Neutral Citation [2015] IEHC 395

THE HIGH COURT

COMMERCIAL

[2011 No. 8150 P]

[2013 No. 187 COM]

BETWEEN

JOHN SPENCER

PLAINTIFF

AND

IRISH BANK RESOLUTION CORPORATION LIMITED (IN SPECIAL LIQUIDATION)

FIRST NAMED DEFENDANT

AND (BY ORDER)

STAPLEFORD FINANCE LIMITED

SECOND NAMED DEFENDANT

JUDGMENT of Ms. Justice Costello delivered the 19th day of June, 2015

Introduction

1. In these proceedings the plaintiff seeks damages for negligent misstatement in respect of oral and written statements he alleges were made to him by the first named defendant ("the Bank"). Specifically he contends that as a result of certain representations made by the Bank he invested €1 million personally in a life assurance bond offered by Anglo Irish Assurance Company Limited ("AIAC") and he borrowed a further €1 million from the Bank for the purpose of advancing that sum to a partnership, the Cashel Rock Partnership, so that the Partnership could purchase a life assurance bond from AIAC. In relation to the Partnership, the plaintiff initially claimed that he was an assignee of the interests of the Partnership and was entitled to sue in respect of the losses allegedly caused to the Partnership arising out of the investment in the Bond. At the end of the case it was accepted that the evidence did not establish an assignment of the Partnership interest and this claim was not maintained. Both Bonds now have a nil value.

2. The plaintiff also advances a distinct claim for negligent misrepresentation as against the Bank in connection with the representations which he alleges caused him to enter into a loan agreement with the Bank, being the monies he then advanced to the Cashel Rock Partnership so that the Partnership could purchase the Bond from AIAC. He seeks a declaration that discharges him from his obligations arising under the current loan agreement.

3. He also sues for damages for breach of warranty, breach of duty and breach of fiduciary duty.

4. The second named defendant was joined by order of the Court. It purchased the loan, the subject of the proceedings, from the Bank pursuant to s. 12(2) of the Irish Bank Resolution Corporation Act 2013. The second named defendant has counterclaimed seeking judgment against the plaintiff pursuant to the loan agreement. The plaintiff replies that he is entitled to set-off his claim in damages against the Bank in relation to the loan against the entire claim due and owing pursuant to the loan agreement. The plaintiff accepts that if claim to a set-off fails that the second named defendant is entitled to judgment against him in respect of the loan.

The Whitgift Shopping Centre

5. In the 1960s the Whitgift Shopping Centre ("the Whitgift Centre") was constructed in central Croydon on lands owned by the Whitgift Foundation. It was refurbished in 1985 and 1998. In 2005 it was a large retail/office centre. Part of the Centre comprised ageing offices and a car park which was leased to the Home Office on a lease which was due to expire in December, 2010.

6. The freehold title to the Centre vested in the Whitgift Foundation. The Whitgift Foundation was founded in 1596 and is comprised of two charities; it owns much of the freehold of central Croydon for, *inter alia*, educational trusts. There was a long reversionary lease held by the Royal London Mutual Insurance Society ("the Royal London") and a long sub-lease held by Whitgift Shopping Centre Partnership and property partners. In essence the Whitgift Foundation and the Royal London each owned 25% of the interest in the Centre and the then managing company, the Whitgift Shopping Centre Partnership and property partners, owned the remaining 50%. This long leasehold interest was offered for sale in 2005 and is the subject of these proceedings.

7. Under the terms of the reversionary head lease, no development could be carried out without the consent of the Whitgift Foundation. In addition, even if the Foundation as landlord authorised developments to the Centre, the Whitgift Foundation and the Royal London would each have to agree to contribute to the costs of any proposed development on a *pro rata* basis. They were under no obligation to contribute to the costs of any development in excess of 5% of the rental income of the Centre.

The purchase of the long leasehold interest in the Whitgift Centre

8. Howard Holdings plc ("Howard Holdings") was an Irish and UK based property development, advisory and management company. It had over 50 staff and was based in Croydon. It had significant experience in the Irish, UK, European and South African property markets and at that time had approximately stg£1.5 billion of property under development. The Bank had established a successful working relationship with Howard Holdings during the development and management of two successful property developments in Cork.

9. On 29th March, 2005, Howard Holdings made a presentation to the Bank in relation to the Whitgift Centre. The presentation provided a description of the *"[s]ignificant opportunities for asset enhancement"*. The Bank was interested in joining with Howard Holdings in forming a joint venture to purchase and develop the asset.

10. The structure of the proposed purchase and investment was complex. The leasehold interest was to be acquired by AIAC, a subsidiary of the Bank, and was to be vested in a Jersey unit property trust ("the JUPT"). A fund known as the Whitgift Geared Property Fund was established by AIAC to acquire 77.3% of the units in the JUPT. The balance of the units were to be purchased by representatives of Howard Holdings ("the JV Partners"). The investors in the Whitgift Geared Property Fund would each purchase a life insurance bond from AIAC for the Fund. The value of each bond or policy was linked to the value of the underlying asset, being the long leasehold interest representing 50% of the interest in the Whitgift Centre.

11. The purchase price for the 50% stake in the Whitgift Centre was stg£225 million plus costs of stg£7 million. The source of funding was a debt facility of stg£166 million provided by the Bank and investor equity of stg£66 million. Of this equity, stg£15 million was to come from the JV Partners and stg£51 million was to be raised from the Bank's client base of high net worth individuals. Pending the raising of the equity, the Bank was to provide AIAC and Howard Holdings with bridging facilities in relation to stg£66 million which would be repaid upon receipt of investor equity.

12. The Bank was to be involved in this project in a number of ways. As a result it had to consider the proposed investment from a number of points of view. As provider of finance for the purchase of the leasehold interest it required approval from its Credit Committee for the proposed facility; as it was proposing to market and sell the Insurance Bonds in the Whitgift Geared Property Fund to its clients it required Product Committee approval for the investment product. These parallel approvals were pursued within the Bank in May and June, 2005. While there were issues which were never resolved in evidence in relation to each of these approvals, the Bank proceeded on the basis that it had Credit Committee and Product Committee approval. This was never questioned by the Bank.

13. It was essential that a thorough due diligence investigation be carried out as part of the process in deciding whether or not AIAC should purchase the leasehold interest (and whether the Bank should provide finance and invite its clients to invest in the Whitgift Geared Property Fund). The Bank instructed Davies Arnold Cooper solicitors to prepare a report dealing with the title and planning history of the Whitgift Centre. They furnished a report in July, 2005. The Bank also instructed DTZ Debenham Tie Leung ("DTZ") to prepare a valuation report; this Report was furnished on 22nd August, 2005. In addition, the Bank had the benefit of a property report prepared by EC Harris LLP for the previous owners of the leasehold interest in the Whitgift Centre. The Bank instructed McCann Fitzgerald and Matheson Ormsby Prentice solicitors and KPMG Accountants to advise in respect of the legal and tax matters relevant to the proposed investment.

14. On 31st May, 2005, Howard Holdings hosted an investment presentation in Croydon to a number of client relationship managers from the Bank during which they had the opportunity to visit the Whitgift Centre. On 20th June, 2005, representatives of Howard Holdings and of the Bank met with representatives of the Whitgift Foundation in relation to the proposed acquisition of the 50% interest in the Whitgift Centre by Howard Holdings and AIAC and in order to assess the position of the Whitgift Foundation in relation to proposed developments of the Centre. The details of these meetings will be considered later in this judgment.

15. Once the Bank had completed the due diligence process to its satisfaction on 29th September, 2005, AIAC entered into a contract to purchase the leasehold interest and the Bank advanced the finance (both bridging and long-term). The Bank and AIAC were now formally in a position to offer bonds in the Whitgift Geared Property Fund to their clients.

Planning in relation to the Whitgift Centre and Park Place

16. The planning history in relation to the Whitgift Centre and an adjoining development was complex and still evolving throughout 2005. Prior to the acquisition of the Whitgift Centre by AIAC in 2005 the previous owners of the long leasehold interest had made two planning applications to develop the Centre. The first application, known as Bishops Court 1 was refused on 4th April, 2003. A revised application in respect of the Whitgift Centre, known as Bishops Court 2 was submitted. This also was refused but was appealed in 2005 to the Secretary of State. The appeal was rejected on 5th October, 2005.

17. The owners also applied to develop the site of an existing car park between office blocks B and C on the Wellesley Road of the Whitgift Centre to provide a new medium sized retail unit. This application was referred to as the Phase IV development. It was on the site of the car park that was leased to the Home Office together with various offices. That lease was due to expire in December, 2010 so that the owners did not have an immediate right to vacant possession of this plot of land. On 22nd December, 2004, planning permission was granted in respect of the Phase IV development but it could not immediately be acted upon without the cooperation of the Secretary of State.

18. In addition, a property company, Minerva plc ("Minerva") applied for planning permission to develop a very large new shopping mall abutting the Whitgift Centre. It involved the relocation of the existing Allders store which was part of the Whitgift Centre, though it was in separate ownership. This store was an iconic department store in Croydon. The proposed development was referred to as Park Place. On the 7th May, 2004, Croydon Council granted permission to develop Park Place. This planning permission was inconsistent with and excluded the possibility of the grant of the Bishops Court 2 application, as there was an overlap between their two plans. The anchor tenant of Minerva's development at Park Place was Allders. On 30th January, 2005, Allders went into administration. This meant that there was no committed anchor tenant for the Park Place development. On 29th March, 2005, Minerva announced that it had entered into a joint venture agreement with Lend Lease Europe to develop Park Place. A condition of the joint venture was that John Lewis Partnership ("John Lewis") would replace Allders as the anchor tenant in the proposed Park Place development. A significant disagreement between the parties concerned the likelihood in 2005 of the Park Place development coming to fruition, the degree to which this posed a threat to the Whitgift Centre and plans for its development and whether the planned Park Place development should have been disclosed to clients of the Bank who were invited to invest in the Whitgift Geared Property Fund.

The plaintiff's investment in the Whitgift Geared Property Fund

19. The plaintiff is a solicitor who in 2005 had been in practice on his own account in Nenagh for some 20 years. He had developed a substantial property portfolio of more than 15 properties both in Ireland and in England. He found managing a large number of individual properties was time consuming and wished to change to a less "hands on" form of property investment.

20. In the spring of 2005 he became aware of an opportunity to invest in a geared property fund offered by Quinlan Private in an asset in Knightsbridge in London ("the Knightsbridge Investment"). On 2nd and 3rd June, 2005, the plaintiff wrote to Ms. Margot Deacy of the Private Client Division of the Bank asking for a loan to enable him to part-finance his proposed investment in the Knightsbridge Investment. On 16th June, 2005, the Bank issued the plaintiff with the letter of offer to enable him to complete this investment. The Knightsbridge Investment was in sterling and the plaintiff wanted to fix the euro cost of the sterling he would require for the investment. The plaintiff agreed a rate and a purchase price for the relevant amount in sterling at that time.

21. Ms. Deacy was aware that the Whitgift Geared Property Fund would shortly be available to market to clients of the Bank. While she arranged for the loan to the plaintiff, she also urged that the plaintiff should consider this option before finally committing himself

to the Knightsbridge Investment.

22. On 22nd June, 2005, Ms. Deacy met the plaintiff at his office and discussed a number of matters. They discussed an investment property owned by the plaintiff and three other partners in Nenagh; a property that they owned in Croydon (entirely unrelated to the Whitgift Centre); and the possibility of acquiring a new premises for another solicitor's practice in either Killaloe/Ballina. In addition there was a general discussion in relation to his pension provision. He indicated that he was interested in gearing up his pension with a view to purchasing a property. He was interested in family partnership and he requested a follow-up meeting on estate planning. At that meeting Ms. Deacy offered the plaintiff the opportunity to invest in the Whitgift Geared Property Fund.

23. Following the meeting of 22nd June, 2005, Ms. Deacy sent the plaintiff a loose-leaf brochure with a compliments slip. This was received by the plaintiff on 23rd June, 2005. In summary this brochure identified 5 asset management opportunities which had a total potential rent increases of stg£2.5 million. It identified 5 possible development opportunities offering a total potential development profit of stg£30 million. It identified a longer shot where AIAC might be able to acquire and develop out an adjoining property with an estimated additional development profit of stg£20 million. The return on equity was:-

> *"projected at 150% over 10 years on conservative rent assumptions and NO development profits assumed. Based on Howard's Master Plan for the centre, our client ROEs could be as high as 250% (development profits included)."*

In this judgment I refer to this document as the first loose-leaf brochure.

24. The plaintiff was interested in involving a friend who resided in Australia in a property investment. On 27th June, 2005, he faxed his friend, Ms. Catharine Scott, a handwritten note urging her to invest with him in the Whitgift Geared Property Fund together with a copy of the first loose-leaf brochure.

25. The next day the plaintiff emailed Ms. Deacy in relation to his pension mortgage in the following terms:-

> *"Dear Margot,*
>
> *…The [pension] fund is due to receive €175,000 per annum for at least the next 7 - 8 years and I am aiming for a growth rate in it of 12 - 15% year on year...*
>
> *If it is possible to proceed on this basis I am interested in relying on the Anglo investment in Woodgift (sic), Croydon as recently discussed."*

26. In late June, 2005 the plaintiff was now considering both the Knightsbridge Investment and the Whitgift Investment as alternative opportunities. He continued to write to Quinlan Private in relation to the Knightsbridge Investment up to 30th June, 2005.

Decision to invest

27. On 15th July, 2005, the plaintiff sent an email to the Bank confirming that he would not be proceeding with the Knightsbridge Investment and cancelling the pre-ordered sterling. He stated:-

> *"Instead I propose to enter an investment vehicle formulated by Anglo Irish Bank which is due to come on stream in terms of its offer to the public in about 3 weeks."*

28. Ms. Deacy sent him a second compliments slip which is stamp dated 15th July, 2005. There is considerable controversy as to what was enclosed with the compliments slip which I will discuss further below. The plaintiff's case is that it enclosed a second, different, version of the loose-leaf brochure to that which he received on 23rd June, 2005, and which he faxed to Ms. Scott on 27th June, 2005. The plaintiff ultimately said that he received the second version of the loose-leaf brochure on 15th July, 2005, and he decided to invest in the Whitgift Investment. He therefore abandoned the Knightsbridge Investment and he wrote on 15th July, 2005, to cancel the pre ordered sterling he had required for that investment. In this judgment I shall refer to the second version of the loose-leaf brochure as the loose-leaf brochure.

29. Having decided to invest in the Whitgift Geared Property Fund the plaintiff took the necessary steps to enable him to invest in the Fund. The plaintiff proceeded to realise a number of his assets in order that he could fund his own investment. In July to September, 2005 the plaintiff sought to include Ms. Scott in the Whitgift Investment. This posed some technical difficulties as participation in the Fund was confined to Irish residents. She resided in Australia. Ms. Scott granted the plaintiff her Power of Attorney dated 2nd August, 2005, in order to facilitate her participation in the proposed investment. On the advices of Mr. Greg Tynan of the Bank it was suggested that the plaintiff and Ms. Scott invest as a partnership, thereby complying with the residency rules associated with the Fund. The plaintiff and Ms. Scott formed the Cashel Rock Partnership. The plaintiff had a 1% interest in the Partnership and Ms. Scott had a 99% interest in the Partnership, however the plaintiff held this 1% on trust for Ms. Scott so he accepted that she was 100% beneficial owner of the Partnership.

30. The plaintiff had two meetings with representatives from the Bank during September, 2005. On 9th September, 2005, he met with Ms. Deacy and Mr. Tynan and on 29th September, 2005, he met Ms. Deacy. Mr. Tynan was involved in order to deal with the complications imposed by the involvement of Ms. Scott in the investment. Ms. Deacy stated that the plaintiff *"really liked both the asset management and the development play associated with the Whitgift Fund".*

31. By letter dated 5th October, 2005, the plaintiff confirmed that he would be investing €1 million in the Whitgift Geared Property Fund in his own name and the Cashel Rock Partnership would invest €1 million. On 12th October, 2005, the plaintiff and Ms. Scott entered into a deed of partnership effective from 1st October, 2005. Ms. Scott was to invest €495,000.00 and the plaintiff €5,000.00 in the Partnership.

32. Between the 12th and the 19th October, 2005, the plaintiff met representatives of the Bank at the Radisson Blu Hotel in Galway. Mr. David Hayes and Ms. Deacy were present. Mr. Hayes made a presentation to the plaintiff in respect of the proposed investment in the Fund. Mr. Hayes had a brochure at the meeting. It is hotly contested whether or not it was the loose-leaf brochure or whether it was the formal funds brochure colloquially referred to as "the Black Book". In a letter dated 19th October, 2005, the plaintiff expressly acknowledged that he had an opportunity to read "*the investment information*". An issue to be decided is whether or not this refers to the Black Book, to the loose-leaf brochure or whether in fact no information was furnished to the plaintiff to read in advance of signing the letter on 19th October, 2005.

33. On 19th October, 2005, the plaintiff completed a number of documents. The first was a personal financial review with Ms. Deacy.

In assessing his attitude to risk he was asked to indicate what percentage of his investment he wished to place in low-risk, medium-risk or high-risk. Low-risk indicated the potential investor was prepared to take little or no risk with this portion of his wealth. Medium-risk indicated that the potential investor was prepared to take a moderate level of risk with this portion of his wealth to achieve a return in excess of the types of return produced by low risk investments. An investor who was prepared to accept high-risk was prepared to take significant risk with this portion of his wealth in order to achieve higher returns. The plaintiff indicated that he was prepared to invest 100% of his wealth at high-risk as so defined. Ms. Deacy recommended investment in the Whitgift Geared Fund and the plaintiff acknowledged that the recommendation was based upon the information he had disclosed and that he agreed with the recommendation. This document was signed by Ms. Deacy as sales intermediary and by the plaintiff on 19th October, 2005.

34. Also on 19th October, 2005, the plaintiff and Ms. Deacy signed a letter of that date from the Bank to the plaintiff dealing with his investment objectives referred to as the 'Reasons Why' letter. The letter refers to a meeting had over the past few weeks and under the heading "Investment Objectives" stated as follows:-

> *"You indicated that you had several investment objectives. I have outlined these below*
>
> • ***Diversification*** *– you wish to develop and expand the types of investments you hold – in your case you would like to have exposure to the UK and other property Markets as you have sufficient property holdings in Ireland.*
>
> • ***Growth*** *– You wish to get an improved return on your assets by investing in geared property investment options. You are aware that leveraged investments have additional risks however also have additional potential investment returns.*
>
> • ***Security*** *– you wish to invest in a well-managed investment however Capital Guarantees are not required and you could get less back than you invested.*
>
> • ***Income*** *– we have advised you that this investment does not provide a regular income and you have sufficient resources to cover your income requirements for the next 7-10 years".*

35. The letter recorded the following information that had been provided in relation to his investment experience background and financial standing:-

> • *"You are aware of property investments and have significant exposure to property investments in your own right*
>
> • *You have experience of Geared property investments and you are aware of the additional risk due to the borrowing*
>
> • *You have invested in other types of investments including unitised funds, pensions, shares and life investments.*
>
> • *Your current financial standing allows you to invest in the proposed investment for the term and you are aware of the potential risks to both Capital and returns.*
>
> • ***You have had an opportunity to read the investment information and you are satisfied that it meets your investment requirements."*** *(emphasis added)*

36. The letter specifically recorded that in deciding how to invest his money and with a view to potentially higher returns he was prepared to take significant risk with capital. The letter stated that the Whitgift Geared Property Syndicate was a high-risk investment. The letter defined high-risk as where the capital was not guaranteed and could be subject to a high degree of volatility. It was acknowledged that he had an appetite for high-risk. The letter stated:-

> • *"Recommendation*
>
> • *Based on the information discussed at our meeting and set out above, I recommend the following investment option as suitable to your circumstances: The Whitgift Geared Property Syndicate. The amount to be invested will be €1,000,000 in the name of John Spencer."*

The plaintiff signed the letter and his signature was witnessed by Ms. Deacy.

37. By letter of loan offer dated 13th October, 2005, the Bank offered to advance the plaintiff the sum of €1 million to part fund his investment in the AIAC Whitgift Geared Property Fund. Security for the loan was to be the assignment of his interest in the Fund. At the meeting with Ms. Deacy on 19th October, 2005, the plaintiff accepted the letter of offer. He expressly waived his right to a 10 day period to consider the commitment to the agreement and he also waived any right which he may have to withdraw from the agreement under s. 30 or s. 50 of the Consumer Credit Act 1995. He confirmed by his signature that he had read the conditions of the letter and the general conditions in the credit agreement and acknowledged that they formed part of the agreement. His acceptance of the facility letter was witnessed by Ms. Deacy on 19th October, 2005.

38. Also on 19th October, 2005, the plaintiff applied to AIAC for an investment bond in the Whitgift Geared Property Fund. As this was a life assurance bond, the Life Assurance (Provision of Information) Regulations 2001 applied. Ms. Deacy signed the Bond as the plaintiff's financial advisor. It is expressly noted that it was recommended that independent financial advice be taken when purchasing financial products. Both Ms. Deacy and the plaintiff executed the application for the Investment Bond on 19th October, 2005.

39. By deed of assignment made on 13th September, 2005, between the plaintiff and the Bank, the plaintiff assigned his interest in bond number INB/0003006 issued by AIAC to the Bank as security for his liabilities to the Bank.

Concluding the investment

40. Ms. Scott completed a similar personal financial review on 4th November, 2005. She likewise indicated that she wished to put 100% of her wealth in high-risk investments in order to achieve higher returns. She signed a similar declaration to that signed by the plaintiff and both Ms. Scott and the plaintiff completed an identical investment bond application on 4th November, 2005. She indicated that she had a net worth of approximately €2 million. The financial advisor in respect of this document was indicated to be Mr. Tynan. This document stated that the amount to be invested was €2 million.

41. On 23rd November, 2005, the plaintiff indicated that he and Ms. Scott had now decided that he would invest in one bond in his own name for €1 million and the Cashel Rock Partnership would invest €1 million in a separate bond. Accordingly, on 23rd November, 2005, the plaintiff executed a security assignment in respect of the Bond in the name of the Cashel Rock Partnership in favour of the

Bank. The Partnership's investment was accepted by a receipt dated 30th November, 2005, in respect of bond number INB/0003125.

The Policy Documents
42. By letter dated 5th December, 2005, the Bank issued a receipt to the plaintiff in respect of bond number INB/0003006 in the Fund. The letter enclosed documents relevant to the Fund and the investment including: the policy documents, the Fund's brochure (the Black Book) and disclosure documentation.

43. The Black Book sets out nine asset management opportunities and development opportunities that were set out in the loose-leaf brochure. Importantly it does not monetise the expected return. On the contrary, on p. 20 it states that it is difficult to quantify the return potential from the opportunities. At p. 33 it sets out the risk factors as follows:-

> *"A geared property investment is considered to be high-risk and the following considers the types of risk associated with an investment of this kind. This brochure does not constitute investment advice, and prospective investors should consult their own legal, financial or tax advisors in relation to the participation in this investment…*
>
> *This brochure includes information obtained from external sources, and this information has been reproduced accurately from those sources, but Anglo and AIAC do not accept any responsibility for the accuracy or completeness of such information…*
>
> *Investors should note that a fall in the capital value of the property of approximately 26% would reduce the value of investor equity to zero assuming no surplus rental income and no reduction in Bank borrowings…*
>
> ***Development Risk***
>
> *The intention to develop portions of the Property will attract further risks. However, any proposals to develop within the existing shopping centre or develop new properties on the site of the Whitgift Centre, will have to satisfy Anglo and AIAC with regard to the feasibility and commerciality of same. AIAC will act in the best interests of the Fund investors when assessing such proposals.*
>
> *As mentioned previously, any capital expenditure on the Whitgift Centre in excess of 10% of gross annual income requires the consent of the Whitgift Foundation and the Royal London Mutual Insurance Society. It is worth noting that both bodies have given their consent to, and funded their share of the cost of, the historic major refurbishments carried out to date. Anglo is satisfied that it is in both parties commercial interest to continue to do so where a clear and compelling case exists."*

44. At p. 22, under the heading "*Asset Management / Redevelopment Opportunities"*, the brochure provided:-

> *"One of the key attractions of the Whitgift Centre is the opportunity to add substantial value by way of active asset management and redevelopment opportunities. Howard and the JV Partners believe that the Centre has not been managed to maximise its existing potential. Howard believe that with entrepreneurial management of this Centre, significant value can be unlocked over a 5-7 year period, which coincides with the £2.5bn spend on Croydon in general…*
>
> *Redevelopment opportunities (subject to planning permission and, where applicable, head leaseholders/freeholders consents).*
>
> *The JV Partners have* ***identified a potentially attractive range of development opportunities, comprising residential, office and mixed use schemes. While these are subject to detailed evaluation and planning consents****, Anglo consider that they represent a substantial opportunity to enhance the earnings and overall value of the asset over the medium to long-term."(emphasis added)*

In each case it is stated that the opportunities identified are not intended to be definitive or exhaustive.

45. The policy documents included supplementary provisions for the Whitgift Geared Property Fund which were stated to be supplementary provisions which attached to and formed part of the Bond. Paragraph 3.3 of the Bond provided:-

> *"By signing your Application and requesting that contributions should be paid into the Whitgift Geared Property Fund you agree, accept and acknowledge that :-*
>
> *3.3.1 we have no responsibility to advise you as to the suitability of an investment in the Whitgift Geared Fund for your particular circumstances;…*
>
> *3.3.4 you will not commence or bring and you hereby irrevocably waive any entitlement to commence or bring any legal or other proceedings against us arising out of or connected with the non performance of the assets forming part of the Whitgift Geared Property Fund or their failure to perform as you may have anticipated or expected".*

46. Paragraph 3.4 provides:-

> *"You specifically agree by signing your Application and requesting that contributions should be paid into the Whitgift Geared Property Fund that these Supplementary Provisions are fair and reasonable in the particular circumstances of an investment into the Whitgift Geared Property Fund and you acknowledge that you have had the opportunity to raise any concerns relating to these Supplementary Provisions with us."*

47. Enclosed with the other documentation was an investment bond cooling off notice which expressly gave the plaintiff a period of 30 days from the date of the letter to cancel the investment. Identical documentation was furnished to the Cashel Rock Partnership in respect of bond number INB/0003125 on 19th December, 2005.

2006-2008
48. After concluding the two investments the plaintiff sought tax advice on the transactions from Mr. Brian Bohan. In or around March, 2006 he wrote to Mr. Bohan stating that the investment was expected to yield a return of 300% over a period of 7-9 years. He received no information from AIAC regarding the development of the Whitgift Centre so he instructed solicitors on his behalf to conduct a planning search of the Whitgift Centre to ascertain if any applications for planning permission had been lodged. The results

were negative. In February, 2007 he wrote directly to Howard Holdings enquiring, *inter alia*, in relation to redevelopment proposals. The following year, on 6th February, 2008, he wrote to the Bank stating that he was anxious to hear about the development plan for the Whitgift Centre and the results of any efforts to obtain planning permission.

49. In 2008 Ms. Scott was concerned about her possible tax liabilities in Australia arising from her investment in the Partnership and so she wrote to the plaintiff on 28th January, 2008, stating that she wished to withdraw all financial and/or other interest from the investment. The plaintiff accepted this letter and effectively released her from any obligations under the Partnership of which she was 100% beneficial owner. This included the obligation of the Partnership to repay the plaintiff the loan he advanced to the Partnership so that it could purchase the Bond in the Whitgift Geared Property Fund. The plaintiff initially maintained that this letter constituted an assignment to him by Ms. Scott of her interest in the Partnership. At the end of the case this claim was abandoned.

The plaintiff's complaints
50. The plaintiff commenced these proceedings by a plenary summons dated 12th September, 2011. However the Summons was not served until nearly a year later. In the meantime he wrote a number of letters in July, August and September, 2012 raising a number of different complaints. He queried the qualifications of the person who marketed the Fund to him. He alleged conflicts of interest between the wealth management division of the Bank and the lending division of the Bank. He complained about a lack of information being provided to investors and the right of investors to participate in decision making in respect of the underlying asset of the Fund. He complained that he was dissuaded from investing in the Knightsbridge Investment and persuaded to invest in the Whitgift Geared Property Fund. He complained that Whitgift Centre did not appear to have been correctly managed in many significant ways and he objected to the revised terms of business provided by the Bank. He made no complaint whatsoever in relation to misrepresentation or negligent misstatement and he made no reference to the fact that a plenary summons had been issued on 12th September, 2011. He served no letter before action setting out his case prior to issuing the Plenary Summons or serving it a year later.

51. The first time he complained in relation to representations upon which he now sues was when he delivered the Statement of Claim. He did not pursue the many other matters in respect of which he had previously complained to the Bank.

Negligent misstatement
52. In the Statement of Claim he pleaded that there were 3 specific oral and written representations:-

> (1) That the Whitgift Shopping Centre was projected to increase its rental income by stg£2 million year on year.
>
> (2) That there existed significant potential to increase the rental income by reason of "*existing asset management*" and "*new development*" opportunities.
>
> (3) That the potential return on investment after 10 years was between 220% and 300%.

53. He said that the oral representations were made by Mr. Hayes and the written representations were in a brochure provided to the plaintiff by the Bank.

The written representations upon which the plaintiff relies are those set out in the loose-leaf brochure. The brochure identified 5 asset management opportunities as follows:-

- "***Relocate*** *pedestrian access along M&S.*

  - Forecast net added values £8.5m

  - Timeframe 3-5 years.

- *Planning exists for 80k sq.ft new space*

  - Forecast net value added £5m

  - Timeframe 3 years

- *Early lease renewals*

  - Forecast value added £4.5m

  - Timeframe 1-3 years.

- *Reconfigure M&S and River Island units*

  - Forecast net value added £3.5m

  - Timeframe 3-5 years

- *Increase Mall Income*

  - Forecast net value added £3.5m

  - Timeframe 1-3 years".

54. It identified 4 potential development opportunities:-

> *"WHITGIFT TOWER*

25 STOREYS

200, 000 sq ft

OFFICES / RESIDENTIAL / HOTEL

PROFIT £15m

FOCUSHOUSE

15 STOREYS

125, 000 sq ft

OFFICES

PROFIT £10m

WESTERNGATEWAY

NEW RESIDENTIAL

FIVE STOREYS

110 FLATS

140,000 sq ft

PROFIT £12m

RESIDENTIAL TOWER

10 STOREYS

175 FLATS

160,000 sq ft

PROFIT £15m".

55. Under the heading "*Risks and Sensitivities*" the brochure stated:-

> "***Whitgift Foundation****. The WF owns the Freehold title to the property. Their consent must be received for all expenditure >£1m. We have met with the WF, who confirm that they will support and fund plans which will maximise the value of the Whitgift Centre."*

In order to succeed in his claim the plaintiff must establish that as a matter of probability he had this brochure and that Mr. Hayes made the oral representation pleaded prior to his decision to invest in the Whitgift Geared Property Fund.

The plaintiff's evidence in relation to the representations

56. The plaintiff's evidence was in many respects wholly unreliable and frequently inconsistent. It has to be remembered that he was giving evidence in respect of events which occurred nine years previously. He had no clear recollection of many of the key details of the case. He was clearly trying to reconstruct events to some extent by reference to the documents. Even making allowances for this fact, there were some startling inconsistencies in his evidence.

57. In his Statement of Claim of 9th November, 2012, and the Amended Statements of Claim of 2nd May, 2013, and 31st July, 2014, the plaintiff pleaded that he met Mr. Hayes and Ms. Deacy at the Radisson Blu Hotel in Galway in the autumn of 2005. He says it was at this meeting that Mr. Hayes made his oral presentation and furnished him with the loose-leaf brochure. This presentation was what persuaded him to invest in the Whitgift Investment. The date of the meeting is reiterated as being in the autumn of 2005 in the Replies to Notice for Particulars dated 18th January, 2013.

58. On the other hand in his Witness Statement dated 4th June, 2014, for the first time the plaintiff alleged that the meeting occurred during the period the 11th – 15th July, 2005. He was adamant in his evidence to the Court that this was the correct date as his decision to invest in the Whitgift Geared Property Fund was made when he decided not to proceed with the Knightsbridge Investment. He cancelled the sterling he had pre-ordered to enable him to invest in the Knightsbridge Investment on 15th July, 2005. It was clear therefore that his evidence was he decided to invest in the Whitgift Fund on or before the 15th July, 2005, at the latest.

59. During the course of the plaintiff's cross-examination it became apparent that a number of documents had been omitted from his affidavit of discovery. In particular, four crucial documents came to light at that stage. The first was the compliments slip stamp dated 22nd June, 2005, from Ms. Deacy enclosing a brochure. The compliments slip did not identify the brochure. He had previously discovered a handwritten note written by the plaintiff to Ms. Scott setting out the reasons why she might wish to invest in the Whitgift Geared Property Fund. This is the note referred to at para. 24 above. He now discovered a further copy of this document with a faxed report attached to it which indicated that it had been sent on 27th June, 2005. This note referred to a brochure which it enclosed. The plaintiff also discovered a version of the loose-leaf brochure which was different to the one upon which his case was based. This third document is the document I have called the first version of the loose-leaf brochure. On the back page of that brochure there was a long number handwritten by the plaintiff. He identified this as the fax number of Ms. Scott. He therefore accepted that this was the document which he had faxed to Ms. Scott on 27th June, 2005, together with his handwritten note. He accepted that the first loose-leaf brochure was furnished to him by Ms. Deacy under cover of her compliments slip and that this was the document relied upon by the plaintiff when he invited Ms. Scott to invest in the Whitgift Geared Property Fund on 27th June, 2005. He accepted that at this stage he was urging her to invest in the Fund. He said that he was "*warm*" to the investment. Crucially his calculations indicate that he was assuming a return of 300%, though this figure does not appear in this brochure which

refers to a ROE of 150-250%. He made no reference to development opportunities.

60. The plaintiff produced a fourth document as part of this further discovery. This was a second compliments slip from Ms. Deacy which was stamp dated the 15th July, 2005. It read:-

> *"Attached please find up to date brochure FYI*
>
> *I have also attached a copy mandate for you & Partner to complete*
>
> *Kind Regards*
>
> *Margot Deacy".*

61. In view of the fact that it referred the most up to date version of the brochure, the plaintiff maintained that the loose-leaf brochure upon which he based his case was furnished to him by Ms. Deacy under cover of this compliments slip which he received on 15th July, 2005, rather than by Mr. Hayes at a meeting in the Radisson Blu Hotel in Galway. He now accepted this meeting took place in October of that year. From expenses claims from the Bank and correspondence it is clear that this was on the Friday between 12th and 19th October, 2005. Given the inconsistency of the plaintiff's evidence in relation to this crucial meeting, I am unable to place any reliance on his evidence in relation to it.

62. By the conclusion of his evidence, the plaintiff's case was that he decided to invest based on a brochure which he received in the post sometime on 15th July, 2005. It was the second such brochure. He spoke with no one in the Bank in relation to the investment as outlined in that brochure, but in the late afternoon of 15th July, 2005, he had made up his mind to invest in the Whitgift Geared Property Fund and to cancel his interest in the Knightsbridge Investment. Most importantly his decision to invest was made some months in advance of the oral presentation of Mr. Hayes upon which he had placed so much emphasis in his earlier testimony.

63. Other aspects of Mr. Spencer's evidence were unreliable: he initially maintained that the brochure he had faxed to Ms. Scott was the brochure upon which his case was based i.e. the loose-leaf brochure. Following the additional discovery from his office, he had to accept the fact that this was incorrect and that he had sent a different loose-leaf brochure to Ms. Scott. He had also maintained that Ms. Deacy had given him only one brochure and he was now maintaining she had furnished him with two. When asked to explain why the loose-leaf brochure had the words "second version" written on the top page he said that this was a document he got from Mr. Hayes and he had to differentiate between the two brochures. But he had totally forgotten about the first loose-leaf brochure until mid way through his cross-examination. On another occasion he said he ended up with loads of brochures but was given a brochure by Ms. Deacy and was later given a brochure by Mr. David Raethorne (a witness on behalf of the plaintiff who was also an investor in the Fund). It is clear that Mr. Hayes did not give him either of the loose-leaf brochures, though his case was based upon the fact that Mr. Hayes gave him the loose-leaf brochure and it was that brochure, coupled with Mr. Hayes' presentation which induced him to invest in the Whitgift Geared Property Fund both on his own behalf and on behalf of the Cashel Rock Partnership. I therefore cannot accept the plaintiff's evidence that he received the loose-leaf brochure, upon which his case was based under cover of the compliments slip stamp dated 15th July, 2005.

64. However, that is not the end of the matter, Ms. Deacy gave evidence on behalf of the Bank and she accepted in evidence that she enclosed a brochure that related to the Fund with that compliments slip. Her evidence was that this was the prospectus brochure known as the Black Book. As Mr. Gerard Davis, the author of the Black Book, gave evidence to the effect that the Black Book had not been completed until late August, 2005, clearly Ms. Deacy's evidence that the brochure referred to was the Black Book could not be correct.

65. I accept on the balance of probabilities that Ms. Deacy enclosed a brochure with this compliments slip and on the balance of probabilities that it was not the Black Book. I am left to draw the inference that the loose-leaf brochure was enclosed with the compliments slip and the plaintiff had the brochure when he made his decision to invest in the Whitgift Fund. Therefore the written representations set out in the loose-leaf brochure were made to him prior to his decision to invest in the Fund. On the other hand I do not accept that the plaintiff has established that Mr. Hayes made the oral representation pleaded at para. 6(a) of the Statement of Claim. I dismiss his claim based upon oral representations allegedly made by Mr. Hayes on behalf of the Bank.

Did the contents of the loose-leaf brochure amount to misstatements?
The plaintiff must establish that the remaining two alleged representations were untrue or were made recklessly without regard to their truth or otherwise. It is necessary to consider the evidence in relation to asset management and development prospects of the Whitgift Centre in 2005.

Planning evidence
66. Mr. Nicholas Sutton gave evidence on behalf of the plaintiff and Mr. Daniel Simmonds gave evidence on behalf of the Bank. There was considerable agreement between the two experts. They agreed on the relevant Government policies, Development Plan and local planning policies applicable to the site at the time of the investment. They agreed that the Phase IV development could not be implemented without the Secretary of State surrendering the lease over the car park; that the owners had a five year window from the date of the permission to negotiate the surrender of the lease with the Secretary of State and that the permission could also have been renewed at any time via the submission of a new application. They both agreed that the Phase IV development and the Whitgift Tower development opportunity were mutually exclusive as they occupied the same site.

67. Mr. Sutton and Mr. Simmonds each considered the five asset management opportunities identified in the loose-leaf brochure. They agreed that in order to relocate the pedestrian access along by Marks & Spencer that planning permission would be required but that this would be easily secured. They noted that planning existed for the 80,000 sq. ft. new space as the Phase IV development. They agreed that the remaining three identified asset management opportunities did not require planning permission. Thus there was agreement that from a planning perspective there was no difficulty with the asset management opportunities set out in the brochure.

68. Mr. Sutton considered the new development opportunities. In relation to the Whitgift Tower he accepted that this was possible in planning terms. He had concerns with the identified opportunities at Focus House, Western Gateway and the Residential Tower based on either their scale or their siting. He accepted that the Western Gateway proposal was achievable from a planning policy perspective.

69. In relation to the Residential Tower proposal he said that the scale of the building was probably not unacceptable but he was concerned that the site was inappropriate as the apartments would be looking over plant equipment on the roof of the Whitgift Centre. He accepted that difficulties might be overcome through design. He was of the opinion that the application for a 15 storey

office tower at Focus House was highly optimistic. He accepted that there was a policy for tall buildings on the Wellesley Road but he was not sure if the Focus House site fell within the scope of this policy. On balance he thought it did not. Likewise with regard to the Western Gateway proposal. He agreed that the policies were highly promotional of the kind of development referred to. His problem was with the siting of this proposal as it would block an existing gap in the street scene, it is potentially one storey too high and there could be problems with noise and disturbance.

70. Mr. Sutton considered the planning history of the Park Place development and Bishops Court 1 and Bishops Court 2; he noted that Croydon Council considered that the two schemes (Park Place and either version of Bishops Court) should be considered as alternative competing developments. He agreed. He was of the view that Park Place had won out when it had obtained planning permission in December, 2004. He was cross-examined on the basis that it was a very large and complex development and that it was ambitious and by implication difficult to implement. He said:-

> *"[i]t would have been very difficult – or it would have been difficult to deliver. Notwithstanding, it would have been possible."* [1]

Mr. Simmonds in his Report had identified a number of difficulties in carrying out the Park Place development. Mr. Sutton said:-

> *"I would agree that it would be very difficult to pull those matters together. I don't think that it couldn't be done."* [2]

He was of the view that the Park Place development was relevant to the Whitgift Centre because it was in direct competition with the proposals for the Whitgift Centre (the Bishops Court proposals). He was of the opinion that these proposals should have been highlighted to investors at the time of the investment as they were likely to impact on the overall attractiveness of the Whitgift Centre to retailers as well as the asset management and new development opportunities referred to in the loose-leaf brochure.

71. Mr. Simmonds on behalf of the Bank thought that the development opportunities identified in the loose-leaf brochure were reasonable. There was support for each of the proposals in the relevant planning policies and development plan. He summarised the effect of the policies and the development plan as being highly promotional in terms of promoting new development in central Croydon including both retail development and other town centre uses including offices, housing and a hotel. He noted that the importance of the Whitgift Centre and its potential to expand was expressly mentioned in the London plan.

72. He considered the Park Place development; in his opinion it was very ambitious. He pointed out that the applicant's site was very large and complex comprising 21.4 acres. It inevitably contained a large number of different land ownership interests. He was of the view that piecing together such a large and complex development site would be a challenge. Indeed, part of the site comprised lands in the Whitgift Centre itself. He also pointed out that it would incur some significant costs such as section 106 agreement costs obligations, a glazed pedestrian bridge across George Street and the subway under it, remodelling of the existing roundabout at the junction of Berkley Road and Park Lane, pedestrianisation of the High Street between George Street and Katherine Street; a bus interchange to be provided between Katherine Street and Park Street and a new public square. The viability of the proposals were reliant on a suitable anchor store. Originally this was to be Allders. On 30th January, 2005, Allders went into administration and the development agreement for Allders to occupy the Park Place development had been terminated by the time the Inquiry completed on 10th February, 2005. It was therefore necessary for Minerva to obtain a new anchor tenant. Furthermore, Minerva formed a partnership with Lend Lease but this joint venture was conditional upon John Lewis agreeing to become the anchor tenant. In the event, no such agreement was reached. On the basis of all of the above he was not surprised that the Bank took the view that the Park Place development was not a viable commercial development and would not affect its future development plans.

73. DTZ prepared a planning review of the Centre for Howard Holdings dated June, 2005. This Report was included in the DTZ Report on the Whitgift Centre for the Bank and AIAC dated 22nd August, 2005. At para. 5.58 DTZ noted that the offices in the Whitgift Centre were no longer well suited to modern business requirements and that the refurbishment of the office buildings for other uses was likely to be acceptable as redevelopment of the buildings for modern offices was likely to be impracticable. At para. 5.59 they were of the view that an alternative use for the existing office floor space as residential would be considered acceptable in principle. DTZ noted in their Report that they had discussed the attitude of Croydon Council to the Whitgift Centre with the Senior Development Control Officer. They reached the conclusion that the investment opportunity offered by the Whitgift Centre was very positive in planning terms. In principle Mr. Sutton on behalf of the plaintiff agreed with this conclusion.

Property valuation evidence

74. Mr. Russell Francis of Colliers International gave evidence on behalf of the plaintiff and Mr. Mark Whitfield of Montagu Evans LLB gave evidence on behalf of the Bank. They agreed that the evaluation approach adopted by DTZ accorded with market practice at the time and was reasonable having regard to information available to them at the time and that the valuation set out in the Report was realistic and appropriate. The valuers disagreed in relation to DTZ's projections in relation to rental values and tenant demand. Mr. Francis considered these to be bullish and he did not agree with DTZ's projections with regard to asset management. Mr. Whitfield considered the projections to be reasonable. However Mr. Francis agreed that it was reasonable for the Bank to rely upon the DTZ Report.

75. They each considered the investment return potential set out in the loose-leaf brochure. The dry investment return was 165% over 10 years. Mr. Francis was of the view that it was reasonable though bullish. They agreed that where actual forecast returns are stated, such as in the loose-leaf brochure, it would be reasonable to assume that the amounts stated had been the subject of calculation. However, neither expert had been provided with any calculations purporting to show the returns that may have been available from either the asset management opportunities or the new development opportunities, though Mr. Francis noted that the DTZ Report provided some figures in respect of some asset management opportunities.

76. They both accepted that the asset management opportunities identified in the loose-leaf brochure existed as opportunities It was agreed that the EC Harris Report of 2004 dealing with the condition of the Centre was included in the DTZ Report and it was accepted that the refurbishment costs outlined by EC Harris would probably be covered by service charges and were not therefore likely to be an issue for investors in the Fund.

77. There was considerable disagreement between the valuers in relation to the realisable value of the asset management opportunities and new development opportunities and the projected returns identified in the loose-leaf brochure. Before considering their evidence on these matters I summarise what was set out in two reports on the Whitgift Centre prepared in 2005.

78. Colliers International, Mr. Francis' firm, marketed the sale of the long leasehold interest in the Whitgift Centre in 2005. Their brochure stated that the particulars in the sales brochure were intended to give a fair overall description of the property. They stated that they currently recorded 71 named major retailers which required either a new store, expansion or relocation in Croydon. They

stated that the Centre offered a number of opportunities to improve the asset through active management. They identified 11 such opportunities which included the 5 opportunities identified in the loose-leaf brochure (though expressed in slightly different language). The brochure referred to the offices occupied by the Home Office (blocks A, B, C and E) and the Centre Tower. It noted that the Secretary of State's lease was due to expire in 2010 and the Centre Tower leases were due to expire between January, 2007 and March, 2015. It stated:-

> *"With Croydon designated by the government as an area for commercial and residential expansion, the opportunity exists to convert the offices to residential and/or hotel use."*

79. The DTZ Report noted that the asset management of the Whitgift Centre had not been as proactively undertaken as it ought. The Report identified a number of management opportunities and then considered 7 in some detail. In relation to mall income (one of those identified in the loose-leaf brochure subsequently), it noted that it should be possible to install 8 to 10 retail merchandising units ("RMUs") without interfering with sight lines within the malls or disrupting pedestrian flow. It would not be unreasonable to add stg£280,000.00 to stg£350,000.00 per annum to the rental income of the Centre in this way. It identified the possibility of redeveloping and reconfiguring the pedestrian access to the north end of the Centre near Marks & Spencer and reconfiguring the Marks & Spencer unit. The development would enhance rental growth performance, secure Marks & Spencer representation, increase and improve pedestrian flow and improve the northern end of the Centre. The authors also considered reconfiguring the River Island unit. The Report included a very large list of retailers whom the authors believe were either anxious to move to Croydon or who were actively seeking new premises within the town and who therefore potentially could be tenants for the new units for the reconfiguration proposed in the Report. They pointed out that the requirement was across all sectors of the market in terms of both use and aspirational standing and in the size of the units required.

80. In light of these two contemporaneous documents, I turn to consider the evidence led on behalf of the parties on these issues. Mr. Whitfield gave evidence in relation to the asset management opportunities identified in the loose-leaf brochure on behalf of the Bank. He was of the opinion that these opportunities were reasonable and deliverable. Mr. Francis believed that delivery of the identified opportunities would be problematic. He acknowledged the potential to reconfigure the Marks & Spencer store and to relocate the pedestrian access to the north of the Centre but thought it would be difficult to achieve. He accepted there existed an opportunity for early lease renewals but he took issue with the profit forecast. He felt the increase in mall income would be problematic as there would be issues in relation to sight lines and reducing mall widths.

81. I prefer the evidence of Mr. Whitfield in this regard. Many of Mr. Francis' concerns had been considered and answered in the DTZ Report. Between 8 and 10 RMUs could be sited in the malls without interrupting sight lines and without interrupting pedestrian flows. Similarly, on balance Marks & Spencer was unlikely to withhold co-operation with the proposed reconfiguring of its store and the reconstruction of the entrance to the north of the Centre in view of the long-term lease commitment it had to the Centre and the fact that it needed to improve its trading performance in the Centre. I do not accept Mr. Francis' evidence in relation to the difficulties in realigning the entrance near Marks & Spencer and reconfiguring it and other the stores in the Centre. I think it is significant that both DTZ and Colliers International each independently identified these and other opportunities in respect of the Centre.

82. The real difficulty is whether or not the monetisation of these opportunities was reasonable. Mr. Francis accepted that if 10 RMUs were added to the malls at the rental and yield identified in the DTZ Report then it was correct to attribute a net of value added to the Centre of stg£3.5 million. In relation to the forecast net added value stg£8.5 million attributed to the relocation of the pedestrian access along by Marks & Spencer at the north end of the Centre, Mr. Whitfield stated that he could not point to a calculation that gets you stg£8.5 million but stated:-

> *"… in terms of was it a reasonable opportunity, yes. Was it likely to yield a significant increase in value or profit, in my view, yes."* [3]

83. Mr. Whitfield said it was not possible at this remove to replicate the calculations which would have been performed in 2005. He said:-

> *"But, having said that, the figures that were put forward in this brochure were prepared by Howard in conjunction with DTZ and, you know, as a DTZ report itself suggests, they undertook some calculations at the time. It seems fairly clear to me that there would have been calculations and I have got no reason to suppose that the outcome of those would be any different to the figures that are stated in Appendix 2."* [4]

In summary he felt the values set out in the Report also were reasonable. Mr. Francis did not give any evidence as to the possible value the identified opportunities would add to the Whitgift Centre. It was to be inferred that he did not believe that even if the opportunities were realised that they would enhance the value of the Centre at all.

84. In relation to the development opportunities Mr. Francis pointed out that consent would have to be obtained from both the Whitgift Foundation and Royal London and that they would each have to agree to contribute 25% of the development costs in order for the developments to be delivered. He said to deliver what was articulated in the loose-leaf brochure was exceptionally difficult for all manner of reasons. He referred to the ownership structure, the fact that the Whitgift Foundation and Royal London would have to contribute. He thought the Western Gateway proposal was to be constructed on land not owned by the Whitgift Centre and he referred to the problem of the lease to the Secretary of State. Fundamentally his objection was that he did not know where the figures had come from and he did not know whether they referred to the 50% interest in the Centre or 100% interest in the Centre.

85. Mr. Whitfield's view was that the potential for development was a reasonable observation having regard to the nature of the Croydon market at the time. Each of the development opportunities identified was likely to be economically viable and commercially deliverable. Subject to detailed design, in the light of existing planning policy it was reasonable to proceed on the basis that obtaining planning permission was unlikely to be problematic. There had been a significant amount of residential development within Croydon in the recent past and office blocks were being converted to residential use. There have been no development of new grade A office stock in Croydon since approximately 1990. This lack of supply, coupled with a number of known requirements from major Croydon occupiers for new grade A accommodation was, at the time, encouraging a number of developers to bring forward proposals for large-scale speculative grade A office developments within Croydon Town Centre. He said there was at the time known office tenant interest from Nestlé, AIG, Direct Line and RBS. Furthermore, a number of government departments in Croydon were thought to be willing to consider relocation opportunities to provide modern accommodation in place of the largely obsolete 1960s stock that most departments within the area occupied.

86. He was of the opinion that against this background it was not unreasonable for Howard Holdings and the Bank to have identified

these opportunities as a means by which additional development values could have been realised through development around the edge of and over the Whitgift Centre. He pointed out that none of the opportunities identified were proposals comprising a major redevelopment of the Centre. Rather they were incremental opportunities to develop additional accommodation in a way that would be complimentary to both the existing Centre and the council's wider aspirations for the regeneration of Croydon Town Centre.

87. As with the asset management opportunities, he was of the opinion that the development opportunities identified were, as opportunities, reasonable and that any reasonable asset manager would have identified and pursued them over time. He pointed out that clearly none were certain and not all would have been successful and indeed may not have been realised in the exact manner contemplated at the point of purchase. He acknowledged that the delivery of each of the opportunities would have required a number of matters to have been addressed (planning, pre letting (if appropriate), superior landlord and freeholders consent and the like) prior to delivery. In addition he said it was highly unlikely that all of the opportunities identified would have been delivered and the timing of the delivery of any was uncertain, albeit it in the context of an investment holding period of up to 9 years. He felt it was likely that one or more of these opportunities would have been delivered.

88. He placed particular emphasis on the fact that in order to achieve the percentages identified in the loose-leaf brochure it was not necessary to complete every one of the opportunities identified in that brochure. It would be necessary to deliver 92% of the cumulative value of the identified asset management opportunities to reach the forecast percentage increase of 30%. In relation to the development opportunities, out of the stg£52 million worth of development profit identified, the return that was required was just under half. He therefore disagreed with Mr. Francis and was of the view that the development opportunities were realisable and that the projected return was reasonable.

89. Mr. Whitfield was cross-examined about the need to discuss possible development plans with the Whitgift Foundation as the freeholder whose consent was required in order to carry out any development on the lands and who would be requested to contribute 25% of the costs of any proposed development. He agreed that it would be reasonable to expect that the attitude of the Foundation to the type of developments contemplated would, at the very basic level of residential, retail or office, have been ascertained in advance of making forecasts in relation to the opportunities set out in the loose-leaf brochure.

90. A major point of dispute between Mr. Francis and Mr. Whitfield related to the Park Place development. Mr. Francis considered that the grant of planning permission constituted a major threat to the Whitgift Centre; that it would have a significant impact upon the attitude of existing and potential tenants to the Whitgift Centre and that this in turn would seriously impact on the ability to realise gain from early lease renewals, the third identified asset management opportunity. He accepted that it would be reasonable to assume that if the Park Place development were to be delivered that it was at least five years away given the number of matters that had to be dealt with including CPO procedures and construction time.

91. It was known that there were significant commercial difficulties with the Park Place development. The project had been designed around the Allders store as anchor tenant and the space for the anchor tenant had been specifically designed to meet the needs of Allders. On 30th January, 2005, Allders went into administration and therefore was no longer available to anchor the development. Minerva entered into a joint venture agreement with Lend Lease Europe Limited to carry out the development but the involvement of Lend Lease was conditional upon John Lewis becoming the new anchor tenant. While John Lewis had expressed an interest in opening a store in Croydon, it had not committed (and in fact never did) to the Park Place development. Mr. Francis accepted that all of these issues were known to be hugely problematic in the early part of 2005. He accepted that in the event no unconditioned agreement was ever reached with John Lewis and consequently with Lend Lease.

92. Mr. Whitfield took the view that in the summer of 2005 either the development was going to go ahead anchored by John Lewis or it was fairly unlikely to happen. If it went ahead with John Lewis he felt it could potentially have some significant benefits for Croydon as a whole including the Whitgift Centre. But the development needed an anchor tenant which it did not have in the summer of 2005 and without an anchor tenant there was no development partner with Lend Lease. He said that the view that the Bank took that the development was unlikely to happen was one that many people took at the time.

The attitude of the Whitgift Foundation

93. The attitude of the Whitgift Foundation was critical to the reasonableness and reality of many of either the asset management opportunities or the development opportunities. If the Whitgift Foundation was likely to refuse consent to any development which required its consent or to refuse to contribute to the development costs of any development then, in reality, there was no real prospect of the development being carried out. In that case it would not be reasonable to identify any such development as an opportunity. While in theory it might exist, if as a fact consent and/ or investment would not be forthcoming, it could not proceed.

The evidence of Mr. Richard Stapleton

94. Mr. Richard Stapleton, the Surveyor to the Whitgift Foundation gave evidence on behalf of the plaintiff. He had been surveyor to the Foundation since 1998. He indicated that the Foundation was a charity that had been established in the 16th century and had to be prudent in relation to its assets. He confirmed that prior to 2000 the Foundation had made capital investments in the Whitgift Centre alongside the other co-owners of the Centre to refurbish and improve parts of the Centre. He said that the Foundation had long formed the view that it should be reducing its investments in the Centre. He confirmed that he had two meetings with Howard Holdings in 2005. On the 27th May, 2005, he met with representatives of Howard Holdings in Croydon. He confirmed that the Foundation's formal approval would be required for any redevelopment of the Centre. He confirmed the Foundation's established policy was to consider any specific proposals to improve the Centre on its merits and any decision as to the appropriateness of the Foundation giving its consent and/or investing in a proposal would depend on the advice it received at the time, including advice on viability, risk and availability of funds. It was made clear and it could not be assumed that the Foundation would be prepared to make any further investment. It was pointed out that under the terms of the lease there was no obligation on the Foundation to make further investment in excess of the capital limit (5% of net rental income). He stated that Howard Holdings' representatives did not discuss any specific plans or proposals at that meeting.

95. On 20th June, 2005, he met with representatives of the Bank and Howard Holdings. The Foundation was questioned about its aspirations for the Whitgift Centre and it was indicated that the Foundation's prime concern was to ensure that the asset was properly managed and developed and that it was for the Asset Manager of the Centre to come forward with any specific development proposals. In the absence of specific proposals it was impossible to comment further. Mr. Stapleton said that he expressly asked the representatives of Howard Holdings to explain their plans for the Centre and they said they were not prepared to do so. None of the asset management opportunities or development opportunities identified in the loose-leaf brochure were raised at the meeting. Mr. Stapleton's evidence was that if the Foundation had been shown the loose-leaf brochure they would have said that they would not fund the development opportunities identified in that loose-leaf brochure. He regarded them as speculative.

96. He said that on several occasions during the meeting both Howard Holdings and the Bank asked precisely what the Foundation's

position would be on development proposals but that that in the absence of specific proposals it was impossible to comment further. He said it was made clear that any proposal would have to be considered on it merits and that the Foundation did not have any significant funds to invest in the Centre.

97. Under cross-examination he agreed that in 2005 the Foundation was open to the idea of redevelopment of the Centre. He agreed that the attitude of the Foundation was one of openness to consideration of improvement in redevelopment opportunities, subject to detailed plans being submitted for consideration and risk assessment and with no guarantee that the Foundation would necessarily follow through with the proposed plan. He agreed that as no specific proposals had been discussed they were neither in nor were they out.

Banking evidence

98. Evidence was led by both the plaintiff and the Bank in relation to the relationship between the plaintiff and the Bank and the duty of care allegedly owed by the Bank to the plaintiff. There was a considerable amount of evidence given in relation to the possible conflict of interest in the Bank in relation to its multiple roles in the investment. Likewise there was evidence given regarding the suitability of the investment to the plaintiff's requirements and the characterisation of the level of risk involved in the investment. None of this was relevant to the plaintiff's case unless it was established that the Bank owed the plaintiff a fiduciary duty. As neither of the banking experts asserted this to be the case, these matters are no longer relevant to the plaintiff's claim.

99. Dr. Thomas Walford gave evidence on behalf of the plaintiff. He criticised many aspects of the Bank's involvement in the investment and its dealings with the plaintiff. However, many of these are not relevant to the case advanced by the plaintiff. Mr. Conor O'Malley gave evidence on behalf of the Bank. He and Dr. Walford agreed that the Bank's professional advisors (DAC and DTZ) were high quality and appropriate to the proposed investment. They agreed that it was reasonable for the Bank to rely upon the Reports of DAC, DTZ and EC Harris. Dr. Walford did not accept that it was reasonable for the Bank to rely upon advice from Howard Holdings as he did not accept that they had the appropriate expertise. They agreed that the DTZ Report accurately described the value and pertinent aspects to making an investment in the Whitgift Centre. It was the type of report they would expect as part of a due diligence process. They agreed that on the basis of the information provided by the property experts that it was reasonable in 2005 to consider a base return of 165%. They agreed that the plaintiff would be classified as a private client as defined by the applicable Code of Conduct for the Investment Business Services of Credit Institutions ("CCIBSCI").

100. Dr. Walford identified the primary relationship between the Bank and the plaintiff as being created on 19th October, 2005, when he formally completed a personal financial review and signed the investments objective letter and application for the Bond. He said it was difficulty to categorise the relationship between the plaintiff and the Bank as normally the relationship would be governed by an investment agreement and there was none in this case. He said it was not a straight forward advisory relationship. He was of the opinion that the Bank owed the plaintiff common law duties of care. He was not of the opinion that there was a fiduciary relationship between the Bank and the plaintiff.

101. He accepted that the plaintiff understood the nature of a geared investment and that the plaintiff acknowledged in writing the risks he was undertaking a number of times. He acknowledged that the plaintiff understood that it was an illiquid, geared investment; that it was a 100% investment in one asset in which he could lose all his money if the property dropped by 26%.

102. Dr. Walford was highly critical of the adequacy of the disclosure by the Bank to the plaintiff of what he regarded as material information. He said he was stunned to hear that at the meeting between Howard Holdings, the Bank and the Whitgift Foundation, that Howard Holdings were resistant to talking about any development proposals they had in mind. He was very strongly of the opinion that potential purchasers of the investment should have been made aware of more of the risks involved, particularly those that related to the development and planning issues. He was highly critical of the fact that there was no reference to the grant of planning permission to Park Place or the threat posed by Park Place to the Whitgift Centre or of the refusal of the Bishops Court 2 application. In relation to the identified new development opportunities in the loose-leaf brochure, he was of the view that it should have been made clear that all of these needed the consent and funding from the Whitgift Foundation and that they all needed planning permission.

103. Dr. Walford was particularly critical of the references to the Whitgift Foundation in both the loose-leaf brochure and the Black Book. It was his opinion that these were misleading to a significant degree and they failed properly to disclose matters which ought to have been disclosed to potential investors. He criticised the statement that stg£2.5 billion would be spent in Croydon over the next 5 to 6 years by major UK developers including Minerva. This was a reference to the Park Place development. However, the Bank elected to omit all reference to the Park Place development from its literature because it believed that Minerva would be unable to deliver the proposed development. Dr. Walford was of the opinion that it was highly questionable that the Bank had met its duty not to mislead a client as to any perceived advantages or disadvantages of a contemplated transaction by failing to disclose the refurbishment costs estimated by EC Harris in 2004. However, this was based on a false premise as in fact the property experts, Mr. Francis and Mr. Whitfield, considered that this would not be an expense to the Fund as the costs would be recovered from the tenants pursuant to their full repairing lease obligations.

104. Dr. Walford was critical of representing the future spend of stg£2.5 billion in Croydon as a positive factor. He described it as grossly misleading. He said that the competition of other new shopping centres in the Croydon Town Centre would change the overall balance and represented a major risk to the future viability, profitability and attractiveness of the Whitgift Centre. This opinion was not in fact supported by the evidence of either Mr. Francis or Mr. Withfield who confined their observations to the Park Place development.

105. Dr. Walford said he could see no basis for the 220% claim and he was therefore of the opinion that the Bank had breached its CCIBSCI obligations in not having considered this matter in more detail.

106. Mr. O'Malley gave evidence on behalf of the Bank. In his opinion it was reasonable for the Bank to rely upon Howard Holdings in relation to the possible development opportunities and asset management opportunities identified in both the loose-leaf brochure and in the Black Book. He said it was reasonable to rely upon their property expertise in 2005 as they were their joint venture partner and co-investor in the Whitgift Centre. He noted that the asset management opportunities were identified by Colliers International when selling the Centre and were evaluated by DTZ. In his opinion the Bank acted in a reasonable manner in relation to the asset management opportunities. It relied upon the expertise of Howard Holdings that these were possible and he noted that the DTZ Report backed up those figures (though the full DTZ Report was not available until 22nd August, 2005). He accepted that there was no analysis of the Howard Holdings figures by the Bank and that Howard Holdings had not furnished the Bank any calculations supporting the figures. There was nothing to indicate why the Bank reduced the Howard Holdings estimates by 33%.

107. Mr. O'Malley said that the plaintiff could not be described simply as an advisory client. The Bank was not giving general advice on

a whole array of products in the market. It was offering this particular investment. To the extent that it was giving advice in that context, he was of the opinion that the Bank had satisfied the obligations it owed to the plaintiff.

108. Mr. O'Malley agreed that where there were actual forecasts stated in the loose-leaf brochure, that it was reasonable to assume that the amounts involved had been the subject of calculation and he confirmed that he himself had not seen any detailed calculations.

109. In relation to the meeting between the representatives of Howard Holdings, the Bank and the Whitgift Foundation, Mr. O'Malley was of the view that it would have been better had they had a greater level of discussion with the Foundation representatives. His attitude to the opportunities identified in the loose-leaf brochure and the Black Book was that they were subject to detailed evaluation, and planning consent and that they were:-

> *"… just initially identified opportunities, you cannot say that, you know, that these were definite and certain….they had done preliminary evaluation but you cannot say that somebody is relying on these proposals with any definite expectation that each of them would go through."* [5]

He agreed that it would have been better had there been a greater degree of discussion between the Bank, Howard Holdings and the Whitgift Foundation in relation to the proposed opportunities. If the Bank were aware of potentially serious planning obstacles in relation to any of the proposals then they should not have been included in the literature as potential opportunities.

The plaintiff's evidence in relation to the representations

110. A crucial issue to be resolved is to what extent the plaintiff either was induced to enter into the loan agreement or relied upon the statements of the Bank in relation to the prospects for a return when he decided to invest in the Whitgift Fund. The plaintiff was examined by his counsel on day 2 of the hearing in relation to his understanding of the projected return of 165% over a ten year period (the base case)

> *"134Q… 165% return on investment, that would involve a growth of 65%: is that right?*
>
> *A. That is my understanding of it, yes."* [6]

He was also cross-examined in relation to the Bank's statement in the loose-leaf brochure to the effect that a combination of the base case, the asset management opportunities and the new development opportunities could give a return of 220%. He was questioned as to his understanding of this representation upon which he based his case. On day 3 of the hearing he stated:-

> *"470…*
>
> *A. Yes. The figure of 220% including my investment would have been satisfactory to me.*
>
> *471 Q. Well, the figure of 165 would too, if I'm right about the maths*
>
> *A. Yes. Yes it would.*
>
> *472 Q. So if I'm right about that, if that's what the return means, in fact you were being offered a figure higher than the figure you would have been happy to invest in.*
>
> *A. If you are right about that, that is true. But my case is all about the realism of the figures."* [7]

111. It is clear from the expert evidence that a return of 165% meant the return of the investment plus 165%. This meant that the plaintiff's understanding of 220% as including the return of his investment was in fact less than what was meant by a return of 165% which, it is common case, was a reasonable representation for the Bank to advance in 2005.

112. The plaintiff gave evidence that he was particularly interested in the development angle of the Whitgift Investment. This was confirmed by Ms. Deacy in evidence on behalf of the Bank. The Knightsbridge Investment likewise involved development opportunities, though they were not spelt out to the same degree as in the loose-leaf brochure. In the handwritten fax to Ms. Scott of 27th June, 2005, the plaintiff made no reference to the development opportunities and the submission was entirely based upon the potential return.

113. The plaintiff accepted that, on the assumption that he had been provided with the loose-leaf brochure in or around July, 2005, further documentation was to come. He accepted that as an experienced solicitor the loose-leaf brochure was not the sort of document that was going to be a legally binding document surrounding the conclusion of an agreement. He stated:-

> *"… I agree with you the loose-leaf [brochure] wouldn't have been an effective way of investing in this".* [8]

He later accepted that at the latest he received the Black Book on the 5th December, 2005. He said that he read it; he absorbed it and pondered it. He was asked whether he understood the document, he was asked did he note the guarded terminology and the absence of figures and he answered, yes that it was legalese and:-

> *"… it's a different emphasis than what I had been told and what the brochure is saying or told me four months ago or three months ago."* [9]

He said that if somebody had asked him to sign the Black Book he would not have signed it. He said:-

> *"I was relying on my rights as I felt that they were in how I got here."* [10]

He said that he understood that quite different things were being said to him in the Black Book. He believed that different things were being said to him in the Black Book than had been set out in the loose-leaf brochure. Specifically he said that he believed that the Black Book was now saying that the Bank was not standing over the figures and that the development opportunities were difficult to quantify. He confirmed that he understood all of this and said that it did not dissuade him from proceeding.

114. In relation to the loose-leaf brochure he said that he took opportunities to be plans and that he took it that "*the investment couldn't fail*". On the other hand he accepted that it was a high-risk investment and that he understood the nature of geared investment. When writing to Mr. Bohan in or around March, 2006, after he had read and considered the Black Book, he informed Mr. Bohan that the assumptions underlying the investment were based on the Black Book and that the investment was expected to make a return of 300% in the following 7-9 years. This figure was a Howard Holdings forecast taken from the loose-leaf brochure and not from the Black Book. He was thus relying on both documents despite his acknowledgement of differences between them. It is also noteworthy that he was referring to the projected return of 300%. He had referred to this when he first invited Ms. Scott to join with him in the investment in June, 2005. It was not a forecast ever made by the Bank, though it was included as a Howard Holdings forecast in the loose-leaf brochure.

Legal submissions on behalf of the plaintiff

115. The plaintiff's case against the Bank was based on negligent misstatement in relation to his personal investment in the Bond. He relies on the case of *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465 and the recent decision of the Supreme Court in *Wildgust v. Bank of Ireland* [2006] 1 I.R. 570. In the judgment of Kearns J. at para. 63 the Court held:-

> *"From the foregoing, it is apparent that I favour an interpretation, or adaptation if needs be, of the Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] A.C. 465 principles which would include more than just the person to whom the negligent misstatement is addressed. The "proximity" test in respect of a negligent misstatement must go further than that and include persons in a limited and identifiable class when the maker of the statement can reasonably expect, in the context of a particular inquiry, that reliance will be placed thereon by such person or persons to act or not act in a particular manner in relation to that transaction."*

116. The plaintiff then relies upon the decision in *Crestsign Ltd. v. National Westminster Bank plc & Anor* [2014] EWHC 3043. In that case judge Kerr Q.C. held at para. 153 that the Bank's representative in that case was under a duty to the directors of the plaintiff company to:-

> *"… explain fully and accurately the nature and effect of the products in respect of which he chose to volunteer an explanation…"*

However, the Bank's representative was not under a duty to explain fully other products which he did not wish to sell to the plaintiff company. While the giving of advice did not of itself mean that there was an assumption of responsibility and a duty of care in tort to give the advice carefully, the disparity in knowledge and expertise between the parties was such that it was reasonably to be expected that the directors would rely upon the Bank's representative's skill and judgement. Clearly there existed a disparity in knowledge and expertise between the parties in this case also. The Bank had all the benefit of the due diligence information in relation to the investment. The plaintiff was confined to the information furnished to him by the Bank whether orally or in writing. This is correct and it is not contested by the Bank.

117. The plaintiff argues that the representations in the loose-leaf brochure and to a lesser extent in the Black Book were either inaccurate or made without any reasonable basis. He challenged the accuracy and the reasonableness of the representations on a number of grounds:

> (a) Each of the development opportunities would require planning permission and in reality it was unlikely that planning permission would be granted for any of these developments by reason of:
>
> (i) Relevant planning guidelines and the location and scale of the proposed developments;
>
> (ii) The attitude of Croydon Council to the proposed development of the Whitgift Centre based on the views expressed by a senior planner and
>
> (iii) By reason of the grant of planning permission and anticipated development of the Park Place Shopping Centre by Minerva.
>
> (b) Two of the identified opportunities were mutually exclusive. The development of the Whitgift Tower as offices/residential/hotel was located on the same site where the Phase IV development had been granted planning permission. He complained that it was misleading to identify these as separate opportunities without making it clear that they were alternatives.
>
> (c) In relation to the Phase IV planning permission, it was in respect of land which was subject to a lease to the Home Office which would not expire until December, 2010. The fact that the project could not proceed immediately was not made clear. Furthermore, it was said that in October, 2005 the Secretary of State subsequently refused to surrender the car park which cast further doubts on the reality of the development opportunity.
>
> (d) He complained that the figures attributed to each of the specified opportunities in the loose-leaf brochure implied that they have been subject to reasonable calculation. In fact the Bank itself carried out no calculations. It based its figures upon figures produced to it by Howard Holdings without the supporting underlying calculations. He says that it was unreasonable to accept these figures without any supporting calculation; it was unreasonable for the Bank not to carry out its own calculations and it was irrational simply to discount the Howard Holdings figures by arbitrary percentages.
>
> (e) The loose-leaf brochure identified as a positive factor the fact that stg£2.5 billion was to be spent in Croydon over the next 5 to 7 years by major developers including, *inter alia*, Minerva. It was said it was misleading to include Minerva as part of this proposed spend as this was a reference to the Park Place development which the Bank had concluded would not be developed. The Bank did not disclose the fact that planning permission had been granted to Minerva to carry out the Park Place development (which on the plaintiff's case potentially could have had a very significant negative impact upon the Whitgift Centre) on the basis that Howard Holdings and the Bank had taken the view for various reasons that the project was commercially unviable and never likely to come to fruition. On that basis, it was misleading to include Minerva in the likely major spend by developers in Croydon in the next 5 to 7 years.
>
> (f) The loose-leaf brochure confirmed that the Whitgift Foundation was the owner of the freehold title to the property and must consent to any expenditure on the Centre greater than stg£1 million. The brochure stated:-

"We have met with the WF, who confirmed that they will support and fund plans which will maximise the value of the Whitgift Centre."

The plaintiff alleges that this was incorrect and misleading as the Whitgift Foundation had not confirmed that they would support and fund any such plans.

(g) The plaintiff complains that the failure to refer to the grant of planning permission to Minerva for the Park Place development and the possible impact of that proposed development on the Whitgift Centre was a matter which ought to have been disclosed as a risk factor in the proposed investment in the Whitgift Geared Property Fund.

(h) The representation that the potential return on investment of 220%-300% after 10 years was in all the circumstances grossly misleading.

118. The plaintiff accepts that what is stated in the loose-leaf brochure is a prediction or forecast in relation to a future event. He submits that a statement of opinion or forecast can constitute a representation in respect of which a duty of care arises. He cites the decision of Lord Denning in *Esso Petroleum v. Mardon* [1976] 1 Q.B. 801 at p. 818:-

"They were in a much better position than Mr. Mardon to make a forecast. It seems to me that if such a person makes a forecast, intending that the other should act upon it- and he does act upon it, it can well be interpreted as a warranty that the forecast is sound and reliable in the sense that they made it with reasonable care and skill."

He argues that the Bank was under a duty to ensure that there was a reasonable basis in fact as regards the statements made concerning potential return on the investment.

119. In relation to the alleged misstatement regarding the rate of investor return, the plaintiff's case is that the Bank was under a duty to ensure that there was a reasonable basis in fact for the statements made concerning the potential return on the investment. He says that on the basis of the evidence there was no basis in fact for the additional projected returns over and above the dry investment case of 165%. In this regard he relies upon the evidence of Mr. Francis.

120. The plaintiff also pleads that the Bank owed him a duty of care and that this was breached resulting in him sustaining loss and damage. The plaintiff argued that the Bank breached the duty of care it owed to the plaintiff in a number of ways:-

(a) The Bank failed to address issues raised internally in relation to the proposed investment both by its client relations managers and by Mr. Cahill and Mr. Fitzgerald of the Product Approval Committee. It is said that pertinent questions were raised which were not adequately addressed. Had they been addressed then the Bank would have been more fully informed as to the attitude of the Whitgift Foundation to the development and investment in the Whitgift Centre. In submitting the proposal to the Investment Product Committee, Mr. Hayes and Ms. Lally stated:-

"Also, there is a risk that the Whitgift Foundation might not support the full redevelopment plans for the asset, although we feel this risk is mitigated by the historic actions of the Foundation who have provided their share of funding on all phases to date. Furthermore, it is a precondition that we meet with the foundation prior to exchange to discuss this fully."

(b) At the meeting with the Whitgift Foundation the representatives of the Bank did not discuss the proposals developed by Howard Holdings in any detail with the representatives of the Whitgift Foundation. Thus, they lost the opportunity to inform themselves of the attitude of the Whitgift Foundation to the development of the Centre generally and to the ideas Howard Holdings had in mind for the Centre in particular.

(c) Howard Holdings did not share certain information with the Bank and the Bank failed in its duty of care to investors including the plaintiff in relying upon Howard Holdings in the circumstances. It is said that Howard Holdings were notified after the meeting of 27th May, 2005, that the previous year the Foundation had refused their consent to a development on foot of the Phase IV planning permission. Secondly, Howard Holdings did not share its calculations in respect of the asset management opportunities and new development opportunities which the Bank circulated to, amongst others, the plaintiff, as part of its marketing campaign.

The loan agreements

The plaintiff relies upon the same arguments in relation to his claim for damages for negligent misrepresentation in relation to the loan agreements. He says that he was induced by these misrepresentations to enter into the loan agreement in 2005. He advanced the loan to the Cashel Rock Partnership and the Cashel Rock Partnership purchased the Bond from AIAC with the ultimate proceeds of the loan. When he renewed the loan in 2009 he had little choice in the matter and this agreement also was induced by the original misrepresentations. It was originally pleaded that the oral and written representations the subject of the claim became implied terms or conditions or warranties of the loan agreement. These arguments were not pursued during the trial and the plaintiff abandoned these pleas.

Submissions of the Bank

121. The Bank submits that in order to succeed in his claim for damages for negligent misstatement the plaintiff must establish the following propositions on the balance of probabilities:-

(1) That a representation was made to him, whether oral or in writing, which may be of a fact or it may consist of an opinion.

(2) That the representation was made by a person who is so placed, that others may be reasonably expected to rely upon his skill or judgement or ability to make careful enquiry, or to give reliable advice or information.

(3) That such representation is made by such a person who intends or knows, or ought to know that the person to whom it is made, will place reliance on it and will be induced thereby to act upon it.

(4) The maker of the representation was guilty of negligence in consequence of which the representation was false,

untrue, inaccurate or misleading.

(5) That the person to whom the representation was made does in fact rely on the statement and is in fact induced thereby to act on the faith and truth of it.

(6) That in consequence of so acting, the person to whom it was made has suffered damage or loss.

The Bank argues that not every statement made even if untrue will found a claim in negligent misstatement. They refer to the case of *Raiffeisen Zentralbank Osterreich AG v. The Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), Clarke J. addressed the question of the statement upon which a plaintiff relies in the following terms:-

> *"86. It is also necessary for the statement relied on to have the character of statement upon which the representee was intended, and was entitled, to rely. In some cases the statement in question may have been accompanied by other statements by way of qualification or explanation which would indicate to a reasonable person that the putative representor was not assuming a responsibility for the accuracy or completeness of the statement or was saying that no reliance can be placed upon it. Thus, the representor may qualify what might otherwise have been an outright statement of fact by saying that it is only a statement of belief, that it may not be accurate, that he has not verified its accuracy or completeness, or that it is not to be relied upon."*

122. The Bank relied upon the following extract from Cartwright on *Misrepresentation, Mistake and Non Disclosure* (3rd ed. 2012, Sweet & Maxwell) at para. 3-14 where he considered the question of "sales talk" as follows:-

> *"Some statements made during the negotiations for a contract might be regarded as just "sales talk": either the statements are, on their face, assertions of fact that they are only exaggerations, "puffing the product" and not to be taken seriously; or they are not sufficiently clear and precise to constitute actionable misrepresentations. The circumstances of the contract and its negotiations have to be considered as a whole in order to decide whether the statement is to be regarded as actionable, and* ***the core question is whether the representee was entitled to take the statement seriously and so as to rely on it in deciding whether to enter into the contract****." (emphasis added)*

The Bank also argues that any misrepresentation in the loose-leaf brochure (which is not conceded) is corrected by the terms of the Black Book. They rely on Cartwright at para. 3-11:-

> *"Since the test for whether a statement is an actionable misrepresentation generally looks to whether it was false at the moment when it was acted upon by the representee, it follows that a misrepresentation which is made but is adequately corrected before the representee acts upon it is no longer actionable. In such a case it can be said either that there is no longer a misrepresentation, or that the representee in acting in the knowledge of the truth is no longer relying on the representation. The correction may be made by the representor, or by a third party, or by the representee independently discovering the truth. But the correction must be sufficient to remove the effect of the original misrepresentation: a partial or inadequate statement is not sufficient. Where, however, the true position appears clearly from the very terms of the contract which the representee claims to have been induced to enter into by the misrepresentation, the misrepresentation will have been "corrected" as long as the claimant is bound by those terms."*

The Bank says that the formal documentation issued to the plaintiff in respect of each of the Bonds is "*wholly at odds*" with what the plaintiff now claims to be actionable misstatement and misrepresentation. It points to the fact that the plaintiff accepted that further legal documentation would be furnished before he entered into the investment and that the loose-leaf brochure was not the type of document to form the basis of the investment.

123. More fundamentally, the Bank argues that the plaintiff clearly accepted that he was prepared to invest in the Whitgift Geared Property Fund on the basis of the return of his original investment and a profit of 120%. He stated:-

> ***"... the figure of 220% including my investment*** *would have been satisfactory to me".*[11] *(emphasis added)*

124. It is common case that the base case as set out in the loose-leaf brochure of 165% return on equity was reasonable. This of course would have involved a return of the original investment of €1 million plus 165%. This is 45% higher than the basis upon which the plaintiff says he was happy to invest.

125. In the light of this evidence, the Bank relies on a further passage from Cartwright at para. 3-52 as follows:-

> *"**Actual reliance extinguished from reasonable reliance**. We are here concerned with whether the representee actually relied on the statement, or can be taken to have done so; not whether it was reasonable for him to rely. The question of whether the reliance was reasonable will often be relevant, but as part of the prior question about whether the statement was actionable. So if the claim is in the tort of negligence, the test for the existence of a duty of care includes a consideration of whether the statement was one on which the claimant could rely, although there is then a separate issue (treated within the remedy as an issue of "causation") as to whether the claimant did in fact rely…"*

126. The Bank argues that it follows from the plaintiff's own evidence that he did not in fact rely upon the representation to the effect that the potential return on the investment after 10 years was 220% as was meant by the authors of the loose-leaf brochure and interpreted by the expert witnesses of the case.

127. The Bank argues that the actual representations comprised in the loose-leaf brochure did not constitute misstatements. In relation to the asset management opportunities it was submitted that there was no real dispute that these were genuine and that it was reasonable to expect that they could achieve a good return from the opportunities. It was noted that in order to reach the percentages set out in the loose-leaf brochure, it was only necessary that some of the opportunities identified were realised. In relation to the Phase IV development, it was submitted that it was a genuinely valuable planning permission. The plaintiff had argued that the letter from the Whitgift Foundation's solicitor to Colliers International had indicated that they had declined to fund this development. It followed that it was misleading to include this as an opportunity in the loose-leaf brochure. In reply to this argument, the Bank pointed to the fact that despite having received this letter, Colliers International, who had read the entire letter and understood its context, continued to maintain that this was an opportunity in their brochure. The Bank argued that it could not, therefore, be inferred that the letter was such as to undermine fatally any reality in this opportunity.

128. The Bank pointed out that in relation to the new developments identified, there were no planning difficulties in relation to the

Residential Tower or the Whitgift Tower. It was submitted that they were all good options which had been put forward at a time when there was strong support for buildings of this nature in Croydon from the officials and from the various development plans and planning regulations and there was a significant demand from prospective tenants.

129. In relation to the attitude of the Whitgift Foundation, the Bank argued that a reasoned decision had been made that it was inappropriate to give details of Howard Holdings' plans to the representatives of the Foundation at their meetings. The position of the Whitgift Foundation was that in principal they were supportive of any viable proposals to improve the Centre and its financial return. As the plans were not discussed, there was no opposition expressed. It was pointed out that Mr. Stapleton's difficulties related more to investment in the proposals than to the landlord's consent to the possible developments. The Bank submitted that it was impossible to say that the Bank knew or could have known in 2005 that if the proposals set out in the loose-leaf brochure were put forward that the Whitgift Foundation would refuse consent to them or that they could not be realised. It was submitted that the evidence of Mr. Stapleton did not make these statements set out in the loose-leaf brochure, misrepresentations and did not make them untrue.

130. The plaintiff placed considerable emphasis on the internal processes of the Bank in relation to both the Credit Committee approval and Product Committee approval. Questions raised by the representatives in relation to the reality of the development opportunities were not answered. The Credit Committee approval, it was said, required that the attitude of the Whitgift Foundation be ascertained. The Bank argues that even if there were internal failures in following on these two points they are not relevant in any claim in negligence alleged against the Bank which gives rise to a claim in damages for the plaintiff.

131. In relation to the fact that two opportunities were identified in the loose-leaf brochure which were mutually exclusive as they occupied the same site (the Phase IV planning permission and the Whitgift Tower new development opportunity) did not in reality make any difference to the overall picture presented by the loose-leaf brochure.

132. The Bank argued that it was reasonable for it to rely upon the figures produced by Howard Holdings and which were reproduced in the loose-leaf brochure. It said that Howard Holdings were the experts and their joint venture partner, the Bank was entitled to rely upon their figures and was not obliged to produce their own.

133. Insofar as the plaintiff was seeking damages for misrepresentation this related to the loan agreement entered into by the plaintiff with the Bank on 19th October, 2005. It was pointed out that this was not a case within Part V of the Sale of Goods and Supply of Services Act 1980 so that there could be no question of damages being recovered in respect of a pre-contract representation. It followed that the only claim to damages that the plaintiff could make is if he could establish that the alleged representations became part of the loan contract. The Bank argued that there is simply no basis to the plaintiff's case that he believed and could reasonably believe in the circumstances that the statements in the loose-leaf brochure were intended by the Bank to form part of the loan contract. It argues it would be extraordinary to contemplate that statements of opinion about a prospective investment to be made by a borrower could ever form part of the terms of a loan contract.

134. Even if it could be established that the representations formed part of the loan contract, the plaintiff has suffered no damage thereby giving no rise to a claim in damages. The Bank argues that the mere fact of entering into a loan contract as opposed to the manner in which a person invests the monies that are loaned to him cannot give rise to damage. In *Galoo Ltd. & Ors v. Bright Grahame Murray (a firm)* [1994] 1 W.L.R. 1360 the plaintiff sought damages as a result of advice given by auditors which resulted in it accepting and continuing to accept loans from a third party. Glidewell L.J. said at p. 1369:-

> *"… I do not understand how the acceptance of a loan can, of itself, be described as a loss causing damage. If anything it is a benefit to the borrower. Of course, a loss may result from the use to which the loan monies are put, but no such resultant loss is pleaded, and even if it were it might very well be difficult to attribute it to B.G.M."*

135. The Bank argues that the plaintiff invested the loan in the Partnership and then the Partnership in turn invested money in the Fund. The plaintiff has not sought to recover any of the monies he advanced to the Partnership. In the circumstances the plaintiff has failed to establish as a matter of law that any damage resulted from his entering into the loan agreement on 19th October, 2005.

136. Furthermore, the Bank says that in respect of contracts not covered by the Act of 1980, the old rule set out in *Seddon v. North Eastern Salt Ltd*. [1905] 1 Ch. 326 continues to apply. Under that rule, an executed contract cannot be set aside unless there is fraudulent misrepresentation. The Bank therefore argues that the plaintiff's case for damages for negligent misrepresentation in respect of the loan agreements is unstateable.

Conclusions
Misstatements

137. The plaintiff has not established on the balance of probabilities that any oral representation was made to him to the effect that the Whitgift Centre was projected to increase its rental income by stg£2 million year on year. Furthermore he has adduced no expert evidence in relation to this alleged representation. Therefore this part of his claim cannot succeed. This leaves two remaining alleged misstatements:-

- A representation in writing to the effect that there existed significant potential to increase the rental income by reasons of existing asset management and new development opportunities.

- Based upon the foregoing further representation in writing to the effect that the potential return on investment after 10 years was between 220% and 300%.

138. The plaintiff's case in negligent misstatement against the Bank rests upon representations which were made directly to him as Ms. Deacy posted him the loose-leaf brochure. He therefore is a person to whom the Bank owed a duty of care in accordance with the principle established in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* If there were any doubt in the matter, I accept that he was clearly in the limited identifiable class of persons to whom the Bank sent the loose-leaf brochure and therefore to whom the Bank made the statements therein set out.

139. I am satisfied that the asset management opportunities identified in the brochure existed and on the balance of probabilities that they were reasonable and realisable. In addition to the evidence of Mr. Whitfield in this regard, it is important to note that these asset management opportunities were identified both by Colliers International and DTZ. All expert witnesses have agreed that it was reasonable for the Bank to rely upon the DTZ Report. While it may well be possible to dispute the details of any one identified opportunity, they were presented in the brochure as top 5 asset management opportunities. They were not presented as definite plans and it would be unreasonable to treat them as such as did the plaintiff. It was not unreasonable for the Bank to state that

there existed asset management opportunities which had the potential significantly to increase the value of the Centre.

140. The new development opportunities were high level concept ideas and not definite plans. This is abundantly clear from both the scant information and the round figures attributed to the identified opportunities. Both planning experts agreed (as did the property experts) that the planning environment in Croydon in 2005 was generally very favourable towards both the construction of new offices and the conversion of aged office space into residential units. There was a pent-up demand for new modern offices in the Croydon Town Centre and the many applicable planning guidelines favoured tall buildings. Mr. Sutton on behalf of the plaintiff accepted that both the proposed development at the Whitgift Tower and the Western Gateway proposal were achievable from a planning policy perspective. In relation to the Residential Tower proposal he said that the scale of the building was probably not unacceptable and his concerns related to the fact that apartments would be overlooking the plant and equipment on the roof of the Whitgift Centre. His major objection was to the proposal of a 15 storey office tower at Focus House. This was because he took the view that the policy favouring tall buildings which applied to the Wellesley Road would not apply to Focus House as it was set back from the road. Even if he were correct in this opinion, clearly it is a matter which was open to legitimate debate amongst planners. In my opinion it cannot be said that the inclusion of the Focus House development opportunity was so unreasonable as to be reckless and to amount to a misrepresentation in the circumstances

141. In conclusion, I do not believe that the identified asset management opportunities and new development opportunities were unreasonable and accordingly the representation that they existed as opportunities did not amount to a misstatement in and of itself. Therefore I hold that the second alleged misstatement upon which the plaintiff bases his case falls.

142. The brochure set out projected returns in respect of each of the identified opportunities. No witness had been provided with any contemporaneous calculations by the Bank in relation to these figures. It was to be inferred that the figures were produced by Howard Holdings. The basis for the calculations in 2005 was never fully explained. Mr. O'Malley on behalf of the Bank explained that at this remove it was not possible to reproduce the exercise. However, he was of the opinion that the figures appeared to be reasonable.

143. There was evidence in relation to the calculation of the projected return in respect of one asset management opportunity. DTZ had estimated the annual return for 8-10 RMUs in the malls of the Centre. Mr. Francis, on behalf of the plaintiff accepted that if this figure was employed that the figure in the loose-leaf brochure for increase in mall income attributable to RMUs of an added value of stg£3.5 million was correct. I prefer the evidence of Mr. Whitfield that the projected percentage returns on the asset management opportunities and the new development opportunities were reasonable; Howard Holdings prepared the figures in conjunction with DTZ. Where DTZ's figures were available so that the calculation could be performed in 2014, Mr. Francis accepted that the calculation was reasonable. The experts agreed that it was reasonable for the Bank to rely upon the DTZ Report. Mr. O'Malley said that it was reasonable for the Bank to rely upon the figures produced by Howard Holdings, the Bank's joint venture partner and an acknowledged property developer with in-depth knowledge of Croydon. It is not unreasonable to assume that if the figure in relation to mall income was properly arrived at that so were the others, or, at the very least, that there was a basis for the figures in each case. It is highly unlikely that accurate estimates and calculations would be produced in respect of one figure but that no such exercise would be performed in respect of others. It is important to bear in mind that these events took place nine years before the case came to trial and that the Court should be slow to draw serious adverse inferences based upon the absence of evidence at this remove of calculations performed at the time.

144. Furthermore, as Mr. Whitfield pointed out, not all of the identified new development opportunities had to be carried out in order to achieve the 25% increase in the value of the Whitgift Centre referred to in the loose-leaf brochure. Therefore I conclude that the plaintiff has not established that it was unreasonable for the Bank to state in the loose-leaf brochure that there existed a potential return of 30% from asset management opportunities and 25% from new development opportunities. Combining these two figures with the agreed base case figure of 165%, this means that it was reasonable for the Bank to represent that there was a potential return on the investment after 10 years of 220%. It is absolutely clear that the Bank did not represent that there was a potential return over 10 years of 300%. That was always solely a Howard Holdings figure and was presented as such.

145. However, the matter does not end there. There were three further matters disputed in evidence by the parties:-

(1) There are two mutually exclusive opportunities identified in the loose-leaf brochure. They are exclusive because they each relate to the same site within the Whitgift Centre and thus it would not have been possible to complete both the Phase IV development (the second of the asset management opportunities) and the Whitgift Tower (the first of the new development opportunities). While it is clear from the coloured version of the loose-leaf brochure that the two opportunities occupy the same site, in my opinion the inclusion of the two as opportunities with no note indicating that they were alternatives was misleading.

146. (2) In one other important respect the loose-leaf brochure was seriously misleading. Under the heading Risks and Sensitivities, the brochure identified the Whitgift Foundation as the owner of the freehold title to the property whose consent must be obtained for any expenditure in excess of stg£1 million. It stated:-

> *"We have met with the WF, who confirm that they will support and fund plans which will maximise the value of the Whitgift Centre."*

147. Howard Holdings had two meetings with representatives of the Whitgift Foundation and the Bank attended one of those meetings. Howard Holdings did not and would not disclose to the Whitgift Foundation any of its plans for the Centre even in the broadest outline. They were asked to give details of their proposals and they declined to do so. Thus, the Whitgift Foundation had no opportunity to express its opinion in relation to plans for development which included residential, office and hotel developments. Mr. Stapleton on behalf of the Foundation said that any proposal would be considered on its merits. He also indicated that the Foundation did not have any significant funds to invest in the Centre. He said that if the Foundation had been shown the loose-leaf brochure they would have said that they would not fund the development opportunities identified in that loose-leaf brochure which he personally regarded as speculative. He agreed that the attitude of the Foundation was one of openness to consideration of improvement but there would be no guarantee that the Foundation would necessarily approve any proposal. There was evidence that the solicitors for the Foundation wrote to Howard Holdings stating that the Foundation had, in the past, refused to fund a proposed development advanced by the previous managers of the Whitgift Centre. There was no evidence that the Bank was informed of the letter or its contents or was ever informed that the Foundation might not invest in a proposed development other than the evidence of Mr. Stapleton referred to above.

148. In the light of this evidence, the statement in the brochure is misleading in my opinion. They did not confirm that they "*will*" support and "*fund*" plans which will maximise the value of the Whitgift Centre. They said they would consider each opportunity on an individual basis and there was no guarantee that they would fund any proposals and they did not have any significant funds to invest

in the Centre. In addition, it would be fair for a reader of the brochure to assume that the reference to plans which will maximise the value of the Whitgift Centre would at least include some of the new development opportunities identified in the brochure itself.

149. The approval of the Whitgift Foundation of the plans of the Whitgift Centre was absolutely fundamental to any of the new development opportunities. Simply put, none of them could be achieved without the consent of the Foundation and none of them could be realised without the *pro rata* funding commitment from both the Whitgift Foundation and Royal London. The Bank was fully aware of the vital importance of the Whitgift Foundation and yet failed to ascertain even in the broadest terms the attitude of the Foundation where representatives to the plans for the development of the Centre which it was promoting to its clients and potential investors in the Fund. The overall impression from the loose-leaf brochure was that the Whitgift Foundation was aware of the identified opportunities and was in principle supportive of the opportunities. This impression was subsequently reinforced by the Black Book where it was stated at p. 14:-

> *"The Whitgift Foundation has given its consent to, and funded its share of the cost of major refurbishments carried out in 1985 and 1998 respectively. Clearly it has an incentive to do so, as beneficiaries of c.25% of gross rental income. AIAC, Anglo and the JV Partners have met with the Whitgift Foundation and are satisfied that the Foundation is* ***in favour of the progressive nature of Howard's plans for the Centre, but clearly can give no guarantee with regard to any consents."*** *(emphasis added)*

It was reasonable to assume that the Foundation had been informed of the broad nature of the plans outlined in the Black Book and was generally in favour of them. It is true that it was stated that the Bank could not guarantee that it would consent to any particular proposal. Nonetheless it appeared that the Bank had met with the representatives of the Foundation and ascertained that the Foundation was aware of the possible plans, that they included the plans identified in the Black Book and that it was in favour in principle of Howard Holdings' plans and that the Bank had no reason to believe otherwise. In the light of Mr. Stapleton's uncontroverted evidence this statement was misleading though not actually untrue.

150. (3)There was considerable debate in relation to the Park Place development. No reference was made to this in the loose-leaf brochure. It is not disputed that there can be a misstatement by omission. The failure to refer to Park Place in the loose-leaf brochure could amount to a misstatement if, in turn, the plaintiff had established that the grant of planning permission in respect of Park Place in 2005 undermined the identified asset management opportunities and development opportunities and the projected returns to such an extent that it was false or reckless to continue to present the opportunities as realistic and achievable. I do not believe that the evidence comes close to establishing this fact. There was clearly considerable doubt as to the commercial viability of the Park Place development. The obtaining of planning permission was one step only in a long chain of events which would have to occur before the development came to fruition. Even on a best case scenario, the development of Park Place was 5 years into the future. I therefore do not accept that the failure to refer to the Park Place in the loose-leaf brochure amounted to a material misstatement.

151. It is true that in identifying the intended future spend in Croydon during the next 5-7 years that the spend by Minerva which was to be in respect of Park Place was inconsistent with the view that the Park Place development would not proceed. Once Howard Holdings and the Bank were of that view, then this portion of the loose-leaf brochure should have been confined to a future spend of stg£2 billion rather than stg£2.5 billion and should have omitted the reference to Minerva. However, I am in no way satisfied that this misstatement had any bearing whatsoever on the plaintiff's assessment of the investment and certainly had no bearing whatsoever on the loss he sustained as a result of his and the Cashel Rock Partnership's investment in the Whitgift Geared Property Fund.

152. Finally, insofar as the plaintiff advances a case that the Bank represented that the potential return on the investment after 10 years was up to 300%, this must be rejected. It is abundantly clear that this was a figure calculated by Howard Holdings. The Bank clearly presented its case as being a maximum of 220% made up of 165% on a dry case basis, 30% for asset management and 25% for the new development opportunities.

153. What then are the legal implications of the two misleading or inaccurate statements I have accepted existed in the loose-leaf brochure? The plaintiff stated that the tort of negligent misstatement does not require the plaintiff to demonstrate that the statement at issue induced him to enter into the contract before a relief can be granted. The question then is, did the Bank breach the duty of care that it owed to the plaintiff? The claim is based upon the alleged failure of the Bank to fulfil a duty of care in making the representations in the loose-leaf brochure. It is not based simply on the falsity of the statements. A representation may be false without having been made negligently. Furthermore it is essential to have regard to the scope of the duty of care in the particular case. The scope of the duty of care is defined by the purpose for which the statement was made. In *Caparo Industries plc v. Dickman* [1990]2 A.C. 605 Lord Oliver made the following statement of principle at p. 638:-

> *"… the necessary relationship between the maker of a statement or giver of advice ('the adviser') and the recipient who acts in reliance upon it ('the advisee') may typically be held to exist where (1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given;(2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose; (3) it is known either actually or inferentially, that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent inquiry, and (4) it is so acted upon by the advisee to his detriment."*

It is necessary therefore to consider the representations in the context in which they were made. They were in a loose-leaf brochure that was given to certain clients of the Bank with a view to ascertaining whether or not they would be interested in investing in the Whitgift Geared Property Fund. If the client expressed an interest in the product then they would be furnished with additional, more detailed information than that set out in the loose-leaf brochure. They could attend oral presentations and they would receive the formal contract documentation including the Black Book. In the case of the plaintiff, he attended a presentation on the investment with Mr. Hayes in October, 2005 and he received all of the contract documentation including the Black Book. He had a 30 day cooling off period if, on reflection, he did not wish to proceed with the investment in the light of this finalised documentation. The plaintiff correctly accepted that the investment could not have been made on the basis of the loose-leaf brochure and he acknowledged that further documentation would be provided. The loose-leaf brochure was not the Bank's final word on the proposed investment. The plaintiff must show that the Bank should have realised that the statements were likely to be acted upon by the plaintiff for the purpose for which it was intended without independent inquiry. So the plaintiff must show that the purpose of the statements was to induce clients of the Bank to invest in the Fund and not simply to ascertain the level of interest amongst the clients of the Bank.

154. In argument the Bank pointed out that not every statement made that is untrue will found a claim in negligent misstatement, which is correct. The Bank referred to the case of *Raiffeisen Zentralbank Osterreich AG v. The Royal Bank of Scotland plc*, quoted above, I accept that this is correct and represents the law in Ireland as well. In that case Clarke J. stated:-

> *"82. In the case of an express statement, "the court has to consider what a reasonable person would have understood from the words used in the context in which they were used": IFE Fund SA v Goldman Sachs International [2007] I Lloyd's Rep 264, per Toulson J at [50] (upheld by the Court of Appeal [2007] 2 Lloyd's Rep 499). The answer to that question may depend on the nature and content of the statement, the context in which it was made, the characteristics of the maker of the of the person to whom it was made, and the relationship between them."*

155. The plaintiff gave evidence that the loose-leaf brochure was not the sort of document that was going to be a legal binding document. He also says that he took the opportunities identified in the loose-leaf brochure to be plans and he took it that "*the investment couldn't fail*". He knew and accepted that further contractual documentation would be forthcoming. In determining the status of the loose-leaf brochure it is important to put it in context. It was provided to potential investors to ascertain their interest in investing in the Fund. It could not form the basis of the investment in the Fund. Further detailed documentation was required and was in fact forthcoming. Most importantly that documentation advised parties to take their own independent financial legal and tax advice and it afforded each of the investors a 30 day cooling off period. Seen in this context, I do not accept that the statements in the loose-leaf brochure had the character of statements upon which the representee was intended and was entitled to rely. So, on this basis his claim founded on the statements in the loose-leaf brochure must fail.

156. Further, the plaintiff's complaints relate to the reasonableness or otherwise of opportunities identified and whether it was reasonable to project a return on investor's equity of 220%. It is clear that it would never have been possible to implement both the Phase IV development and the Whitgift Tower development. The Bank did not represent in the loose-leaf brochure that all of the identified opportunities would be carried out. The asset management opportunities are identified as the top 5 asset management opportunities. This implies that there are others and indeed others were set out in the Black Book. It attributes a possible increase in the value of the asset by maximising asset management opportunities by 30% and by the new development opportunities by 25%. Once it is established that this was a reasonable forecast in 2005 and that not all of the identified opportunities had to be realised to achieve this return then the fact that it would be necessary to elect between mutually exclusive opportunities does not undermine the essential representation as to the possible return. Therefore though the inclusion of the two opportunities in the loose-leaf brochure without making clear that they were mutually exclusive was misleading, the representation in relation to the overall return from the opportunities was not. Therefore the plaintiff's claim for damages based upon this point must be rejected.

157. It is said that it was misleading to present the Phase IV development as a current opportunity when the Secretary of State was in occupation of the land pursuant to a lease that was to run to 2010. The previous managers of the Centre were negotiating with the Secretary of State in June and July, 2005 when the loose-leaf brochure was circulated and when the Black Book was being drafted. They believed that an agreement might be reached to surrender the lease in whole or in part. Therefore neither the loose-leaf brochure nor the Black Book were incorrect at the time that they were written. In October, 2005, the Secretary of State refused the offer on the basis that the terms were too onerous. This was not notified to potential investors and the documents remained uncorrected. In the autumn of 2005 there was the prospect of negotiating further with the Secretary of State or waiting for the lease to expire in due course. In any event the existence of the planning permission was valuable even if Howard Holdings and the Bank did not plan to implement it. On balance, I do not accept that the failure to make clear that the right to develop the Phase IV plans would not have arisen until 2010 is sufficient to amount to a negligent misstatement.

158. The Bank's representations regarding the Whitgift Foundation's attitude to proposed opportunities are the most problematic. The impression created in the loose-leaf brochure was not corrected in the Black Book. Ultimately however the Bank stated that the consent of the Whitgift Foundation was necessary to enable the developments to proceed and that no consent could be guaranteed. Mr. Stapleton gave evidence that in his opinion the Foundation would not have supported or invested in any of the developments outlined in the loose-leaf brochure or the Black Book. While I accept this evidence I am aware of its limitations. His role is to advise the Foundation. He acknowledged that each proposal would be considered on the merits when presented to the Foundation for its approval. The proposals would be in far greater detail that what is set out in the brochures. I cannot conclude that the Bank was intending to submit unrealistic or unrealisable proposals or that the Foundation would not consider them in a *bona fide* fashion. I therefore hold that the statements in the loose-leaf brochure and, to the extent that they are relevant, in the Black Book, concerning the attitude of the Whitgift Foundation to the proposed asset management opportunities and the new development opportunities, do not constitute negligent misstatements.

159. If I am incorrect in that conclusion and the loose-leaf brochure is a document upon which the plaintiff was intended to and was entitled to rely, I must then consider the implications of the further documentation furnished to the plaintiff by the Bank. The plaintiff accepts that by 5th December, 2005, at the latest he had received the Black Book and all the contractual documents referred to above. In fact, on the balance of probabilities I believe that he received the Black Book at the meeting in the autumn of 2005 in the Radisson Blu Hotel in Galway with Mr. Hayes and Ms. Deacy. The Black Book had been prepared as the prospectus for the investment and to be given to intending investors. The plaintiff's 'Reasons Why' letter which he signed on 19th October, 2005, expressly recorded that he had an opportunity to read the investment information and that he was satisfied that it met his investment requirements. I believe that this was a reference to the Black Book which was furnished to him the previous week. The plaintiff accepted in evidence that he read the Black Book; he absorbed it and pondered it. He is and was an experienced solicitor and experienced investor in property. He accepted that the language of the Black Book was guarded and he noted the absence of any figures in the Black Book. He acknowledged in relation to the Black Book:-

> *"… it's a different emphasis than what I had been told and what the brochure is saying or told me four months ago or three months ago."* [12]

160. He accepted that the loose-leaf brochure would not have been an effective way of investing in the Bond. He stated that if he had been asked to sign the Black Book that he would not have signed it. In other words he was not accepting the terms of the document which was to form the contractual basis between himself and AIAC. Having noted all of the above, and despite the fact that he did so when he was still in a position to exit from the investment he stated:-

> *"… I was relying on my rights as I felt that they were in how I got here."* [13]

161. He acknowledged that the Black Book was now saying that the Bank was not standing over the figures and that the development opportunities were difficult to quantify. Despite these differences this did not dissuade him from continuing with the investment.

162. In the light of this evidence I conclude that the plaintiff in fact did not rely upon the statements in the loose-leaf brochure or, to put it more correctly, purported to rely upon them when he had no entitlement to do so. Certainly, as concerns his case based on the figures in the loose-leaf brochure, these were corrected and were corrected to the knowledge of the plaintiff in the Black Book. He had absorbed it and pondered it and noted that the Bank was not standing over the figures and that the development opportunities

were difficult to quantify. In my opinion this amounted on the part of the Bank to a correction of any misrepresentation that occurred in the loose-leaf brochure. As Cartwright stated at para. 3-11:-

> *"Since the test for whether a statement is an actual misrepresentation generally* ***looks to whether it was false at the moment it was acted upon by the representee****, it follows that a misrepresentation which is made but is* ***adequately corrected before the representee acts upon it is not longer actionable****. In such a case it can be said either that there is no longer a misrepresentation, or that the representee in acting in the knowledge of the truth is no longer relying on the representation. The correction may be made by the representor, or by a third party, or by the representee independently discovering the truth. But the correction must be sufficient to remove the effect of the original misrepresentation: a partial or inadequate statement is not sufficient.* ***Where, however, the true position appears clearly from the very terms of the contract which the representee claims to have been induced to enter into by the misrepresentation, the misrepresentation will have been "corrected" as long as the claimant is bound by those terms."*** *(emphasis added)*

163. I accept that this is a correct statement of the law. Applying this to the evidence in this case as outlined above it follows that the plaintiff's claim in negligent misstatement based on the representation that there was potential return on the investment after 10 years of 220% must fail.

164. The plaintiff's case is based on the proposition that had the misstatements, in respect of which he now complains, not been made and had the true position been made clear to him, he would not have invested in the Whitgift Geared Property Fund. It is clear that he was investing in the Fund on the basis that he expected to make a significant return on his investment. To that end he was prepared to accept a high-risk geared investment. It is clear from his faxed note to Ms. Scott in June, 2005 that, not unreasonably, his focus was on the ultimate return. He made no reference to her of the development opportunities as such. He was concerned with the ultimate estimated return on equity for investors. When he was contemplating investing in the Knightsbridge Investment, he likewise was focused on the ultimate potential return. The Knightsbridge Investment brochure did not contain any particular figures or particular plans for development. Undoubtedly he was interested in the development opportunities, as his actions post investment indicate but it was with a view to achieving a return on his investment. Ultimately it was the bottom line which counted. In that context his evidence in relation to the expected return is critical in assessing whether or not he would have proceeded with the investment.

165. The plaintiff gave evidence that he would have invested in the Whitgift Fund if it gave a return of 220%. As referred to above, his understanding was that this meant 220% including his own investment of €1 million. It was common case that a return of 165% (as set out in the loose-leaf brochure) meant the return of an investor's investment plus 165%. It was reasonable for the Bank to make this statement. This meant that the Bank made a reasonable representation to the plaintiff that he would get a return which was greater than that upon which, on his own evidence, he would have been prepared to invest in the Fund. It follows therefore that he has not established that he would not have invested in the Fund had he known the true figures (as he alleges) in relation to the projected returns for the asset management opportunities or the new development opportunities.

166. In submissions on behalf of the plaintiff it was argued that the plaintiff had informed Ms. Deacy on behalf of the Bank that he had been aiming for a growth rate of 12-15% year on year and that the Whitgift Geared Property Fund could only have satisfied this requirement if it achieved a return of between 220% and 300%. This argument is based upon the email to Ms. Deacy of 28th June, 2005, quoted at para. 25 above. I do not accept that this is the basis upon which the plaintiff entered into the investment at all. In the email he stated he was aiming for a growth rate of 12-15% year on year in the context of paying €175,000.00 per annum into a pension fund for at least the next 7 to 8 years. This is fundamentally different to a once-off investment such as purchasing a bond in the Whitgift Geared Property Fund. There was no reference at all to this growth rate requirement in any of his meetings in September or October, 2005 with the Bank. It was not referred to in his 'Reasons Why' letter. Furthermore, it was not what was promised by the Knightsbridge Investment even though he was prepared to proceed with that investment until he elected to invest in the Whitgift Geared Property Fund. He decided to invest in the Fund without any information or representation that this investment with identified return on equity of between 165 – 220% by the Bank would equate to 12-15% over 10 years. The plaintiff has not advanced the case that he was wrongly advised to invest in the Fund on the basis that it would not afford him a 12-15% *per annum* increase over 10 years. There was no expert evidence led in relation to this alleged representation at all. Therefore, any case which he now seeks to advance at the close of the hearing in that regard cannot be entertained and must be rejected.

167. It follows from all of these reasons that the plaintiff's case in negligent misstatement is rejected.

Negligent Misrepresentation

168. As the case in negligent misrepresentation was based on the same alleged misstatements of fact, this case also must fail. Furthermore, it must be rejected on the basis of the arguments advanced by the Bank to the effect that these statements in the loose-leaf brochure could never have been intended to form part of the loan contract. In addition, the Bank is correct in its argument that simply by entering into a loan, the plaintiff has suffered no damage thereby. The fact that he used the proceeds of the loan to advance a loan to the Cashel Rock Partnership and the Cashel Rock Partnership, in turn, purchased a bond in the Whitgift Geared Property Fund and that the Partnership lost money due to the loss of value in the Bond does not and cannot amount to the loss flowing from the loan contract. As was stated by Glidewell L.J. in *Galoo Ltd. & Ors v. Bright Grahame Murray (a firm)*, quoted above, the acceptance of a loan is a benefit to the borrower. While loss may result from the use to which the loan monies are put, this is not to say that the loss suffered by the borrower should be attributable to the lender, even if the lender knows the use to which the borrower intends to put the loan monies. Furthermore, as was pointed out by the Bank, the plaintiff has not sought to recover any of the monies from the Cashel Rock Partnership and, in particular, from Ms. Scott who was legally entitled to 99% of the Partnership and beneficially to 100% of the Partnership. There was no real explanation for this failure and, therefore, even if the plaintiff had a case against the Bank in relation to negligent misstatement in relation to the loan agreement, he has clearly failed to mitigate any loss arising from the loan agreement. For these reasons, I dismiss the claim to damages for negligent misrepresentation.

Other Reliefs

169. The plaintiff was not seeking to pursue rescission of the loan agreements. The other claims of the plaintiff based on an alleged fiduciary duty owed by the Bank to the plaintiff or the alleged breach of warranty or an assignment of the Partnership interest of Ms. Scott have either not been established or were not pursued by the plaintiff at the end of the case, as I have already discussed.

Counterclaim of the second named defendant

170. The second named defendant is the assignee of the plaintiff's loans with IBRC as a result of a deed of transfer on 23rd May, 2014. The plaintiff accepted that as of 31st August, 2014, the amount due and owing on foot of the loan agreement of 2009 (which

replaced the facility of 2005 which had expired) was €1,087,071.19. The relief sought by the plaintiff in relation to the loan agreements was a declaration that he was discharged from all obligations arising under the loan agreement dated 19th October, 2005, which was assigned to the second named defendant on 23rd May, 2014, by reason of the Bank's breach of condition of the loan agreement. The loan agreement of 19th October, 2005, was a demand agreement which expired and was replaced by a new loan agreement in 2009. Even if the plaintiff were to seek a declaration that he was discharged from all obligations arising under this renewed loan agreement, this relief must be rejected. I have found that there was no breach of condition by the Bank of the loan agreement of 19th October, 2005, and therefore the basis for this declaration as sought by the plaintiff has been rejected so he is not entitled to the declaration sought.

171. In addition, the plaintiff argued that he was entitled to set-off any award of damages which he might receive in respect of his claims against the Bank against any sums due and owing under either of the loan agreements which had been assigned to the second named defendant. There were very considerable legal submissions on behalf of both counsel for the plaintiff and counsel for the second named defendant in relation to the issue of set-off that had arisen in this case, which was complicated by virtue of the provisions of the Irish Bank Resolution Corporation Act 2013. However, in view of the fact that I have held that the plaintiff is not entitled to damages, there can be no issue of set-off arising. Nonetheless, I wish to acknowledge the very detailed, helpful submissions that were made by counsel on both sides in relation to this matter. In view of the fact that the resolution of this argument is not necessary for my judgment, I will refrain from dealing with this point.

172. The second named defendant sought judgment on foot of the second facility letter dated 15th April, 2009. The plaintiff accepted that as of 31st August, 2014, the sum due and owing in respect of that facility was €1,087,071.19. The Defence to this Counterclaim advanced by the plaintiff was that he was discharged from any obligation in connection with the loan agreement consequent on the Bank's breach of condition of the loan agreement. In the event that the second named defendant is entitled to judgment against the plaintiff, the plaintiff argued that he was entitled to set-off any damages awarded against the Bank on foot of this claim in these proceedings against the sums allegedly due and owing pursuant to the facility letters to the second named defendant. The plaintiff accepted that the Bank had transferred all rights, title, interest, benefits, liabilities and duties and obligations which the Bank held under the loan facilities to the second named defendant by a deed of transfer dated 23rd May, 2014. In view of the fact that I have held that there was no discharge from his obligations under the loan agreements and that he is not entitled to damages and, therefore, no issue of set-off arises, it follows that the second named defendant is entitled to judgment in the sum of €1,087,071.19 as of 31st August, 2014, together with continuing interest, pursuant either to contract or statute. I will hear the parties in relation to the question of interest.

[1] Day 4, p. 86.

[2] Day 4, p. 94.

[3] Day 12, p. 47.

[4] Day 12, p. 50.

[5] Day 13, p. 54.

[6] Day 2, p. 37.

[7] Day 3, pp. 92-93.

[8] Day 2, p. 114.

[9] Day 2, p. 132.

[10] Day 2, p. 136.

[11] Day 3, p. 92.

[12] Day 2, p. 132.

[13] Day 2, p. 136.