understanding was that, vis-à-vis the loans, they continued to enjoy a "credit balance". By February 2008 the Plaintiffs were increasingly concerned: they had problems in getting investment valuations and concerns about the value of their fund. These were reflected in a meeting with the Defendants' representatives on 13th February 2008 and certain electronic communications generated at that time. Later, in September 2008, Messrs. Crossan and Dowdall reiterated that the investment fund was not performing well and advised that, with a view to reducing the loans, the Plaintiffs should withdraw another €200,000, penalty free, to stop the "haemorrhaging". The Plaintiffs acted accordingly. At this stage, the balance between the investment fund and the Plaintiffs' indebtedness to the bank was a negative one, from their perspective and they were increasingly worried. Mrs. McBrearty asserted an agreement with the Bank in January 2009, whereby the residue of the investment fund was to be surrendered and transferred to a deposit account in a bank of the Plaintiffs' choice, where it would be preserved pending resolution of the dispute between the parties. According to Mrs. McBrearty, the Bank reneged on this agreement, thereby thwarting their intention of placing the surrender amount of some €517,000 in a high interest AIB account in Raphoe, County Donegal. On the Bank's insistence, ASI transferred the money into the Plaintiffs' Euro Loan account in the Bank.

[17] Mrs. McBrearty described a brief meeting at Mr. Scullion's office during the initial stages. When referred to the "suitability" letter, the PFA, the "Key Features" document and the formal written application for the Bond, she retorted that she had not read these documents and they had not been read or explained to her. At the time when their letters of 28th January and 2nd February 2009 were written, the Plaintiffs were desperate. All that they wanted was to pay off the loans. The Defendants' offers of compromise to them had been inadequate. They would have accepted an offer entailing ingredients of the original investment of €1,000,000 plus the "allocation" sum of €80,000 plus 5% growth from the outset of the investment, less their withdrawals. An offer of this amount, Mrs. McBrearty claimed, would have been enough to settle their indebtedness to the Bank at this time. Before concluding their investment with the Defendants, their monies had been on bank deposit elsewhere, earning interest at the rate of 5%: they committed themselves to

the investment advised by the Defendants on account of the promised higher rate of return.

[18] The evidence on behalf of the Plaintiffs was completed by the report of Desmond Peelo, a chartered accountant. This evidence was, sensibly, adduced in documentary form only, by agreement. Having reviewed some of the key documents, Mr. Peelo expresses the following opinion:

> "***There was no capital guarantee in the ASI selected bond.*** *This is apparent in the provided ASI documentation. What was guaranteed was no more than that the unit price (i.e. the value of the investment) at the end of a particular quarter was held at that value for the period of the following quarter should the investor wish to encash the investment during that period.* ***This was not a capital guarantee****.*"

Mr. Peelo strongly questions the viability of an arrangement whereby the Plaintiffs were to repay the Bank loan within less than three years, having regard to the early encashment charges, the up front commissions, the absence of capital guarantee and the description of their investment as long term. He describes the fund management charges and commissions paid to IFA as "*very high by investment sector standards, notwithstanding the added 8% capital allocation*". The remainder of this report is concerned with the exercise of calculating the Plaintiff's claim for compensation, which he computes to be some €342,000.

<u>The Defendants' Evidence</u>

[19] A procession of witnesses, occupying a period of several days, gave evidence on behalf of the Defendants. Once again, I set myself the unambitious task of outlining the salient aspects thereof. Messrs. Crossan and Dowdall were, appropriately, the two main Bank witnesses. There was no real dispute that at the material times the Plaintiffs' dealings and communications with the Bank were predominantly with these two representatives. Mr. Crossan testified that he secured Head Office approval for the proposed loan of €675,000 to the Plaintiffs. Head Office was satisfied that the proposed bond investment would provide sufficient security for the load "*because of the guaranteed element …* [It] *… would be more than sufficient to cover the loan*". Elaborating, Mr. Crossan explained that this entailed juxtaposing (a) the investment capital of €700,000 plus interest and (b) the loan capital of €675,000 plus interest. In performing this simple analysis, the secondary aspect of the investment viz. the low to medium risk investment of €300,000, was disregarded by the Bank. The "back to back" element of the arrangements was considered unusual and, per Mr. Scullion, Head Office instructed that the Plaintiffs seek advice *and* that this be recorded in the "facilities" letter. Mr. Crossan did not attest to any specific recollection of having advised the Plaintiffs in consequence. Indeed, through his evidence, he was at pains to emphasize that, as a Bank (and not IFA) representative, his function was not to provide advice. Pursuant to the Head

Office instruction, the following sentence was added to the initial "facilities" letter, dated 15th March 2006:

> "*We understand on your acceptance of this offer you agree that you have taken independent legal/financial/Other advice and it has been your personal request to structure facilities in this format*".

The signatures of Mr. Crossan and both Plaintiffs appear on this document. Mr. Crossan accepted that while this linguistic formula contemplated deletion and/or particularisation in its final form, this was not effected. Unsurprisingly, Mr. Crossan did not attempt to give any evidence about the "*legal/financial/Other advice*" which (per this added clause) he understood the Plaintiffs to have obtained: it was clear from his evidence that he simply failed to explore this issue with the Plaintiffs.

[20] In cross-examination, Mr. Crossan accepted that he was, in effect, a salesman for the Bank. He agreed that the Bank was keen to secure the Plaintiff's business and, further, that he did not paint a gloomy picture for the Plaintiffs. He further agreed that he was trying to sell the Plaintiffs a loan at a profit to the Bank. Did he inform the Plaintiffs that since the proposed arrangements entailed no risk to the Bank, there was no risk to them? He responded that he might have done so. He agreed that this would have conveyed to them that, on a worst case scenario, their investment would cover the loans. He conceded that, in appearance, the Bank and Mr. Scullion were one and the same party, indistinguishable. From Mr. Crossan's perspective, the Plaintiffs were at no risk of losing money arising out of the overall "deal".

[21] Mr. Dowdall was at all material times the Senior Manager of the Bank branch in Londonderry where all relevant events unfolded and/or were centred. Mr. Dowdall supported the proposed loan of €675,000 to the Plaintiffs in March 2006. In this respect, he stated the following in writing, internally:

> "*Would support request but on proviso that we are absolutely clear from FTIFA that funds being invested amount to the figure below and that capital is fully guaranteed … Loan to be secured - €675,000 …*
>
> *To be secured against capital guaranteed funds as follows …* [€756,000] … *this is guaranteed and Bank have assignment on this …*
>
> *Interim roll up will bring our exposure to €750,000 the funds* [of] *€756,000 which are 100% guaranteed. As stated there is no allowance for any growth from the investment.*"

Mr. Dowdall testified that, ultimately – clearly a very considerable time later - it emerged clearly that the €756,000 fund was **not** guaranteed on account of the

management and related fees. At a later stage of events, at a meeting held on 13th February 2008, Mr. McBrearty made the case (in terms) that his understanding was the same as that reflected in the words of Mr. Dowdall in the March 2006 internal records. Mr. Dowdall, in his evidence, readily accepted that he and Mr. McBrearty had shared the same understanding in March 2006. [The specific reference here is the fourth paragraph of the joint Crossan/Dowdall record of meeting dated 3rd February 2008].

[22] Mr. Dowdall testified that from April 2007 the Plaintiffs were articulating a series of concerns regarding their investment. A meeting ensued, attended by Mr. McBrearty and representatives of both Defendants, on 2nd May 2007, during which the Plaintiffs' concerns/complaints and the issue of their intention to investigate in certain Portuguese properties were discussed. During this meeting, the Bank's representatives (in Mr. Dowdall's words) "*discovered*" that the Plaintiff was entitled to withdraw €200,000 from his investment fund, penalty free. While the outcome of this meeting was that the Bank was to apply to its Credit Department for approval to lend a further €200,000 to the Plaintiffs, the evidence established a delay in taking this step which, at this remove, appears surprising and was not the subject of any attempted explanation by either Mr. Crossan or Mr. Dowdall. The Bank's evidence pertaining to events during this discrete phase - which included differently dated versions of the same document, a distinct lack of clarity about what the Bank's true lending intentions were and no coherent evidence about how, when or in what circumstances the Plaintiffs were informed of the Bank's refusal to make the further loan proposed - was highly unsatisfactory. While Mr. Crossan's internal memorandum dated 25th May 2007 (in one of its incarnations) appears, objectively, to make a tolerably persuasive case for the further loan requested, no cogent evidence explaining either the delay in submitting the loan application or the reasons for the refusal was adduced. Furthermore, Mr. Crossan's aforementioned memorandum is irredeemably inconsistent with his evidence under oath that he made the loan proposal to Head Office *by telephone*. Also belonging to this discrete phase is a notable letter dated 24th May 2007 from the Plaintiffs to the Bank. This contains some simple calculations, projections and instructions to the Bank. These are to the effect that, twelve months hence, the Plaintiffs' investment will, come what may, be capable of settling their indebtedness to the Bank. Strikingly, the evidence contains no challenge to this letter on the part of either Defendant. [**P. 292**].

[23] Mr. Dowdall then described his dealings and communications with the Plaintiff from the beginning of 2008. The Plaintiffs were manifestly discontent with a regard to a series of matters concerning their investment at this time. Mr. Dowdall testified that the Plaintiffs became aware *at this meeting* that the €80,000 "allocation" amount did not form part of the capital guarantee: rather, in his words, it was "*wiped out*" by fund charges. The capital sum invested had been reduced substantially in consequence. Mr. McBrearty expressed his concerns that the investment fund might not now cover his borrowings from the Bank. Following this meeting, overcharges of around €8,000 were discovered by the Defendants, who offered a refund accordingly. By June and August 2008, when further meetings were conducted, the

Plaintiffs' basic complaints and concerns remained unchanged. In September 2008, the Plaintiffs accepted advice to withdraw €200,000 from their investment fund, to be applied to reducing their borrowings from the Bank. The Plaintiffs remained dissatisfied. By November 2008, the Defendants were prepared to compromise the dispute by reinstating the original investment of €1.08 million in its totality, less withdrawals. This (per Mr. Dowdall) would leave the Plaintiffs with a debit balance of around €100,000. While the Bank loans were scheduled to be repaid by March 2009, the Bank was disposed in principle to extending the repayments period. Throughout this period, the Plaintiffs continued to articulate essentially the same complaints and concerns.

[24] In cross-examination, Mr. Dowdall was unable to explain the clear discrepancy arising out of the Defendants' pleading that he first met Mr. McBrearty in April 2007 (repeated) and the internal bank record documenting that he had attended "*a long meeting*" with Mr. McBrearty around the end of May 2006. When asked when he had first seen this internal record, Mr. Dowdall provided a series of manifestly inconsistent replies. He ultimately conceded that as he was the person who sanctioned the mortgage in the Plaintiffs' favour in June 2006, it would be no surprise that he had met with one of them at that stage. He agreed that, from the outset, the mutual understanding of all parties was that the Plaintiffs' investment would pay off their borrowings. He further agreed that it was improper for both Bank and IFA personnel to have met with the Plaintiffs in May 2006. This was contrary to established policy and practice. Mr. Dowdall admitted, with demonstrable reluctance, that he had been in contact with an IFA representative (Mr. O'Connor) during May 2007. He could not account for the Defendants' pleading that there had been no meeting between Mr. McBrearty and the Defendants before Mr. McBrearty travelled to Portugal. He could not explain why, contrary to established practice, the refusal of the May 2007 loan application on behalf of the Plaintiffs was not documented. It was common case that in late 2007 Mr. Dowdall visited the Plaintiff's home for the purpose of having withdrawal/encashment instructions signed and, on this occasion, proffered two bottles of wine. The Defendants' pleading is that this was "*a gesture of goodwill to reflect the pressure FTB had had to put Mr. McBrearty under to sign the letter requesting the encashment before 25th May 2007*". Mr. Dowdall testified that he could not understand this pleading and he disputed it. He did not, however, offer any alternative coherent rationale. While he accepted the clear element of urgency attendant upon the meeting held on 2nd May 2007, he could not explain the ensuing delay in the Bank's application to its Credit Department for the loan requested by the Plaintiffs. Mr. Dowdall agreed (in terms) that the effect of the Bank's obstruction of the surrender value of the fund to AIB Raphoe was that the "no penalties" deadline of 30th January 2009 passed, with a resultant depletion of the fund by €33,000.

[25] The court also heard evidence from various members if IFA personnel – Messrs. Scullion, O'Connor, Devlin, Laird and Hunter. Mr. Smith, head of the

Bank's Legal Department, also gave evidence pertaining to the discrete issue of the *inter-partes* meeting conducted on 3rd June 2008. Mr. Scullion was, self-evidently, a witness of substantial importance. He was **the** "Independent Financial Adviser" (within the meaning/ambit of the Financial Services Authority Codes Regulations *et alia*). His sole function, he stressed, was to advise the Plaintiffs on the investment of their monies. Mr. Scullion was the author of certain key documents – in particular the PFA and the "suitability" letter. His main interaction with Mr. McBrearty occurred during the period January to March 2006. He had virtually no contact with Mrs. McBrearty. Mr. McBrearty did not challenge the accuracy of the PFA. The coincidence of the investment/loan dimensions of the Plaintiffs' wishes made the case unusual. The PFA was submitted by Mr. Scullion to the IFA Investment Committee for approval. He was extremely vague about this aspect of the process. His "FSA limit"was €150,000, with the result that the Plaintiffs' case was, in his words, "*way out of my orbit*". He was unable to say **who** had approved the proposed investment. The "suitability" letter was handed, not posted, to the Plaintiffs. More than one "quotation" was prepared for the Plaintiffs. While the highest rate of commission chargeable by the Defendants for an investment of this magnitude was €60,000, this was reduced to €10,000. Mr. Scullion also gave evidence of certain other procedural steps taken during the process, some of which did not involve him personally. Mr. Scullion did not dispute Mr. McBrearty's assertion that at least one of the key documents (paragraph [12] *supra*) had been considered and signed by the Plaintiffs in his absence. He attended the meeting of the parties on 5th June 2006, when he advised that the speculative (third) element of the investment could be deployed as security for a bank loan to the Plaintiffs. He remained in contact with Mr. McBrearty following his departure from "*the Bank*" in November 2006. In this way he remained abreast of various concerns and complaints articulated by Mr. McBrearty regarding the Plaintiffs' investment. He testified, in terms, that he had a certain informal advisory function in some of the letters prepared by Mr. McBrearty during this period. He described the investment profit as of the "open architecture" variety.

[26] In cross-examination, Mr. Scullion acknowledged his awareness of the Plaintiffs' anxiety to secure a loan from the Bank at the material time. He described their investment as "*part protected/part risk*". Mr. McBrearty made clear to him that his main objective was to ensure that the investment would pay off the Plaintiffs' loan in the event of the USA investment failing to produce. The Defendants were satisfied that the investment **would** achieve this objective: in this context, he referred to the internal file record of the meeting with Mr. McBrearty in late May 2006, attended by him. He described the €700,000 element of the investment as "*ring fenced*" and "*protected*", with the result that this would cover the Bank loan of €675,000. The investment of €700,000 was, in his words, a "*guaranteed product*". He was satisfied that the investment to which the Plaintiffs committed themselves would achieve their aforementioned objectives. He agreed "*entirely*" with the proposition that the Defendants informed the Plaintiffs that the "package" entailed "*no risk to the Bank and* [hence] *no risk to the Plaintiffs*". He was confident that the Bond would make money for the Plaintiffs. In this context, he referred to its

previous performance and testified that this was "*the expectation at the time*", with the result that he recommended it to the Plaintiffs. His belief was that the Bond would grow by *at least* 5% per annum and he relayed this to the Plaintiffs, adding that the expected performance should exceed the available deposit account returns of 5% per annum. He did not dispute that he had shown the Plaintiffs a 5%/9% "growth graph". He assured the Plaintiffs of annual monitoring and quarterly reviews of their investment. Mrs. McBrearty's only attendance at the office materialised on 21st March 2006, when (in his words) he "*summarised*" the information. He was equivocal about whether he had read the "suitability" letter [his recommendation to the IFA Investment Committee] to the Plaintiffs in full. In this context, he added that the Plaintiffs "*would already have had a copy …*" of this document.

[27] Did Mr. Scullion at any time advise the Plaintiffs of any risk that their investment would be insufficient to satisfy the Bank loans? He could not recall having done so. In his view, the "competition" between €675,000 and €1.08 million generated "*sufficient headroom*", particularly given the "*protected*" nature of the €700,000 element of the investment fund. He accepted that lay clients in general did not read the documents in question in detail. He agreed that the word "*guaranteed*" in the documents would have conveyed a sense of "*absolute security*" to the Plaintiffs. He acknowledged that the adjective "*protected*" did not feature in any of his dealings with the Plaintiffs, written or otherwise. When pressed in some detail about the effect of the €80,000 "allocation" amount and its interaction with management and other charges, Mr. Scullion was manifestly unable to provide a coherent explanation. This was most striking. Mr. Scullion was particularly evasive also when asked to explain why the proposed "allocation" amount increased progressively to 8% of the envisaged investment of €1,000,000. While he attempted to distance himself from the Bank's decision that €675,000 would be loaned to the Plaintiffs, he was demonstrably evasive in response to questions about his knowledge of the Bank's actions, intentions and decisions, to the extent that he protested "*no knowledge whatsoever*" of the approval of this loan to the Plaintiff by the Bank, as evidenced by the signed agreement of 15th March 2006. I reject this evidence. He further protested – quite unconvincingly – that this important fact did not feature at all during the meeting which he claims to have conducted with the Plaintiffs on **21st March 2006**. He claimed that he could not recall the **original** sum the Plaintiffs were proposing to invest, while agreeing that this must have been less than £1,000,000. Ultimately, with reluctance, he accepted the proposition (put to him by the court), irresistible in my view, that the only plausible explanation for the Plaintiffs' **ultimate** investment of £1,000,000 was the Bank's decision to advance them a loan of as much as €675,000.

[28] Evidence was given by Mr. O'Connor, a sales manager in the employment of IFA. He was one of four members of an Investment Committee which, on 15th March 2006, approved the Plaintiffs' proposed investment. The other three members were Messrs. Scullion, Devlin and Laird. He confirmed that by the beginning of 2007 Mr. McBrearty had articulated substantial concerns about the Plaintiffs' investment – its nature, make up, performance and charges levied. He

described the ASI valuation as "*complex*". Referring to the meeting held on 2nd May 2007, he testified that the Plaintiffs clearly had "*severe time constraints*" regarding their proposed investment in Portugal. "Plan A" was to secure further borrowings from the Bank to finance this investment. "Plan B" was to make a substantial withdrawal from their investment fund (up to €216,000). At the end of May 2007, the "low risk" fund was closed, its monies being transferred into the two "guaranteed" funds. Mr. O'Connor instigated the necessary arrangements. He referred to an e-mail from Mr. McBrearty to Mr. Dowdall, dated 24th May 2007, stating:

> "*… It is quite clear that the* [Bank] *has not lived up to their promises. When I invested €1,000,000 with the Bank I was led to believe that the Bank would look after me and give me an advance against my own money. This is not the case today … I now stand to lose €500,000 …*".

Mr. O'Connor testified that this was the gist of what the Plaintiff had said about this issue during the meeting on 2nd May 2007. He acknowledged that no record of this meeting – which he had arranged – had been made and suggested that, at its conclusion, there was no clear action to be taken by him. He was reporting to Mr. Devlin, the Area Sales Manager, who had not attended. However, he did not prepare any report for Mr. Devlin. He was extremely vague about who had originated "Plan B". He agreed that there was no record of any advice or warning having been given to the Plaintiffs of a risk of their investment proving insufficient to meet their debts to the Bank.

[29] Evidence was also given by Mr. Devlin of IFA. He testified that his involvement dated from 15th March 2006 and that, in conjunction with Messrs. O'Connor and Laird, he approved the "suitability" letter. By reference to an internal record dated 28th March 2006, he testified that he spoke to Mr. McBrearty by telephone on this date. On the face of this record, Mr. McBrearty confirmed that he had signed the PFA and understood the risk of the product, the terms of the product, the charges and the payment of commission. The terms of this record suggest that the Plaintiffs had not sought advice from their accountant at this stage. Mr. McBrearty was clearly content at this juncture. He stated that he would be availing of the facility of regular reviews with his Financial Adviser (Mr. Scullion). Mr. Devlin confirmed that during his conversation with Mr. McBrearty, he stated that there was no risk to the guaranteed fund. He suggested, somewhat unconvincingly, that he was treating the investment in total isolation from the proposed loan. He agreed that the main purpose of his telephone contact with Mr. McBrearty had been, as documented in the corresponding record, to "*… ensure satisfaction with advice and issues around tax in ROI* [the Republic of Ireland]".

[30] Mr. Laird, another member of the IFA investment committee concerned, also gave evidence. He described certain Financial Services Authority ("*FSA*") requirements by reference to documents such as the "Key Features" quotation from

ASI, dated 20th March 2006 and the ASI "Selective Investment Bond – Key Features" document. He confirmed that most IFA customers are referred to them by the Bank. He outlined the standard IFA protocols relating to disclosure of documentation and information to new customers. The function of the "suitability" letter addressed to the Plaintiffs, dated 10th March 2006, was to convey the IFA investment recommendations to them. This letter was also the vehicle whereby the approval of the Investment Committee was sought. Mr. Laird described his function as one of "review and challenge". In this capacity, following some personal research, the three areas of concern raised by him were the borrowing element of the arrangements, the status of the Plaintiffs as non-residents and Mr. McBrearty's history of litigation. He described ASI as "*the only candidate*" for the proposed investment. This company, he suggested, specialised in guaranteed and protected funds. IFA had not previously brokered investments with ASI. The latter was the third largest bond provider in the world. His explanation of the "allocation" sum of €80,000 was that this was funded by ASI in the form of additional units allocated to the Plaintiffs' investment. ASI then charged this back to the Plaintiffs during the lifetime of the bond. Mr. Laird also described the checks carried out by IFA personnel prior to perfection of the investment.

[31] In cross-examination, Mr. Laird agreed that IFA operates to make profit for the Bank. The normal method of payment by customers is commission, as in this case. IFA makes profit by a combination of initial commission and subsequent "trail charges": the latter are a separate form of commission, exceeding the initial commission received. Mr. Laird agreed that, by reason of the relevant arrangements, the **apparent** benefit to the Plaintiffs of the allocation amount of €80,000 was, effectively, swallowed up in the subsequent charges levied. In short, this was a "benefit" which the Plaintiffs were obliged to repay. Mr. Laird was aware of the Plaintiffs' borrowings from the Bank, but claimed, unconvincingly, that he never learned of the fact of the loan of €675,000. He confirmed that his aforementioned concerns were not documented and that there were no minutes of the Investment Committee meeting. He agreed that the matrix of the Plaintiffs' "case" as of March 2006, was a complex one. He acknowledged that in the relevant documents the passages dealing with charges were formulated in complicated terms. He further acknowledged that the Financial Adviser (Mr. Scullion) should have informed the Plaintiffs that they would have to repay the "allocation" amount of €80,000. He did not dissent from the suggestion that the record of the meeting conducted on 3rd June 2008 documented certain anomalies and ambiguities in the Defendants' dealings and arrangements with the Plaintiffs. At this stage of his evidence, he testified that the fund was (i.e., the units were) guaranteed, less the charges. He explained that the "establishment charge" of 2% during the first two years and the "policy management charge" of 0.75% spread over five years were both levied – to the Plaintiffs' detriment – *because of* the "allocation" amount of €80,000.

[32] The last of the Defendants' witnesses was Mr. Hunter, who has been Head of IFA since 2009. At the material time, he was Operations Manager, with oversight

and complaint handling responsibilities. His involvement in the dispute between the parties dates from February 2008, when the Plaintiffs' complaint was made initially. Ultimately, he approved the "sign off" of this complaint. He confirmed that the essential elements of the Plaintiffs' complaint were documented in the record of meeting dated 13th February 2008 and Mr. McBrearty's e-mail of 14th February 2008. In essence, according to Mr. Hunter, the Plaintiffs were complaining that the nature of their investment had not been properly explained to them and that, contrary to promises made, their investment was proving not to be guaranteed. Mr. Hunter's evidence relied heavily on various of the documents which I have listed in paragraph [6] above. His oversight function consisted largely of reviewing these documents, impelling him to the conclusion that the FSA/IFA regulatory processes had been duly observed. His explanation for the various settlement offers made to the Plaintiffs was that these were an attempt to reach a suitable resolution with the customer, to find a mutually agreeable compromise. He readily acknowledged that many customers do not read and understand the various documents generated by investments, while simultaneously emphasizing the duties imposed on the Independent Financial Adviser. He further agreed that the issue of the €80,000 "allocation" amount was a complex one. He acknowledged that examination of the Plaintiffs' complaint had established that there had been confusion relating to the nature of the guarantee pertaining to their investment. Elaborating, he explained that this confusion arose out of the wording employed in the relevant documents and the failure to distinguish clearly between guaranteed capital (on the one hand) and guaranteed rate of return on the capital investment (on the other). Notwithstanding these concessions, he sought to maintain that *the contents of the file* did not substantiate the Plaintiff's complaints. He confirmed that Mr. Cahill was the senior member of IFA personnel involved in the examination and outcome of the Plaintiff's complaint and the ultimate decision maker. He readily agreed that the overarching purpose of the various FSA/IFA protocols was to ensure that critical documents are fully explained to clients and that clients fully understand them.

Governing Legal Principles

[33] In their final submissions, counsel brought to the attention of the court certain legal principles and decided cases. On behalf of the Plaintiffs, Mr. Michael Lavery QC (appearing with Mr. Ronan Lavery QC) emphasized the intensely factual nature of the issues in dispute between the parties. It was argued that IFA (in the position of Mr. Scullion, as Financial Adviser) were subject to the twofold duty of (a) bringing to the Plaintiffs' attention the true terms of the various investment documents and (b) ensuring that the Plaintiffs fully understood them. In advancing this submission, counsel emphasized the complexity of the documents in question and the broad measure of trust which the Plaintiffs reposed in the Defendants at all material times. They submitted that, in evidence, the Defendants' witnesses effectively accepted that the Plaintiffs received the assurances asserted by them and, further, that no clear warning was given either that the investment might be at risk (with consequential detriment to repayment of the loans) or that it was subject to

significant charges. The causes of action invoked by the Plaintiffs, in alternative sequence, are breach of contract, negligent misrepresentation and breach of collateral warranty. By reference to Chitty on Contracts, paragraph 12-09 *et sequitur* and the decision in ***National Westminster Bank –v- Binney*** [2011] EWCH 694 (paragraphs 4-6 and 14 especially) it was submitted that, as a matter of law, a contract can be partly oral and partly in writing. As a result, the material assurances and representations made by the Defendants' representatives were contractual terms. The Plaintiffs' case was further advanced on the basis of misrepresentation inducing them to enter into the contract. It was submitted, in the alternative, that the oral representations attributed to the Defendants' representatives constituted a collateral contract or warranty, by reference to Chitty [paragraph 12-03] and ***Evans –v- Andrea Merzirio*** [1976] 1 WLR 1078, at p. 1081:

> "*When a person gives a promise or an assurance to another, intending that he should act on it by entering into a contract, and does act on it by entering into the contract, we should hold that it is binding*".

[34] The submissions of Mr. Horner QC (appearing with Mr. Gowdy, of counsel) on behalf of the Defendants formulated, by reference to appropriate authority, the following central propositions:

(a) As a reflection of the paramountcy of certainty in the realm of commercial law, the common intention of the parties to a contract is generally construed objectively and, where a contract is reduced to writing and signed, the written terms are ordinarily binding, irrespective of protestations of inadequate explanation or misapprehension.

(b) The two Defendants were at all material times separate legal entities and there was no true principal/agent relationship and, hence, no agency.

(c) When the first-named Defendant decided to demand repayment of the Plaintiffs and enforce its security, no duty of care was owed to the Plaintiffs.

(d) A collateral warranty only arises where one person makes a promise or assurance to another, intending same to have contractual effect and that the promisee should be thereby induced to enter into the contract concerned.

(e) Where a party with special knowledge and skill makes a forecast about the return on a business venture or investment, the only warranty thereby made is that the forecast was formulated with reasonable care and skill.

Developing these submissions, it was argued that the evidence fails to establish a composite contract or, alternatively, any breach thereof, any collateral warranty (or breach thereof) or any negligent misstatement, as alleged by the Plaintiffs. It was submitted, in the alternative, that no breach of the collateral warranty or misrepresentation asserted has been established. The Defendants' submissions, consistent with the presentation of their case at trial, relied heavily on certain of the documents summarised above.

Findings and Conclusions

[35] The various documents generated during the critical period of January to April 2006 undoubtedly provide substantial insight into the communications and dealings between the Plaintiffs and the Defendants' representatives, culminating in the arrangements in which these proceedings find their origins. However, as the evidence of all three parties makes clear, these documents do not tell the complete story. That they do not do so is, I consider, simply a reflection of the real world. The documents must be considered in the light of the various claims and counterclaims, allegations and counter allegations, which the parties make concerning the events to which they are related. Thus approached, the focus is very much on the Plaintiffs' allegations relating to promises and representations made, advice which was – and was not - given and the riposte to these allegations of the Defendants' witnesses. The various factual issues joined between the parties are to be determined by the court's findings thereon. The findings which follow are based on the court's evaluation of all the evidence adduced during a lengthy trial. This includes particularly an assessment of the witnesses who testified and the substantial documentary evidence. The court's findings and conclusions are made in the civil litigation context which imposes on the Plaintiffs the burden of proving their case to the standard of the balance of probabilities.

[36] During what I have identified above as the crucial period, January to March 2006, the relevant events had three protagonists – Mr. McBrearty, Mr. Crossan (of the Bank) and Mr. Scullion (of IFA). The main evidential confrontation which unfolded in these proceedings lay between the Plaintiffs and these two officials. There are, of course other evidential conflicts between the Plaintiffs and the Defendants. However, I consider that having regard to their nature, timing and circumstances, these are of significantly less importance, not bearing directly on the central issues to be determined by the Court.

[37] The evidence pertaining to the events in the period January to March 2006 may be viewed, firstly, through the lens of the key documents generated during this period. Thus, for example, the IFA "Key Facts" document, detailing their services and terms of business, contained certain information about commission payable. Similarly, the ASI "Key Features" Quotation, dated 20th March 2006, cautioned that the three investment growth illustrations provided were examples and not guaranteed; stated that "*You could get back more or less than these amounts*"; contained

information about deductions from the investment for commission, charges and other matters; detailed the "Establishment Fee" of 3% per annum and the "*policy management fee*" of 0.75% per annum; described certain "*early encashment*" charges applicable during the first five years of the investment; and advised the reader to consider this document in conjunction with the ASI Selective Investment Bond Key Features" document. The latter repeated, in terms, some of the contents of the former stating, for example, that investment performance and charges could differ from those assumed in the illustration; adverting to certain risk factors; stating that investment return was not guaranteed; and listing various charges. The Bond itself also contained sections relating to charges. Furthermore, the "suitability" letter dated 10th March 2006 contained certain information about risks and fluctuations and concluded with a signed acknowledgement by the Plaintiffs that its contents had been explained to them by Mr. Scullion. As already noted, both the internal investigation of the Plaintiffs' complaint (in 2008) and the evidence of the Defendants' witnesses to the court relied heavily on these documents: see my comments in paragraph [7] above.

[38] As I have already observed, however, the documents are not comprehensive of the story herein. In reality, business transactions of this kind, involving a mixture of professional and unprofessional people, are very rarely purely documentary in nature. The present case is no exception, in this respect. As one would fully expect, oral communication between the parties was a significant feature of the events under scrutiny. The Plaintiffs' case rests heavily on the advice which they say they were given and certain representations which they claim to have been made by the Defendants' servants and agents – in particular Mr. Scullion and Mr. Crossan. The Plaintiffs were in dispute with the Defendants for some considerable time prior to the onset of this litigation. One of the planks of the Defendants' case is that, during this period, the Plaintiffs did not consistently or credibly make the case which they have ultimately advanced to the court. I consider that there are indeed certain imperfections and discrepancies in the various complaints, assertions and allegations which the Plaintiffs, in particular Mr. McBrearty, ventilated during the pre-litigation phase. These were exposed fully in cross-examination and I have highlighted some of their main features in my summary of the evidence above. It is appropriate to address particularly one discrete concession attributed to Mr. McBrearty on which the Defendants rely heavily in their final submissions. As recorded in paragraph [10] above, Mr. McBrearty did indeed agree in cross-examination that the "suitability" letter had been read by and explained to him, prior to his signature. I paid particular attention to this aspect of his evidence and I take into account the moderately intensive nature of the cross-examination during which this reply was made, the terms of the reply, his accompanying demeanour and this Plaintiff's medical condition. I am also bound to consider this reply in the broader context of the totality of his evidence. Approached in this way, I decline to attribute weight to it.

[39] The imperfections and discrepancies in the evidence of both Plaintiffs must be evaluated fairly, realistically, objectively and in their particular context.

Approached in this way, I find them unsurprising and far from fatal from the Plaintiffs' perspective. In a protracted and evolving context, Mr. McBrearty found himself dealing with complex, worrying and perplexing issues and was doing so alone, without the assistance of any legal or financial or other expert adviser. Furthermore, I find that during most of this period the Plaintiffs' focus was one of consensual resolution, rather than litigation. I also find that the conduct of the Plaintiffs during this period, in particular the manner in which they expressed themselves in writing on occasions, does not undermine the case made by them at the trial. Next, I must juxtapose the pre-litigation events, discussions, communications and other happenings with the evidence of both Plaintiffs to the court. While there were undoubtedly certain imperfections in this respect these were not of an unexpected or overwhelming magnitude and did not, collectively, operate to undermine the essential thrust of their case. I find that there was a reasonably consistent thread in the Plaintiffs' case both pre-litigation and in their sworn testimony. Furthermore, I find that both Plaintiffs were basically truthful and credible witnesses. In particular, I consider that they made appropriate concessions under intensive cross-examination and did not capitalise on opportunities to embellish or exaggerate their case. It became abundantly clear to the court that, throughout the period in question, Mr. McBrearty was a veritable thorn in the Defendants' side, a truly "awkward customer". However, I conclude that he was not a conniving, dishonest or unreliable witness.

[40] I now propose to examine the above findings in the light of the evidence of all the other witnesses who testified to the court. I have summarised their evidence above and, in certain places, I have interspersed appropriate observations and asides. As already noted, I consider the most important of the Defendants' witnesses to be Mr. Crossan and Mr. Scullion. I make clear that I do not find either witness to be untruthful. However, in their general demeanour and engagement with the court, I found these witnesses unpersuasive. Their recollections were clearly impaired and their grasp of important detail manifestly imperfect. I find in particular that Mr. Crossan was under a duty to scrupulously explore with the Plaintiffs the question of them obtaining independent legal or financial or other advice (paragraph [19] *supra*) and plainly failed to do so. The effect of this was that an important protective measure was neither emphasized to the Plaintiffs nor enlisted by them. Furthermore, Mr. Crossan failed in his evidence to deal with the issues relating to the memorandum in his name, bearing the date 25th May 2007. His failure to do so both impaired his credibility and compromised that of Mr. Dowdall, a later witness, whose efforts to deal with this discrete issue were unsatisfactory. Mr. Crossan also gave evidence which, in my view, positively supports the Plaintiffs' case. Unprompted, he described the Plaintiffs' investment as one of €700,000 ***plus interest***, in the context of dealing in his evidence with the corresponding loan arrangements. Furthermore I find that he informed the Plaintiffs that the combined arrangements involved no risk to the Bank and, hence, no risk to them. I also specifically find that Mr. Crossan advised the Plaintiffs that, on a worst case scenario, their investment would cover the bank loans. This finding is fully supported by his further evidence that, from his viewpoint, the Plaintiffs

were at no risk of losing money arising out of the overall arrangements. This aspect of his evidence further supports the court's conclusion that there were various inseparable elements of a single overarching arrangement, which cannot sensibly or realistically be viewed in isolation from each other.

[41] Next, I turn to the evidence of Mr. Scullion. I have already highlighted above those aspects of both parties' evidence bearing on the question of whether the Plaintiffs' formal written application for the investment Bond was completed in the presence of Mr. Scullion and explained to them by him. Mr. McBrearty asserted that this document was completed by the Plaintiffs in Mr. Scullion's absence. This was not challenged by Mr. Scullion. Furthermore, the Plaintiff's assertion finds support in the internal Bank record of 3rd June 2008. This documents a meeting convened to consider the Plaintiffs' complaints and the outcome thereof. I find that one aspect of the outcome was an acceptance by the Bank of the Plaintiffs' allegation in this discrete respect. The consideration that the ensuing letter dated 13th June 2008 from Mr. Cahill (of FTA) to the Plaintiffs does not address this allegation detracts in no way from my finding. I find further, based on the Defendants' evidence, that this failure represented a significant breach of the FSA/IFA investment protocols. The further significance of this failure is that it lends strength to the Plaintiffs' case about the inadequate level and quality of the advices and services provided to them by IFA during the crucial period and, in particular, their claim that the Defendants failed to adequately explain the content and the meaning of certain key documents and, in consequence, the true and full terms of the investment arrangements which they were proposing to undertake.

[42] I shall now consider certain other aspects of Mr. Scullion's testimony to the court. The paucity of detail in his evidence relating to the investment approval process in March 2006 (paragraph [25] *supra*) was striking. Having regard to his evidence as recorded in paragraph [26] above, I find that he expressly advised the Plaintiffs that their investment would grow by at least 5% per annum. I find further that he did not read in full the "suitability" letter to the Plaintiffs or explain in full its contents to them. In my view, if he had performed either of these acts, this would have manifested itself in an unequivocal recollection to this effect (which he manifestly did not profess to have) and a careful corresponding contemporaneous file note, given the importance and solemnity of this particular event. I have already adverted above to Mr. Scullion's striking inability to provide a coherent explanation of the interaction between the "allocation" amount and management and other charges/deductions. Notably, at a meeting conducted some time after the key events, the Defendants had to enlist the services of an ASI representative and I find that they did so not only to provide necessary explanations to the Plaintiffs but also to equip and enhance their own understanding. I find that the details relating to charges/deductions in particular were matters of intense complexity. I further find that Mr. Scullion failed to properly explain these matters to the Plaintiffs. This was a failure of obvious gravity. I find also that this discrete failure was clearly acknowledged internally by the Defendants as one of the outcomes of their investigation of the Plaintiffs' complaint, duly documented in the aforementioned

record of 3rd June 2008. If any further support for this finding is required, it is readily found in the evidence of Mr. Hunter (paragraph [32], *supra*). Insofar as, ultimately, there was any substantial or significant conflict of evidence between the Plaintiffs and Mr. Scullion, I resolve this in the Plaintiffs' favour, having regard to the findings recorded in this paragraph, my other observations and findings about Mr. Scullion's evidence and my further finding that both Plaintiffs were essentially truthful and credible witnesses.

[43] I would highlight also the following aspects of the Defendants' evidence:

(a) In an internal record generated in mid-March 2006, it was stated:

> "*The loan will be secured against these guaranteed investments with the interest received on the investments more than covering the estimated €75,000 interest accrued on the loan. The loan will be used to fund property investment in the USA (€450,000) …*".

This record I consider self-explanatory and of obvious significance: it records unequivocally that the Plaintiffs' investment **would** generate interest. Moreover, strikingly, it contains not the slightest suggestion that the Bank loans (with interest) to the Plaintiffs would overtake their investment.

(b) As recorded in paragraph [21] above, Mr. Dowdall, whose position of seniority requires no emphasis, readily testified that at the material time he shared Mr. McBrearty's understanding of and expectations regarding the 8% "allocation" premium. In short, Mr. Dowdall too understood the effect of the composite arrangements to be that the Plaintiffs' investment provided a sheet anchor guarantee against their borrowings. The significance of this evidence requires no elaboration: the finding that there was a significant aberration in the advice given to the Plaintiffs at the material time follows readily.

(c) The evidence pertaining to the events of April/May 2007, about which I have already made certain observations and findings, supports one of the core elements of the Plaintiffs' case, regarding the advice and representations made by the Defendants about investment growth and the expectation thereby generated in the Plaintiffs that their investment would perform sufficiently well to facilitate a further substantial loan, of some €200,000, to them just over one year later.

(d) I further find, as a matter of probability, that Mr. Dowdall **did** represent to the Plaintiffs around April/May 2007 that a further loan of around €200,000 would be available to them: this is consistent with

two matters in particular. The first is Mr. Dowdall's understanding of the investment, as noted in (b) above. The second is a combination of Mr. McBrearty's indignant (and probably intemperate) reaction to the "no loan" communication which ensued and the olive branch of the bottles of wine proffered by Mr. Dowdall immediately thereafter.

(e) Mr. Laird's evidence reinforces my finding above concerning the failure of Mr. Scullion to properly advise the Plaintiffs about the €80,000 "allocation" amount and the corresponding issue of charges levied upon and deductions from their investment.

(f) I unhesitatingly reject the attempts of those defence witnesses who, unpersuasively, sought to portray the outcome of the complaint investigation and, particularly, the meeting of 3rd June 2008 as anything other than a series of internal findings and acknowledgements by the Defendants that there had been significant failings in the investment advice and services provided to the Plaintiffs. While there were enthusiastic attempts to persuade the court about the thought processes and intentions of the protagonist in this particular phase, Mr. Cahill (who did not give evidence), I must reject these in their totality. In this respect, I draw attention also to the evidence of Mr. Laird, noted in paragraph [31] above.

[44] It is also appropriate to address as a discrete issue two of the outcomes of the meeting of 3rd June 2008, as documented:

> "*Ambiguous paperwork re fees payable and extent of capital guarantee …*
>
> *Anomalies on actual investment fund provided in contrast with paperwork provided to Mr. McBrearty …*".

I have already considered above the evidence of the Defendants' witnesses relating to the "*ambiguous paperwork re fees payable …*". The clearest and most cogent evidence relating to the other part of the first finding, namely "*ambiguous paperwork re … extent of capital guarantee*" was given by Mr. Hunter (paragraph [32], *supra*). As I have already recorded, Mr. Hunter testified that this finding relates to the wording employed in the relevant documents and the failure of the Defendants to distinguish clearly between guaranteed capital and guaranteed rate of return on capital investment. The internal complaint finding and Mr. Hunter's evidence about this matter are easily related to the internal record which spoke of "*interest received on the investments*" [*supra*] and the ASI "Key Features" quotations which were structured, formulated and presented in a manner which, prominently, listed projected returns at the rates of 5%, 7% and 9% per annum. One juxtaposes this evidence with the evidence of **all** of the Defendants' witnesses that lay clients, as a general rule, cannot be expected to either read or understand the contents of the kind of documents

generated during the events under scrutiny. The descriptive label "*complex*" was readily applied to certain of these documents by many defence witnesses. To this equation I add the Defendants' internal record dated 5th January 2009, which contains an unequivocal acknowledgement of the Plaintiffs' "*misunderstanding of the guarantees on the investment*". Having regard to the findings set out above, I conclude that this misunderstanding was fully attributable to unacceptable shortcomings in the investment advice and services provided by the Defendants to the Plaintiffs. Finally, I accept – and give due weight to – the Plaintiffs' evidence that prior to concluding their arrangements with the Defendants their money was already earning investment interest in a bank and could be expected to earn as much as 5% per annum in one of the better deposit accounts.

[45] As I have already acknowledged, there were undoubtedly imperfections in the evidence of the Plaintiffs. These were highlighted extensively in the Defendants' submissions and I take them fully into account. Ultimately, it falls to the court to evaluate and weigh the entirety of the evidence, bearing in mind that the burden of proof lay on the Plaintiffs throughout. As I have highlighted above, the "story" told by the documents is significantly exposed, augmented and illuminated by the substantial evidence which the court has received relating to the surrounding circumstances and the sequence of events. While the conduct of the Plaintiffs both before and during the litigation invites the analysis, which I accept, that they did not articulate their case in clear and consistent terms, having regard to all the evidence and in light of my findings above, I do not consider this fatal from their perspective. As appears from the court's review of the evidence, the findings which I have made and the formulation of the parties' respective arguments, this is an intensively fact sensitive case. Having subjected all of the evidence to careful scrutiny, I conclude that the Plaintiffs have discharged the burden of making good the essential elements of their case, as summarised in paragraph [3] herein.

<u>The Outworkings of the above Findings and Conclusions</u>

[46] I must now give effect to the findings rehearsed above and this omnibus conclusion against the framework of the causes of action promoted by the Plaintiffs and the legal principles which fall to be considered. In embarking on this particular task, I pay tribute to the quality and clarity of the arguments formulated by the parties' respective counsel. If one thing emerges clearly from the extensive case law belonging to this field, it is that the common law, in its wisdom, has at no time formulated any absolute bar to the recovery of damages against the framework of the findings rehearsed above. Furthermore, as a result of one of its characteristic trends, namely the evolution of new and modified principles designed to provide just solutions to difficult cases, the common law permits the Plaintiffs' case to be viewed in different ways. The first is through the prism of a composite contract. The second is through the lens of a collateral warranty. The third involves applying the ingredients of a negligent misrepresentation. The legal principles to be considered and applied by the court are contained in a number of venerable authorities. These include, amongst others, ***Vallejo –v- Wheeler*** [1778] 98 ER 1012;

L'Estrange –v- Graucob [1934] 2 KB 394; ***Heilbut –v- Buckleton*** [1913] AC 30; and ***Esso Petroleum –v- Mardon*** [1976] 2 All ER 5, at p. 14. Giving effect to the assortment of legal principles which fall to be considered against the findings rehearsed above, I conclude as follows.

[47] Notably, the arguments of both parties focussed with some emphasis on one of the more recent reported cases belonging to this field, ***Peekay Intermark –v- Australia and New Zealand Banking*** [2006] EWCA Civ 386. There are certain noteworthy features of the leading judgment of the Court of Appeal, delivered by Moore-Bick LJ. Firstly, his Lordship recorded that in any case where misrepresentation is claimed, the starting point must be to determine whether the Defendant did in fact make the statement on which the Plaintiff relies: see paragraph [23]. His Lordship then distinguished between words more properly described as a description of a proposed investment than a true representation of fact: see paragraph [24]. Next, the judgment draws attention to the personal characteristics of the individual to whom the relevant statement was made: an experienced investor (paragraph [25]). His Lordship then noted the decision in ***Redgrave –v- Hurd*** [1881] 20 Ch. D 1, to the effect that where a person induces another to enter into a contract by misrepresentation, it is no answer to say that the representee had the means of discovering the truth. Referring to the decision in ***Assicurazioni Generali –v- Arab Insurance Group*** [2002] EWCA Civ 1642, Moore-Bick LJ acknowledged the principle that while a misrepresentation is capable of being corrected, any asserted correction must be efficacious (my gloss) and correction will always be a question of fact: see paragraph [36]. Where correction is canvassed by the Defendant, actual discovery of the truth by the Plaintiff must be established. His Lordship noted that a series of decisions made crystal clear that where it falls to the court to decide whether a person has been induced by misrepresentation to enter into a contract, this will always be a question of fact: see paragraph [40]. Moreover, where reliance is placed on documents, the content and presentation thereof will normally be a material factor: see paragraph [43]. Thus the principle that a person who signs a document knowing that it is intended to have legal effect is normally bound by its terms, irrespective of reading or comprehension, is but ***a general rule*** and, even where applicable, the contract duly executed may be rescinded if induced by fraud or misrepresentation: see paragraph [43]. Finally, His Lordship noted the category of cases which have given rise to the principle that where one party to a contract misrepresents to the other the content or effect of the document intended to embody their agreement, the former is precluded from enforcing the contract in accordance with its terms: see paragraph [44].

[48] The *ratio decidendi* of the decision in ***Peekay*** is also noteworthy. Firstly, disagreeing with the trial judge, Moore-Bick LJ concluded that the relevant statement of the promisor had not in fact induced the promisee to sign the documents and enter into the contract: rather, the operative factor had been the promisee's assumption that the investment product concerned would correspond to the oral description given earlier to him: see paragraph [52]. This is further emphasized in the concurring judgment of Chadwick LJ, who highlighted the

description of the promisee as an experienced investor in the managing markets and concluded that he could not have been said to have been under any misapprehension about the need for receiving and then studying a definitive and detailed written description of the investment product previously outlined to him orally by the promisor. Nor could it be said that the investment decision would have been made if the ensuing documents had not been received. The absence of any finding to the contrary by the trial judge was considered critical. The Court of Appeal disagreed with the critical inference made by the trial judge which was that the promisee assumed that the terms outlined to him orally were to be found in the documents and would not differ materially from the description previously given. As this moderately detailed analysis of the decision makes clear, I reject the Defendants' submission that ***Peekay*** is substantially on all fours with the present case.

[49] The decision in ***Peekay*** provides a convenient template for the exercise of applying the relevant legal principles to the findings which I have made above. This gives rise to the following omnibus conclusions:

(a) It was a term of the contract between the Plaintiffs and the Defendants that the latter would secure for the Plaintiffs an investment of the main proportion of their monies - €780.000 out of a total of €1.08 million – which would secure a minimum return of 5% per annum during a period of five years. It was a further term of the composite agreement which I have found to exist that the Plaintiffs' investment would not be overtaken by their borrowings (with interest) to the Bank. Both terms were breached by the Defendants.

(b) In the alternative, the Plaintiffs' case may be viewed through the prism of negligent misrepresentation. The terms to which I have referred above may also be considered to have had the character of misrepresentations, made negligently, which were plainly intended to - and did – induce the Plaintiffs to enter into the composite contract or, if viewed in isolation, the investment agreement.

(c) In the further alternative, the Plaintiffs' case based on a collateral warranty succeeds.

I accept the Defendants' contention that, strictly, the two Defendants were separate legal entities and did not have an agency relationship in the factual matrix with which the court is concerned. I further accept the argument that the Bank's decision to demand repayment of the Plaintiffs for the purpose of enforcing its security was not accompanied by any duty of care to them. However, neither of these factors undermines the conclusions set out above. I have given careful consideration to those aspects of the governing principles which are capable of undermining these general conclusions. Having done so, I find that, in the factually sensitive matrix of

the present case and having regard to the court's findings of fact, rehearsed above, the Plaintiffs' entitlement to damages is not defeated in any way.

Remedy

[50] I consider that it would be inappropriate for the court – and unfair to all parties – to attempt to measure damages in the light of the above findings and conclusions. At this juncture, I confine myself to drawing attention to the words of Millett LJ in ***Bristol and West Building Society –v- Mothew*** [1998] Ch 1, p. 12:

> "*In the case of breach of warranty …*
>
> *The measure of damages is the extent to which the Plaintiff would have been better off if the Plaintiff had been right…*
>
> *Since he entered into the transaction in reliance on the advice or information given to him by the Defendant, the starting point is to compare his position as a result of entering into the transaction with what it would have been if he had not entered into the transaction at all …*
>
> ***Accordingly, in this class of case, the Plaintiff must prove two things: first, that he has suffered loss; and, secondly, that the loss fell within the scope of the duty he was owed***."

[My emphasis].

Without deciding the point finally at this stage, it appears to me, having regard to the findings and conclusions rehearsed above, that this formulation of principle gives sustenance to the proposition that the Plaintiffs' recoverable damages are the value of their investment if it had performed in the manner promised, less the realisable value. It is clear, come what may, that updated computations and calculations, to take effect of matters such as interest, will be required. I strongly exhort the parties to employ their best endeavours to accomplish this exercise consensually. I shall adjourn the proceedings for a period of two weeks accordingly. Bearing in mind the factors that these were conjoined actions, that this judgment is concerned almost exclusively with the contested issues in one of the actions only, that the Bank's claim against the Plaintiffs appears to be essentially uncontested and, finally, that a balancing exercise will ultimately be required in consequence, I shall also defer for the moment the final order as to costs, to which the parties will have an opportunity to contribute. I strongly urge agreement on this issue also.