35 pages.

ROYAL COURT

(Samedi Division) 150

30th July, 1997

Before: F.C. Hamon Esq, The Deputy Bailiff,
Jurat M.W. Bonn, Jurat C.L.Gruchy

Between	David Dixon and Miss Jane Richardson and Reeb Investments Limited	Plaintiffs
And	Jefferson Seal	Defendant

Advocate M.S.J. O'Connell for the first and second plaintiffs
Advocate N.M.C. Santos Costa for the third plaintiff
Advocate A.D. Hoy for the defendant

JUDGMENT

THE DEPUTY BAILIFF: This is the first of a series of actions brought by clients of a firm of stockbrokers called Jefferson Seal against that firm of stockbrokers. This case deals with three private investors, Mr. David Dixon, Miss Jane Richardson and Reeb Investment Limited, a wholly owned investment company belonging to Mrs. Violet Beer. Although there is a certain common interest in the three cases, each will in due course have to be treated separately. During the course of trading, Jefferson Seal advised the three investors with whom this case is dealing to invest substantial funds in Confederation Life 9 7/8% 2003 subordinated Bonds ("Confed Life"). Confed Life was put into liquidation on 15 August 1994 and in consequence Mr. Dixon lost £200,000 of his savings, Miss Richardson lost £90,000 of her savings and Mrs. Beer (through her company) lost £102,000 of her savings. In its Answer, Jefferson Seal pleaded contributory negligence on the behalf of Mr. Dixon and claimed that if Miss Richardson succeeds in her action against Jefferson Seal, then they have a third party claim against Mr. Dixon. We shall deal with the pleadings in more detail later.

Confed Life was incorporated under the laws of Canada in 1871. Originally a company having share capital, Confed Life has been a mutual company without share capital(being owned by its policyholders as members) since 1968. At the time of its collapse, Confed Life was one of the largest Canadian insurance companies with operations in Canada, the USA and the UK. According to the Consolidated General Fund balance sheet at the 27th December, 1992, the company had gross assets of just under Can.$18 billion which were principally the property of the policyholders as policyholders rather than members. According to its balance sheet at 31st December 1992, its surplus was Can.$900 million and apparently in 1991 Confed Life ranked third amongst Canadian life companies by gross assets and 41st internationally on the same basis. Its downfall can be traced back to the mid-1980's when it began to invest heavily in the booming Canadian property sector. This property boom in Canada came to an end, a deep recession ensued and there were inevitably sharp rises in bankruptcies and foreclosures and a fall in property values. This had dramatically affected Confed Life's asset base which became exposed and which eventually led to its liquidation on the 15th August, 1994.

Before we analyse the evidence that we have heard in Court over the last three weeks, we need to say that in regard to its customer a stockbroker's duty lies primarily in contract and stockbrokers are liable if they fail to use that skill and diligence which a reasonably competent and careful stockbroker would exercise. In Eckersley & Ors. v. Binnie & Ors. (1988) 18 Con LR1 at 99 Con, the Court of Appeal, at 79, said this:-

> *"In defining the duty of the first defendants the judge correctly ruled that the standard of care required was that of reasonably competent engineers specialising in the design of water transfer systems, including tunnels, applying the standards appropriate at the time of design, construction and operation. The law requires of a professional man that he live up in practice to the standard of the ordinary skilled man exercising and professing to have his special professional skill. He need not possess the highest expert skill; it is enough if he exercises the ordinary skill of an ordinary competent man exercising his particular art. So much is established by Bolam v. Friern Hospital Management Committee [1957] 2 All ER 188 [1957] 1 WLR 582, which has been applied and approved time without number.*
>
> *"no matter what profession it may be, the common law does not impose on those who practise it any liability for damage resulting from what in the result turn out to have been errors of judgment, unless the error was such as no reasonably well-informed and competent member of that profession could have made."*
>
> *(See Saif Ali v. Sydney Mitchell & Co [1978] 3 All ER 1033 at 1043, [1980] AC 198 at 220, per Lord Diplock)"*

It is stated in Charlesworth & Percy on Negligence (9th Ed'n 1997) 8 - 209 that *"the stockbroker's duty includes that of ascertaining with reasonable accuracy facts relating to any particular transaction and transmitting them to the customer. If the latter suffers loss by the stockbroker's breach of duty it matters not whether the stockbroker had acted innocently or fraudulently"*. Of course since the decision in Hedley Byrne & Co. Ltd. v. Heller & Partners (1964) AC 465,a stockbroker also owes a duty in tort to his customer even in regard to a third party with whom he has no contractual relationship. The rule is a strict one. If a stockbroker gives free but negligent advice or material information on request to a client then if he believes that that advice is likely to be acted upon and does not issue a disclaimer of responsibility he may also be liable should loss or damage be suffered as a result of his negligence.

We have no doubt from the facts as we have heard them that the defendant had a duty of care towards each of the plaintiffs. We shall explain our reasons for that decision where it becomes necessary.

During his closing address to the Court, Advocate Hoy made a remarkable submission. He said *"In relation to Mr. Dixon, Jefferson Seal no longer pursued any allegations of contributory negligence apart from* *the averment that it was Mr. Dixon who was responsible for the amount of the bond which was purchased by him and therefore for the overall weighting of his portfolio so that the other allegations of contributory negligence which were pleaded are withdrawn."* In that case any similar allegations of contributory negligence against Miss Richardson must fail and we are left with an extraordinary situation that on the pleadings Mr. Dixon owed to Miss Richardson as third party a duty to exercise reasonable care and skill in advising her in connection with her investments. According to the "Richardson pleadings", Mr. Dixon was under a duty to consider the suitability of each and every investment to be made on behalf of Miss Richardson and in the light of her investment requirements to adopt a prudent investment strategy and further to have regard to the overall structure of her portfolio in making investment decisions and to manage and review her investments and advise her in the light of any market developments.

It is necessary to deal with some preliminary matters.

A Eurobond, in general terms, is a negotiable bearer instrument issued by a borrower for a fixed period of time paying interest known as the coupon which is fixed at the issue date. This interest is paid regularly to the holder of the bond until it is redeemed at maturity when the principal amount is repaid. It is underwritten through an international syndicate of, for example, banks, and sold principally to investors outside the country in whose currency it is denominated. Whilst the vast majority of these bonds are straights there are variants such as zero coupon bonds which as their title denotes carry no coupon and simply redeem at the face value at a date in the future. There are of course risks attendant on holding such bonds such as the interest rate risk, a risk of the issuer defaulting on its obligations (as happened with Confed Life) and the ease with which a bond can be sold in the market and of course with international bonds, the risk of currency movement.

There are certain particular advantages for Jersey residents in purchasing Eurobonds in that a Eurobond has no withholding taxes and any tax on the income falls to the individual to declare. If a bond is sold full of interest and another or the same purchased empty of interest then there may be a tax benefit of some substance. There are three categories of clients with which a stockbroker deals. We shall examine these in more detail, but we need to say this now. "Execution only" clients use stockbrokers (or Eurobond advisers) merely to transact business physically. The Eurobond adviser in these cases is there merely to obtain the best price possible from the market. He then legally completes the transaction, but he does not give specific advice or perform other services.

Discretionary clients are identified where the client delegates the entire process of investment management and administration to the specialist adviser. The adviser is responsible for all investment decisions, executing transactions and regular reporting. Jefferson Seal on the evidence had no discretionary clients.

Advisory clients are clients who, once parameters are established between the client and the stockbroker or specialist Eurobond adviser will, according to these parameters, receive such notification and advice as has been agreed. In response to a request for further and better particulars of the defendant's re-amended answer made pursuant to an order of the Judicial Greffier dated 2nd May, 1997 vis-a-vis Mr.

Dixon, it was stated by the defendant that *"It was not the defendant's case that it did provide the plaintiff with its advisory service"*.

At the relevant time (that is during the existence of Confed Life) the charges of Jefferson Seal were at discretion. They were apparently calculated on an individual basis as to the amount of work involved and the amount of ongoing work involved and, on occasions, depending on the size of the transaction. No other charges were incurred. The bonds were held in Euroclear and no charge was made although an attempt was made at some time in 1992 or 1993 to levy a £10 collection charge for the payment of the income but this was dropped as it proved too cumbersome.

The case is complex but it is necessary in our view (1) to set out the duties of a stockbroker vis-à-vis his clients, (2) then to examine the sequence of events particularly in the light of the developing information concerning the altering status of Confed Life whereby each client purchased and lost his or her investment in Confed Life; (3) then to examine the expert evidence given to us by four experts and (4) then to reach a conclusion on all those facts.

It is necessary to state by way of preliminary that Standard and Poors, a very long established credit rating agency (we shall also deal with others such as Bloomberg and Dominion Rating Services) has credit rating for Euorbonds in the following categories (we take these from their own literature):

> *AAA: Extremely strong capacity to meet financial commitments. Highest rating.*
>
> *AA: Very strong capacity to meet financial commitments.*
>
> *A: Strong capacity to meet financial commitments, but somewhat susceptible to adverse economic conditions and changes in circumstances.*
>
> *BBB: Adequate capacity to meet financial commitments, but more subject to adverse economic conditions.*
>
> *BB: Less vulnerable in the near-term but faces major ongoing uncertainties to adverse business, financial and economic conditions.*
>
> *B: More vulnerable to adverse business, financial and economic conditions but currently has the capacity to meet financial commitments.*
>
> *CCC: Currently vulnerable and dependent on favourable business, financial and economic conditions to meet financial commitments.*
>
> *CC: Currently highly vulnerable.*
>
> *C: A bankruptcy petition has been filed or similar action taken but payments or financial commitments are continued.*
>
> *D: Payment default on financial commitments.*
>
> *Ratings in the "AAA", "AA", "A" and "BBB" categories are regarded as investment grade.*

Ratings in the "BB", "B", "CCC", "CC" and "C" categories are regarded as having significant speculative characteristics.

Rating from "AA" to "CCC" may be modified by the addition of a plus (+) or minus (-) sign to show relative standing within the major rating categories.

<u>The Duties of the Stockbroker</u>

Jefferson Seal became a separate legal entity in 1986. It had been a branch of a firm founded in Manchester in 1935 by its namesake. His son Mr. David Seal had joined the firm in 1956 and came to Jersey at the request of a particular client in 1971, forming the branch office in 1973 as the rules permitted. Mr. David Seal formed the company, provided most of the capital and with his partner David Bowen ran the company, promoted it as necessary and having seen it flourish, sold his interest to Cater Allen in 1993. He remained a director until 1995, when he reached the company's retiring age. Jefferson Seal was by most standards a small firm. It employed at the relevant time about twenty people and there were perhaps seven or eight people in the front office, talking to clients. The fact that it was small does not mean that it was not, however, successful, but it flourished without much regulation. Its note-paper declared that it was a member of the London Stock Exchange and its contract notes had the words "Subject to the Rules, Regulations and Usages of the London Stock Exchange". It is important to recall that Jefferson Seal did not follow the Securities and Futures Authority rules until it was made the subject of a review by the Surveillance Department of the Stock Exchange. None of the four complainants in that matter was a plaintiff in this action. As a result of the review the firm received a letter on 12th September, 1996. The first two paragraphs of that letter read as follows:-

"As you will be aware, the London Stock Exchange has, for some time, been conducting an investigation in to Jefferson Seal's conduct in relation to the recommendation and purchase by Jefferson Seal in 1994 of Confederation Life Insurance Company 9.875% Bonds due 3 March 2003 (the "Bond") on behalf of a number of clients.

As a result of its investigation, the Exchange has decided not to commence any formal disciplinary proceedings against Jefferson Seal. However, the investigation has raised a number of serious concerns relating to the conduct of Jefferson Seal's business. Of particular concern are Jefferson Seal's procedures for ascertaining and informing clients of the nature of their investments and keeping them appraised of developments in respect of such investments."

We shall comment on the expert evidence later. Suffice it to say by way of identification that the plaintiffs called two expert witnesses, Mr. William Scott and Mr. J.C.R. Morley-Kirk and the defendant called two expert witnesses, Mr. John Cobb and Mr. Steven Sholl.

Mr. Scott referred to this letter as a very strong criticism of the way that Jefferson Seal organized their office. Mr. Scott, who was not a witness given to hyperbole said this:

> *"If I had been in receipt of such a letter, I would have been in a state of considerable panic and all hands would have been put to the pumps immediately to try to rectify our position".*

Mr. Cobb was not overly impressed by the general standard of the Stock Exchange regulatory body although in his opinion they had improved considerably over the years as they had got more used to what they were going to do. Mr. Cobb said of this letter that in his view it showed that there had been no formal breach. Mr. Cobb would have drawn very considerable comfort from that fact. He would have noted that several procedures were at fault but in any event the whole concept of the procedures had been considerably tightened up. There was at the time of the investigation, in his view, every requirement to "know the client" but no formal requirement to record it. Mr.Cobb was only concerned that there were inadequacies. His view of the letter was quite different from that of Mr. Scott.

We have here a divergence of opinion. Mr. Cobb thought that while it was good practice "to jot things down" it was acceptable to keep instructions in one's head. The immediate problem of course would occur if the stockbroker, holding these instructions only in his head, were struck down. Mr. Cobb was relaxed that if the pooled knowledge of those remaining in the firm was not helpful, it would only be necessary to approach the client to start again. That in an emergency situation could have its drawbacks.

However, we can move out of this disputed area by saying that we must look to see if the loss suffered by the plaintiffs, (for loss was clearly suffered), was attributable to the stockbroker. That is a self-evident concern because the very nature of dealing in the stockmarket or Eurobond market means that losses can be suffered as well as gains being made and it would be nonsensical to assume that every loss is attributable to a stockbroker's lack of a duty of care or to his negligence.

Over and over again in this trial, the word "judgment" occurred. It is axiomatic that if the judgment exercised had bad results that cannot be proof that there was a failure to meet the necessary standard of care. As was said in <u>Wilsher v. Essex Area Health Authority</u> (1987) QB 730 at 747 by Mustill J:

> *"The risks which actions for professional negligence bring to the public as a whole, in the shape of an instinct on the part of a professional man to play for safety are serious and are now well recognised. Nevertheless, the proper response cannot be to temper the wind to the professional man. If he assumes to perform a task, he must bring to it the appropriate care and skill. What the Courts can do, however, is to bear constantly in mind that, in those situations which call for the exercise of judgment, the fact that in retrospect the choice actually made can be shown to have turned out badly is not in itself a proof of negligence; and to remember that the duty of care is not a warranty of a perfect result".*

What then is the duty of a stockbroker? Perhaps the question can be rephrased by asking what was the duty of Jefferson Seal in Jersey, where they were not, according to some witnesses, as constrained by regulation as some of their mainland colleagues. However, the duty "to know the client" was accepted by everyone as being paramount. Unless a stockbroker knows what his client's requirements are he will be stymied in the exercise of his judgment. It requires no knowledge of the mysteries of stockbroking to reach that conclusion. The "know your client rule" according to Mr. Morley-Kirk (and we can see no reason to depart from his wording), is globally recognized by investment regulators, banks, stockbrokers, and investment managers as the key to the successful and proper provision of client services.

Sadly, the noticeable lack of record keeping (which may have been standard practice at the time) has led the Court into areas of some confusion. It would have been so simple and so useful had Mr. Beadle, the director immediately concerned with Bond activity, noted down what he understood to be the clients' investment goals and other inter-related matters. As it is, we have little documentation and much conflicting evidence.

It would also have been helpful if this Court had known by some form of objective evidence (and we are referring to these three plaintiffs) what was their risk tolerance (which might include a dislike of certain types of products or currencies). The stockbroker should also have known the investment structure of his clients because there may be different reporting requirements for these. Indeed Mr. Sholl put the matter most aptly. He said that when advising the client the broker has a duty to take reasonable care to ensure that any recommendation made is suitable for that client.

We need to expand on a matter touched upon earlier which is the type of service offered by a stockbroker and outline the professional duties owed by the stockbroker to his client in respect of that service.

<u>Execution Only Services</u>

This is a basic level of service which includes execution of purchase and sale transactions and arranging settlement. Some stockbrokers do not provide execution only services but a few firms (sometimes referred to as discount brokers) specialise in this area, generally offering discounted commission rates. Investment advice is not given but the stockbroker will often provide general market information such as share prices, index levels etc. clients using this service will normally give their dealing instruction by telephone. Generally the broker will return the client's call following execution to report the transaction.

The broker has a duty to exercise due care in conducting the business on behalf of the client, and to ensure that the business is executed in a timely manner and at a price which is the best reasonably available having regard to market conditions and the size of the transaction.

<u>Advisory Dealing Services</u>

In order to do this, the broker needs to take steps to know his client, that is to say he should seek to obtain sufficient information from the client to enable suitable advice to be given. In this context the following information would always be relevant.

(a) Investment objectives - At the simplest level the broker will need to know whether his client

	requires income or wishes to generate a capital gain. If income is the objective, then questions such as how much, and at what frequency, will arise.
(b) Investment horizon -	For how long is the client prepared to commit to the investment. If this is only a short period, months for instance, a bank deposit may be more suitable than stock market investments. Consideration should be given to future capital commitments.
(c) Attitude to risk -	All investment involves risk but this is not always well understood by investors. In addition to asking whether the client is prepared to entertain a loss, the broker should do his best to assess the client's attitude to risk.

Additionally, the advice may need to take account of other factors, such as any existing investments of the client. The broker will have an ongoing duty to monitor the investments and ensure that the portfolio's constituents remain aligned to that strategy.

An examination of the pleadings may advance the matter further.

The defendant in its re-amended Answer, when attempting to show that Mr. Dixon was in fact advising Miss Richardson, said this:

> *"Mr. Dixon acting on behalf of the plaintiff informed Mr. Beadle that the plaintiff's principal investment objective, was similar to that of his own; namely to achieve capital appreciation by way of income investment."*

Further we can consider in the particulars of contributory negligence, withdrawn except for one particular, how the defendant itself viewed these duties. If these were the particulars of where the plaintiff was alleged to have failed in his duty, then the contents of these particulars give clear guidance of what the client could reasonably expect from the broker.

On that basis, the broker had, according to its own pleading, several criteria, the most important of which were these:-

1. It had to give sufficient consideration as to whether the Bond was a suitable investment for the client in the light of his investment requirements.

2. It had to give sufficient regard to the ratings attached to the Bond by the credit rating agencies both at the time he bought the Bond and at all material times until the trading in the Bond ceased.

3. It had to keep the performance of the Bond under review and to monitor all relevant information relating to it.

Mr. Dixon and Miss Richardson, also pleaded that the defendant was aware that the plaintiffs had no requirement for a high income yield from the bond portfolio, that investments placed in the bond portfolio were intended for the purpose of capital growth and that all bonds in which the plaintiffs invested were to be of high quality. The pleadings of Beer Investment Limited are not exactly similar and the company's particulars of the negligence and/or breach of duty alleged are as follows:-

(i) The defendant recommended the purchase of the Bond knowing that the plaintiff was relying on its skill, knowledge and judgment to give the plaintiff sound advice in such matters and the defendant failed to recommend a sound investment to suit the express needs of the plaintiff as had been expressed by the plaintiff to the defendant from the outset; and/or

(ii) The defendant failed to ensure that the plaintiff was fully aware of the risk factors involved in investing in the bond and failed to inform the plaintiff that the bond was subordinated; and/or

(iii) The defendant failed to ensure that the plaintiff's portfolio was structured in a correct manner as the concentration of capital in the Bond was excessive; and/or

(iv) At the time of purchase of the Bond the defendant knew or ought to have known that the Bond lacked the security necessary to qualify it for consideration as a suitable investment for the plaintiff's portfolio; and/or

(v) The defendant failed to make any or any adequate efforts to sell the Bond despite the fact that the defendant knew or ought to have known that the value of the Bond was decreasing from the time it was purchased to the day that it was declared in default; and/or

(vi) The defendant failed to keep the plaintiff updated and informed of the developments concerning the rating and value of the Bond.

Much of this case then will turn on the actual requirements of each of the three plaintiffs and perhaps when we understand what those requirements were, we can examine where any default might have occurred if we are satisfied that the broker clearly understood the requirements.

In attempting to discover what the investment strategy of each client was, the evidence is often conflicting. We have found this surprising because in this case the conflict is so marked that someone has to be mistaken. We have to recall that by 1994 Mr. Brian Beadle had been a stockbroker for nearly twenty years and had clearly achieved considerable success. He had, however, some 150 clients of his own who were invested in some 300 - 400 different Bonds and Eurobonds and apparently the total value of the Bonds held in safe custody by Jefferson Seal on behalf of their clients was in the order of £150 million.

Mr. Sholl made an interesting comment. Stockbrokers, he told us, protect themselves now (as opposed to the earlier days) by keeping a permanent hard record of conversations with clients and advice given to clients. By hard record, we presume he meant by writing things down. Mr. Sholl (unlike Mr. Cobb) had always done that and had tried to encourage others to do it. He made a truism - if a stockbroker has to rely on his memory, he is relying on a fallible source that may not be totally reliable over matters that occurred (in this case) three years previously. Anyone connected with a court of law, where memory is constantly shown to be a fragile structure, can put the lie to someone who claims that his or her memory is infallible. The fact that the FSA now requires the recording of important matters is neither here nor there. Practically the whole of a broker's business is carried out on the telephone. Enormous sums of money are dealt with daily. Mr. Sholl kept records for the very purpose that not all clients in this world are trustworthy and reasonable. Disputes often arise. Note taking must be important if there is a departure from an investment strategy. We were told that in the past, stockbrokers did not keep individual records because firms of stockbrokers were originally partnerships and not necessarily happy partnerships. The lack of note taking was often a means of self-protection for a stockbroker who did not necessarily trust those with whom he worked. That seems to us to be singularly unhelpful as an argument to call in aid. Besides the fact that we saw nothing of self interest in Mr. Beadle not taking notes, this Court cannot concern itself in the protection of the broker. It may well be, as Mr. Cobb pointed out, that the regulatory body were at fault in not bringing in these requirements earlier. That, in our view, helps the stockbroker not one jot or tittle. It is a stockbroker's fundamental duty to give suitable recommendation to a client whose needs he has ascertained. Although neither of the defence experts felt that nothing "in the environment that Jefferson Seal was working in at the time" required any note to be taken, we feel that such an omission is so glaring that it militates against the defendant.

From the evidence that we heard it is quite clear that a stockbroker cannot tell his client everything that may affect his investment, but Mr. Cobb was perfectly clear on the duty of a stockbroker and he set it out in his report in this way:-*"The client must be happy with the plan and hopefully with the performance, and the stockbroker must know precisely what he is trying to achieve on behalf of his client. Mutual confidence and understanding are the key."*

Let us for a moment examine a problem which the non recording of a conversation has exacerbated. The defendant, as we have seen, pleaded in its answer that *"in fact the plaintiff informed Mr. Beadle that his principal investment objective was to achieve capital appreciation by way of income reinvestment (that is, by receiving income and then reinvesting it in order to achieve capital growth".)* When formally asked to give particulars of each and every occasion when the plaintiff so informed Mr. Beadle the defendant understandably was unable to provide details of the occasions upon which such matters were communicated. It is understandable because they kept no notes. However, there came a point in the cross examination of Mr. Dixon by Advocate Hoy where Advocate Hoy suggested that in March 1994 there had been a discussion with Mr. Dixon whereby a new policy had been agreed where Mr. Beadle would be seeking a 10% return. There is nothing in writing to help us. The only letter that we have is dated 1st February 1994. Before we set the letter out, Mr. Dixon gave an explanation of it by saying that he had been receiving valuations that bore little relevance to the actual value of the stocks concerned and the letter was to try to draw out Mr.

Beadle into admitting, as he did, that there had been some problems with his computer print out. The letter reads:-

"Messrs. Jefferson Seal
Att. Brian Beadle Esq.
1st February, 1994

Dear Brian,

Regarding our conversation this afternoon, when you said it was too late to trade, I now request you to retain the status quo, as I feel that I am unable to make any decisions whilst the values of the various stocks in my portfolio are at very different values to those quoted by you to me, i.e. there being a differential of £34,000+ on the Zebra and even about double that on the Exon some while ago and another occasion prior to that. I would like an accurate current valuation and an explanation for the past errors. I would also point out that as mentioned by phone I would have traded the Zebras long ago except for the fact that the value showed a 10% rise to maturity and the price according to your valuations has not altered for about a year, so this is no short term error? So I have now lost out on the various opportunities discussed.

Yours sincerely,
D.W.L.DIXON"

Mr. Dixon described that letter as "frivolous" intended to achieve accurate valuations.

But we have to bear in mind that prior to March 1994, Mr. Dixon had a portfolio with a lower than average income (about 3%). If 10% had been required as a return on the entire portfolio, that would have required the entire portfolio to have been discarded and a completely new set of investments purchased.

Advocate Hoy in his closing speech submitted that those discussions could only be reasonably construed in the context of a requirement of achieving a 10% return from the monies which were then on cash deposit. We have to recall that Mr. Dixon had by the middle of March 1994 sold his U.S dollar Eurobonds and placed £300,000 on deposit. For that reason, the yield on his portfolio had dropped from 2.49% to 1.46%.

Let us try, in the absence of any meaningful notes, to ascertain what Mr. Dixon's investment criteria were.

Mr. Dixon is 64 years old and is in Jersey terms a grower. He came to Jersey in 1964 and purchased and ran a well known and successful fruit farm. He has lived with Miss Richardson for some 27 years. He had known the Seal family in Manchester and there was a joint venture between George Blampied Limited and Mr. Dixon adjacent to the Patriotic Street car park. Mr. David Seal was involved with George Blampied Ltd. It was because of that connection that Mr. Dixon transferred his investments from Le Masurier, James and Chinn to Jefferson Seal. The investments were all bond investments and they were all low risk. At the time Mr. Dixon had not heard of the system of rating (such as AAA or AA) and we have no doubt that the technical terms were unknown to him until after the crash of Confed Life.

He required his bond investments to be equivalent in standard to the one that he transferred from Le Masurier James and Chinn. This was, in his words, his pension fund. He had little experience of investment but we believe that he had a shrewd eye for what he conceived to be solid investments. By way of example, his holding in an equity HSBC Holdings plc ordinary HK$ 10 shares were entirely his own investment and not purchased on the advice of Jefferson Seal.

He had, and we find that as a matter of fact, very little knowledge of Eurobonds.

He had income from the farm, from some residential accommodation and from a shop in town. He was adamant that his bond portfolio was purely for capital investment. On 1st April 1993, Mr. Dixon wrote to Mr. Beadle (they were on Christian name terms) a letter which says in part:

> *"With reference to our conversation yesterday, I confirm that if, in the unlikely event that you are unable to contact me regarding obtaining my wishes in regard to the investments you hold on my behalf, that you will deal with me to the best of your ability to act as you think I would have done bearing in mind previous verbal instructions, which are based on the principle that I do not wish to obtain income from the investments you hold on my behalf as they are for capital growth only."*

When apparently the development of the property in Kensington Place took on the possibility of Mr. Dixon buying out the half share of George Blampied Limited, Mr. Dixon discussed the matter with Miss Richardson and they made a joint decision to convert some of their investments into cash. It is of passing interest that Mr. Dixon spoke of selling some of "our Bond portfolio".

With the maturity of some Zebra bonds (recommended to him by Mr. Beadle) which were zero rated together with cash provided by Miss Richardson and by him, there was available a substantial proportion of the possible purchase price. However the deal did not proceed and Mr. Beadle was approached for advice on reinvestment.

There was some £200,000 available from Mr. Dixon and some £100,000 available from Miss Richardson.

Mr. Dixon told us that the advice given by Mr. Beadle was to invest substantially in Confed Life. Apparently, he even suggested to Mr. Dixon that he should sell his remaining Zebras that were nearing maturity and invest these in Confed Life. Mr. Dixon said that he had always understood that the higher the interest the greater the risk. He was adamant that the last thing that he was looking for was high income.

We have examined in some detail the Bonds that were purchased for Mr. Dixon by Jefferson Seal. Many in the early days (from 22nd May 1992) are triple or double A rated. There are one or two that are not.

For example, on 8th July 1993, Mr. Dixon purchased £70,000 of Forte 9.375 maturing 07/2003. These were rated BBB+, but he says that they were purchased on the recommendation of Mr. Beadle. Mr. Dixon assumed that it was a safe bond, because it was a household name, but in any event it was sold a year later. Some of his holdings he bought and sold at a loss. One of them was English China Clay - a Bond that Mr. Dixon purchased without advice because he knew of the English company's interest in Ronez - a local company that he considered well managed and successful.

Mr. Dixon had contact with Mr. Beadle from time to time in order to enquire what the state of the market was and contact was normally made by telephone. Mr. Dixon could only recall coming in to the office of Jefferson Seal on no more than two or three occasions but there was contact at least once a month.

Mr. Dixon had no doubt that his cautious investment policy had been spelled out to Mr. Beadle when Jefferson Seal took over his four bonds transferred from Le Masurier James & Chinn.

Mr. Dixon wrote his letter on 1st April 1993 to confirm that cautious strategy. In our view there is little doubt that this cautious strategy was in the forefront of Mr. Dixon's mind at all material times.

The defendant's case at one time concentrated on "bond washing". The Confed Life Bond was unusual. If all three plaintiffs wanted capital growth and security and there was no income requirement, then it was in our view the wrong Bond in any event. We must recall that Zebra Bonds are strictly gilts, very secure and good for capital growth. If Mr. Dixon, in particular, was involved in "bond washing", and we do not feel that he instigated any such policy, a broker would normally, as we understand the evidence, be looking at a one year time frame or shorter. The longer the duration of the Eurobond, the more likely is it to be volatile in its terms. If a Eurobond, with a 10% coupon, were to be sold 360 days later, the broker would be wishing to sell it at the same price and to capitalise on the 10% coupon. It does not need a deep knowledge of the stock market to see that a 1% fluctuation in interest rates could have a 9 or 10 point movement in the Bond so that there is a risk always of a loss on the price, as well as an expectation of a gain on the price.

That is why Bonds with a shorter maturity, riding close to par, are unlikely to be so volatile. If this is being carried out on a one or two year horizon, then bond washing may not indicate a high risk appetite.

Mr. Hoy stressed the importance of a letter dated 23rd April 1991. That letter is addressed to Mr. Dixon. It says:-

"23rd April 1991

D W Dixon Esq
La Grange
Augres
Trinity

Dear Mr. Dixon

We have paid £331.54 to your account maintained with Hambros Bank (Jersey) Ltd. in settlement on balance of the following transactions effected on your behalf for settlement 22 April 1991.

Sold Yen 13m World Bank 7 1/4% 27.4.95 raising Yen 14,010,659.00

Purchased Yen 14m Finland 6 3/4% 25.3.96 cost Yen 13,930,875.00

Yours sincerely,
Brian F. Beadle
Eurobond Manager"

There were other examples. Here a bond full of interest is sold a few days before it fell due and a bond empty of interest was purchased with the proceeds. Indeed, there is a letter from Mr. Beadle to Mr. Dixon which may make the policy clearer. It reads:-

"5th August 1992

D.W.Dixon Esq.,
La Grange
Augres
Trinity
Jersey

Dear Mr. Dixon,

Further to our telephone conversation, I have pleasure in enclosing a sold contract note covering US$50,000 British Telecom 8 3/4% 11.8.99. As agreed, this bond was sold full of accrued interest with the resulting proceeds being re-invested into a different bond. The reason for pursuing a different route is that the re-purchase price of the British Telecom would be at too high a premium to its redemption value and I consider better value being achieved by purchasing US$58,000 City of Yokohama 7 3/8% 5.8.02. There is a difference in yield to maturity where we have increased total return from 6.85% to 7.16%. The result of this transaction means a cash difference in your favour of US$256.56 and I confirm that this sum has been converted to sterling at a rate of 1.9165, resulting in a cheque for £133.87 being forwarded to your account at Hambros Bank.

I trust you had a pleasant vacation.

With kind regards,
Yours sincerely,

Brian F. Beadle
Director"

Mr. Dixon says that he took the advice of Mr. Beadle and it may well be that this was Mr. Beadle's way of making more capital appreciation for him. It is of interest that on 12th March 1993 we have a valuation of Mr. Dixon's then current portfolio. The Kingdom of Spain Japanese Yen Bond was due to pay interest on 23rd March and there are several manuscript notes at the foot of the paper: *"Dixon Yen Bond, Income due 23/3. Do something by 15/3"*. There are also some noted but unsuccessful attempts to raise Mr. Dixon by telephone. Clearly no contact was made because a letter of 23rd March 1993 shows the eventual earned income being paid into Mr. Dixon's account with Hambros Bank. It may well have been as a result of that that Mr. Dixon wrote the letter to Mr. Beadle on 1st April 1993 to which we referred earlier. We see nothing untoward in that letter. Mr. Dixon says that he wanted capital growth and not income. He had just received income. (He was not apparently on holiday at the time.) Whilst we do not believe that Mr. Dixon was averse to having his interest rolled up into capital, we do not see that this helps the defendant to prove that, as was raised at trial for the first time, Mr. Dixon suddenly changed his strategy to achieve a 10% return. This, of course, altered to a claim that the 10% was limited to the monies that Mr. Dixon had on deposit.

Apparently, Mr. Dixon felt disquieted at the number of transactions that Mr. Beadle was carrying out on his behalf. He said repeatedly that he had no income requirement but if income were generated then that was of no great concern. There was one Bond (the Republic of Finland 6 3/4%) where income was paid in French francs and these were paid into a French franc account to help finance the running of a property in France. Naturally, Mr. Dixon had no complaint where he made a profit but he denies the suggestion that he instigated the policy. Time and again we were referred to the letter of 5th August 1992 where it was "agreed" that a bond full of interest should be sold and a bond empty of interest purchased. Mr. Dixon says that he was concerned about a constant changing of investments which in Mr. Dixon's view was making more commission for the broker.

It was put to Mr. Dixon that he was a highly shrewd and astute business man. When Mr. Dixon moved his investments to Jefferson Seal he only had four AAA Bonds, all zero rated. We cannot see that his views changed nor that his knowledge of Eurobonds greatly increased. The first Bonds he purchased (on Mr. Beadle's advice) were Zebra zero Bonds and with these, he was relaxed. We cannot understand why Mr. Beadle recommended the sale of the Zero Bonds, unless the investment strategy had changed drastically.

Mr. Dixon strongly denied that he had agreed a 10% return from the monies that he had on deposit. Mr. Beadle said that when he discussed the matter with Mr. Dixon in April or May 1994 (it must be recalled mainly on the telephone, although Mr. Dixon would occasionally come into the office), Bond yields at that time were approaching 9 1/2% to 10% and Mr. Dixon appeared very pleased as interest on bank deposits at the time was in the region of 5% to 5 1/2%. Mr. Beadle went on to say that the appeal of a 10% return was *"he believed very much in Mr. Dixon's thoughts"*. Now, that is an expression of understanding rather than a clear and precise record of insruction and, in the absence of any written confirmation, we can see how a misunderstanding may have occurred. The purchase of the Confed Life may be behind that mistaken belief. There seemed to be at that time a general policy of Jefferson Seal to look for a 10% return for many of their clients. The Bond was very attractive but what may have slipped the mind of the adviser is that the attraction to the stockbroker of the yield of the Bond obscured the requirement by the client for security. The purchase of Confed Life may have led to a rate of return that was attractive to the investor (and it is difficult to see how someone who is a relative tyro in Eurobond dealing could have failed to find it attractive). Whether it met with Mr. Dixon's overall strategy is quite another matter.

Mr. Beadle described his relationship as an ongoing one based on his understanding of Mr. Dixon's requirements, alerting Mr. Dixon to possibilities but always with the result that Mr. Dixon took the decision.

Before March 1994 there was certainly no "10% strategy". Mr. Beadle said so. The strategy, if it came about at all, came about in the course of discussions about reinvestment. Mr. Dixon was said to be excited by a target area of 10% *"whether by way of income or more importantly by capitalising the income that was a target area in which he would be very interested in doing business."*

There were clearly a number of discussions, either on the telephone or by "chance conversations" when Mr. Dixon was in the offices of Jefferson Seal. There had been discussions over 4-5 weeks, according to Mr. Beadle, as to how the monies on deposit could be most usefully invested. That "several weeks" is a telling period of time. There were during the course of this period a number of bonds mentioned but, if Mr. Beadle is to be believed, then the 10% return was paramount. It does seem to us unfortunate that this remarkable change of strategy is not pleaded and came out only at trial. There is no record because the discussions "formed the normal part of a broker/client relationship". That does seem to us to be a startling omission which quite clearly took the plaintiff by surprise at trial.

Miss Richardson

Miss Richardson had a portfolio of equities and bonds and, of course, wished to participate in the property investment with George Blampied Ltd. For this purpose, she sold all her bonds and put the proceeds on deposit. She chose to reinvest her money when the property transaction fell through. Mr. Dixon spoke to Mr. Beadle and he advised Confed Life as a good Bond investment. She invested 10% of her portfolio (£90,000) in the Bond. It is clear that Miss Richardson only met Mr. Beadle once on a ferry crossing back from France. There were many contract notes in her name, and letters written directly to her by Jefferson Seal.

At no time during his cross-examination of Miss Richardson did Advocate Hoy put to her the question of the 10% strategy that he had dropped like a bombshell before Mr. Dixon. That is surprising because the point was alluded to in a question put to Mr. Scott that her investment in the Bond was consistent with a 10% strategy.

There are, of course, the identical letters sent by Mr. Dixon and Miss Richardson on 7th April 1995 which was a straight bat reply not agreeing to the private client agreement which followed the review of the Securities and Futures Authority. The letter (in words no doubt chosen with care) *"formalises the manner in which we (Jefferson Seal) have always conducted business on your (the clients') behalf"*. Miss Richardson said that Mr. Dixon prepared the reply; she discussed it with him and signed it. Having seen and heard Miss Richardson in the witness box, we did not form the view of Miss Richardson that she would blindly follow Mr. Dixon in any matter with which she did not agree. We say this even though initially Miss Richardson's "portfolio" apart from a holding in British Gas, mirrors Mr. Dixon's. We say "portfolio" because Mr. Cobb described it as merely "a collection of investments."

It appears that there were some 53.79% invested in fixed international $US. Miss Richardson had no complaint on this but she was adamant that Mr. Beadle had discussed these matters with Mr. Dixon and she followed Mr. Beadle's advice without question.

Both Mr. Dixon and Miss Richardson were questioned about a communication sent to them by Mr. David Bowen of Jefferson Seal while they were on holiday in the British Virgin Islands. A question put to Miss Richardson as to why a question raised in that communication on a British Gas Bond led to a purchase by both Mr. Dixon and Miss Richardson a few days later of that Bond was not put to Mr. Dixon in cross examination. That was unfortunate as Miss Richardson was unable to comment constructively.

What she did tell the Court was that she did not require high yielding, high interest investment and she only required capital growth.

She used the interest on her Hambros deposit for her general living expenses.

On the evidence we totally reject any suggestion that it was Mr. Dixon who advised Miss Richardson to invest in the Confed Life bond when she purchased the bond on 13th June, 1997. On the evidence that we heard, Mr. Beadle was recommending Mr. Dixon to purchase the bond (of which Mr. Dixon had no direct knowledge) on the telephone and he knew that Mr. Dixon was relaying that information to Miss Richardson and he heard her confirm her acceptance. We do not consider that to fall within a third party obligation.

<u>Reeb Investments Limited</u>

If ever the need for making notes was necessary, then the evidence of Mrs. Beer makes it plain.

The defendant pleads the following:-

"It is admitted that Mr. Beadle of the defendant met Mrs. Beer on at least 2 occasions in January and the early part of February 1993 prior to 12th February 1993. In the course of the meetings Mrs. Beer informed Mr. Beadle that she and her business partner, Mr. Steve Skinner, were in the process of purchasing a property to be converted to the use of a licensed establishment in St. Helier ("the public house").

The plaintiff had a sum in excess of £500,000 which would become available for investment during the following 2 to 3 months as various bank deposits matured ("the investment funds").

She and Mr. Skinner had sufficient working capital to meet the purchase and refurbishment costs of the public house without having to draw upon the investment funds.

She did not envisage that there would be any need to have recourse to either the capital of the investment funds or the income therefrom in connection with the refurbishment costs of the public house but that the investment funds had to produce a high level of income in case there was an unforeseen increase in the refurbishment costs.

The defendant then sets out the letter of 12th February 1993 with a surprising omission. We set out the whole letter, although of course the defendant stated that it would refer to the full letter at trial and did so.

"12th February 1993

Mrs. V D Beer,
Le Patrimoine
Mont de la Chenaie
St. Lawrence

Dear Mrs. Beer

As we approach mid-February, I think the time has now come to give consideration as to what to do with your sterling funds which mature from deposit towards the end of the month. As you are aware, interest rates in the UK continue to decline and I would not be surprised to see further reductions occur either side of the March budget. There is no doubt that although bank deposit rates will fall in line, if not ahead, of UK base rates, the decline in sterling fixed income security yields is unlikely to be at the same pace. Within the gilt market yields for 5 to 10 years maturities range between 7 3/4% and 8 1/4% whilst in the Eurosterling bond market yields in excess of 9% for good quality borrowers can still be achieved. It is in this market which I think you would be best served and which will allow you to lock in on a high, acceptable rate of return whilst allowing a degree of capital appreciation as interest rates continue their decline. However, as mentioned during our meeting, interest rates will not go down forever and at some stage in the future, possibly toward the end of 1993 or in 1994 depending on economic recovery, interest rates may be forced higher. It would be at this time that fixed interest investments should be liquidated in order to protect the capital gain achieved and funds placed back on to bank deposit, where at least an increasing return will eventually compensate for the immediate downturn in income.

As we have at least 12 months of lower interest rates to come, I am quite happy to recommend to you the investment of some, if not all, of your funds into the under-mentioned securities:

Confederated Life Ins 9 7/8% 3.3.03 price £101
Yield to maturity 9.75%
Norsk Hydro 9 3/4% 26.2.03 price £101
Yield to maturity 9.6%
DSL Bank 9 1/4% 18.8.02 price £105
Yield to maturity 8.84%
Northumbrian Water 9 1/4% price £102 3/4
Yield to maturity 8.75%

Each of the above bonds are recent issues in the market and offer a rate of return considerably above deposit rates and above similar maturing UK gilts.

With this form of investment, income accrues daily and when the instrument is sold there is no penalty incurred as there would be on breaking a bank deposit. Settlement for both purchase and sale is undertaken on a 7 day basis held in the central clearing depot Euroclear. I will be only too pleased to hold *these bonds for you in our safe custody account and account to you as and when for the income. In providing you with this facility there will be no charge made but there will be a small charge of £10 made for the collection of the annual income.*

Once you have given the above ideas consideration, perhaps you would like to give me a call or come in to see me to discuss the finite details.

I look forward to hearing from you in due course.

With kind regards,
Yours sincerely,

Brian F. Beadle,
Director".

That letter bears out what Mr. Beadle said in evidence:-

"I am basically saying that the decline in interest rates could be relatively quick and as has been seen many times in the past, interest rates move in cycles and I was advising Mrs. Beer that I thought at that time the cycle may finish or may come to an end during the course of 1993 or the beginning of 1994 and she may be able to take profits but it may well be necessary to go back on to bank deposits."

Mr. Costa then asked Mr. Beadle *"What was her [Mrs. Beer's] risk tolerance"*. The reply was quite unequivocal: *"To have something as stable as - as secure as - bank deposits."*

A question was put to Mr. Cobb as to whether Confed Life was as secure as a bank deposit. The exchange was so illuminating that we set it out verbatim:-

Q "If a client were to say to you I want my investments to be as secure as bank deposit and you have put her investments into Confed Life, do you think that is prudent?

A I think that it is totally impossible to envisage that anybody could state that an investment subject in its capital terms to variations because of interest rate movements and as subject to risk because of the nature of the company itself anybody could conceive that the two were comparable. I cannot imagine anyone of any professional nature concerning that situation.

Q Mr. Beadle says that that risk was precisely the sort of risk that Mrs. Beer was prepared to tolerate. And yet of the very first investment he put £100,000 into Confed Life.

Do you believe that that was something that followed her risk strategy?

A I did not hear everything that Mr. Beadle said. I find that a remark that I cannot imagine him stating. I cannot imagine him saying that. If he said it I cannot imagine that he understood the question. It is inconceivable to me that anyone could make such a statement. Mr. Beadle *understands about interest rate movements. He understands about companies having a risk element. If he said it he is wrong."*

Advocate Hoy did not attempt to re-examine Mr. Beadle on the matter, but in his closing submission, he argued that the statement was "simply a mistake". He went on to say that the proposition that the higher the rate of return the greater the risk is so blindingly obvious to even the most unsophisticated investor that *"it must have been obvious to Mrs. Beer on reading the letter that the investments which were being suggested to her were not as secure as bank deposits."*

Mrs. Beer is a 73 years old widow. She appeared to us to be a lady of integrity who gave her evidence with certainty and clarity. Reeb Investments is a family company of which she is a director, now with her son. She has very little to do with the company at the present time. In about February 1993 she contacted a friend, Mrs. Dawn Simon. We heard from Mrs. Simon who is a senior manager with Ansbacher (Jersey) Ltd. The ladies have known one another since 1935. Mrs. Beer had £100,000 maturing and Mrs. Simon recommended her to Jefferson Seal and in particular to Mr. Beadle.

Mrs. Beer clearly did not wish to risk her capital in any way. Mrs. Beer told us that she told Mr. Beadle at her first meeting with him that she had to be very careful as the family was in the process of renovating the Tipsy Toad Town House and because the plans were only now before the Island Development Committee she might need the money at any time.

There was more money to come but piecemeal. Mrs. Beer was also taking out a five years life insurance policy. She did not expect to have to call on the money she had available to invest for about a year but the estimate on the alterations nearly doubled. Mr. Beadle recommended Bonds because they were vehicles that were so easily called in. Mr. Beadle told Mrs. Beer when she questioned him on security, that Bondholders came before shareholders. This, not unnaturally, *"sounded good to her"*. She did not, of course, know anything of the constituant of a subordinated mutual such as Confed Life. We have no doubt that Mrs. Beer was, insofar as Bonds were concerned, an innocent abroad. She relied, we have no doubt, entirely on Mr. Beadle's recommendations. These Bonds were not chosen by Mrs. Beer. The choice was left to Mr. Beadle. The letter of 12th February makes that clear:- *"I am quite happy to recommend to you the investment of some, if not all, of your funds into the under-mentioned bonds."*

Mrs. Beer clearly had no idea of "high yields" - she merely wanted her capital to be secure.

The inherent danger of not taking notes is clearly shown by the pleadings filed on Jefferson Seal's behalf. There is an admission that Mr. Beadle met Mrs. Beer on at least two occasions in January and the early part of February, 1993 but prior to 12th February 1993. It is stated that Mrs. Beer informed Mr. Beadle of four matters. These must have been retained in Mr. Beadle's memory bank because nothing was written down.

Firstly that she and her business partner, Mr. Steve Skinner, were in the process of purchasing a property to be converted to the use of licensed premises in St. Helier. It is perfectly clear now that Mr.

Skinner was never a partner of Mrs. Beer and that her family had owned the property for over 100 years. The question of purchasing the property was never in issue. Secondly, the plaintiff had a sum in excess of £500,000 which would become available for investment during the following two or three months as various bank deposits matured. That is clearly a confused scenario in that £500,000 was the rough estimate for the alterations to the Tipsy Toad Public House. Thirdly, it is alleged that Mrs. Beer and Mr. Skinner had sufficient capital to meet the *"purchase and refurbishment costs of the public house without having to draw upon the investment funds."* That is clearly wrong and Mr. Beadle had to admit that it was wrong because the letter that he wrote discusses the question of the ease with which money could be withdrawn without penalty if they were placed in a bond investment. Fourthly and finally it is alleged that Mrs. Beer had told Mr. Beadle that she did not envisage that there would be any need to have recourse to either the capital or the income of the investment funds to refurbish the public house but that *"the investment funds had to produce a high level of income in case there was an unforeseen increase in the refurbishment costs"*.

Mrs. Beer said that she had little enthusiasm for interest which would have played a quite insignificant part in this substantial redevelopment (but not purchase). It is again totally inconceivable, as later pleaded, that after the letter of 12th February 1993, Mrs. Beer told Mr. Beadle that she was reluctant to purchase bonds which were priced in excess of par; that she did not want to buy bonds with excessive accrued interest and that she wanted to purchase new issues which would give a high yield. Most of the expressions used there would have been as alien to Mrs. Beer's ear if they had been uttered in Cantonese.

Mrs. Beer had money in three different banks on three months' call. She wanted ready access to those funds and it was the Bond strategy that was suggested to her by Mr. Beadle. A higher rate of return was attractive but in her view not essential to her where security was paramount.

In our view she told Mr. Beadle that she had money coming in but the matter is confused. There was £500,000 to be spent on improvements to the Tipsy Toad. We can see that Mrs. Beer (through her company) eventually did invest some £500,000 but, as she said, if the Comptroller of Income Tax had allowed her to invest in her original choice of life policy that would have reduced the global figure available by £100,000. We have a scribbled note of Mr. Beadle (disclosed only after the Court of Appeal judgment). That note, upon which Mr. Beadle relies as proving the accuracy of his memory of their meeting, says:-

"Mrs. Beer Awy 25/3
N.W. Deposit 412/- 29/3/93
150/- left at Lloyds"

This is with a series of many other quite unrelated jottings. This is confusion worse confounded. Mrs. Beer had another account at Barclays Bank. We cannot, as Advocate Hoy would have us believe, agree that the aggregate of those two sums proves a logical link to what was eventually placed in Jefferson Seal's care. It is self-evident that £500,000 was available because that is what was eventually invested. It is on the evidence that we must test the reliability of the witnesses. We have to say that the presentation of the facts presented to us by Mrs. Beer are cogent and believable. We have no doubt that this lady was accurate in everything that she told us.

That finding helps us when we come to consider the "switch" recommendation of 11th October 1993. The switch recommendation was, according to Jefferson Seal, to be made for greater capital security. According to the pleadings, Mrs. Beer declined to follow the defendant's advice as this would have caused a reduction in the annual interest of £6,275. That is the reason given. Mrs. Beer was quite certain that the switch was never discussed. She gave us a reason. If the move were to greater security then she said that she would have immediately asked how she could be moving into better capital security when that was her paramount necessity. In evidence, Mr. Beadle told of a meeting that he had with Mrs. Beer. It is not pleaded and there is no record of a meeting and the "switch recommendation" has the words "File" and "Hold" written on it. Mr. Mark Able, who was an assistant to Mr. Beadle who made one of these notes gave no evidence to support the alleged meeting. It seems to us totally implausible that Mrs. Beer, who was not in any way knowledgeable on the investments would have rejected a switch recommendation that gives her greater capital security and £25,000 more in nominal holdings (from £550,000 to £575,000) simply because of a loss of interest. It is more surprising that in such a close knit company as Jefferson Seal where Mr. David Seal and Mr. Brian Beadle sat at adjacent screens and worked cheek by jowl, this remarkable rejection would not at least have been voiced abroad. We heard from Mr. Denis Boucault, well known to this court as a most cautious and respected accountant, who carried out a careful trawl of Reeb Investments' files. He found no trace of the document. We do not believe that, whatever was intended, Mrs. Beer ever had notice of the switch recommendation. She certainly did not see it.

In his report to the Court, Mr. Sholl said this:

"Unlike equities, where investment performance reflects the changing fortunes of companies and their products and services, bonds are largely technical instruments. Of course the performance of bonds is influenced by actual or anticipated economic events, such as movements in interest rates, but it is perfectly possible for an analyst to assess the investment potential of a corporate bond issue and remain completely ignorant of the nature of the borrower's business. All he needs to know about the borrower is its capacity to meet the liabilities of the bond. However, the size of the bond markets and the numbers of borrowers is so great that even major bond houses with large economic research depatments don't try to keep track of the creditworthiness of each borrower themselves - they rely on specialist credit rating agencies."

Mr. Cobb, when asked to comment on that paragraph said that he very much doubted if a broker would recommend a bond and *"remain completely ignorant of the nature of the borrower's business"*, but he says that Mr. Sholl was here talking about an analyst and we need to examine in some detail for a moment how the bond was issued and the historical events that followed thereafter, particularly insofar as the analysts were concerned. Reeb Investments Limited purchased the Confed Life Bond on 22nd March 1993 and Mr. Dixon and Miss Richardson purchased the Bond on 13th June 1994. These dates are significant in relation to the fall of Confed Life.

We spent some time examining the offering circular dated 26th February 1993. This is a lengthy document and full of information concerning the company. Interestingly, as we understand the situation, the offering circular is received after the offer has been made. In advance of the circular, a broker receives some detailed information from the market makers who in this case were Barclays de Zoete Wedd Limited, Credit Suisse First Boston Limited, S.G.Warburg Securities and UBS Phillips & Drew Securities Limited. Barclays de Zoete Wedd Limited were the lead underwriters and others were co-lead underwriters.

We have seen some of the advance information but, although Mr. Cobb said that it was a digest of the prospectus, having seen the Bloomberg printouts, we cannot see that the advance publicity could possibly précis all the details contained in the prospectus and particularly in the statement of accounts. We spent considerable time looking at those accounts, but we have every doubt that anyone at Jefferson Seal ever actually studied them. Mr. Sholl was refreshing in his view that with a large number of offer circulars coming into a stockbroker's office during the course of a week, much of this detailed information would have been discarded without even having been examined. One of the matters brought to our attention was the fact that there was a statutory reserve, being an amount required to be set aside by the Office of the Superintendent of Financial Institutions in Canada of C$ 810 million. Mr. Scott commented on the fact that Mr. Seal drew great comfort from the fact that there was in total C$ 900 million in the accounts with no other attached liabilities or assets, but as we examined the matter it became clear that this C$ 900 million was the difference between two truly enormous numbers totalling approximately C$ 18 billion which is the balance sheet total. In Mr. Scott's pointed description, C$ 900 million is in fact an inherent surplus above the point of which the company gets into trouble and it is only .5% of the balance sheet total. He felt that there would not have to be a very big movement in either assets or liabilities for that figure to disappear entirely. It is really a balancing number because on the one hand there are the various assets in the company, such as property, (with some investments in bond or equity shares or cash deposits) and then on the other side of the balance sheet are all the various liabilities. Far and away the largest liability is an actuarial calculation of the present value of the policyholders' liabilities and the surplus is the difference between the two sides.

Mr. Sholl attempted, and succeeded, by taking us more deeply into the accounts, to pour a little cold water on this technical approach. Mr. Cobb made a telling point which is why, if Confed Life had a surplus of only C$ 900 million, Standard & Poor's did not immediately draw attention to this point. As a corollary to that, we have to ask ourselves whether a knowledgeable stockbroker should not have been concerned particularly when towards the end of the day it became clear an additional C$ 400 million capital was required to be put into Confed Life when the negotiations were proceeding for a merger with Great West. Our feeling is that it would have been difficult for anyone paying close attention to the developing situation not to have come to the conclusion that the company was under-reserved and that the Bond was becoming more risky - Mr. Sholl in passing said that it offered a "bit of spice".

Mr. Sholl suggested that the company had further assets which were not evident on the balance sheet and would seem to explain its investment grade rating. It may well be that the 810 million Canadian dollar reserves, although they represent reserves required by law, were still able to satisfy not only the creditors of the company at the time, but also the analysts at Standard & Poor's who were able to rate the Bond as A+ at the time that it was issued. However, on 9th June, 1993, Standard & Poor's down-graded their rating from A+ to A, and were still able to pronounce the outlook for ratings as stable at this new level. Standard & Poor's commented that *"the rating action does not indicate significant new asset quality problems but reflects the expectation that the workout of existing problems will weaken earnings. While the overall quality of Confed Life's commercial mortgage portfolio compares favourably to that of its peers the company's relatively large investment in this class means any deterioration in that portfolio materially impacts ratings. Standard & Poor's views recent actions initiated by the new management as appropriate adding to the overall fund the strength of Confed Life."*

The collapse of Confed Life clearly took everyone by surprise. The signals were there:

<u>21st March 1994</u>

Standard & Poor's placed the company's various ratings, including subordinated debt, on credit watch with negative implications. In other words, a notice was published that the present ratings were under review and were likely to be downgraded. Mr. Scott told us that in the vast majority of such reviews (ie credit watch with negative implications) result in an actual downgrade.

<u>14th April 1994</u>

Standard & Poor's lowered its ratings of Confed Life by one point, downgrading the subordinated debt to A-. At this time Standard & Poor's commented "the downgrade reflects weak earnings and the declining trend in capitalisation, both of which are driven partly by continuing large provisions for investment losses in the C$8.5 billion mortgage investment portfolio."

They further commented that:

"In placing the company on credit watch, Standard & Poor's indicated that Confederation Life was negotiating a possible strategic affiliation that would provide it with a sizeable capital infusion. The proposed transaction, which has been discussed now with Standard & Poor's would result in better risk-adjusted capital and liquidity for Confederation Life than on a stand-alone basis. However, capitalisation is not likely to recover in the foreseeable future to the level that Standard & Poor's considers appropriate for the [previously] existing ratings."

Standard & Poor's comment also on a number of restructuring operations being undertaken by the company. As regards the immediate outlook Standard & Poor's stated:

"Absent completion of this transaction, the claims-paying ability rating would decline further to the A or A- level ...

Ratings will remain on credit watch with negative implications until the transaction is a certainty. The draft letter of intent is expected to be finalised and signed within the next two weeks. Final approval of all aspects of the transaction likely would occur in the third quarter of 1994."

15th April, 1994

The Dominion Bond Rating Service which had put its ratings under review with negative implications since 23rd November 1993, downgraded Confed Life's subordinated debt to BBB and retained its "under review" status. Although more negative than Standard & Poor's, it remained within "investment-grade."

3rd May, 1994

The Canadian Bond Rating Service (another local bond rating agency) published its rating of the subordinated bonds as "A (low)" ie equivalent to A-, and removed Confed from its credit watch list.

2nd August, 1994

The "Financial Post", a financial newspaper in Canada, carried a report noting that Confed Life's exclusive negotiation period with Great West (another large Canadian Life company) had expired (on 31st July 1994) without concluding the "strategic affiliation" referred to in Standard & Poor's report of 14th April 1994.

The report quotes a Confed Life spokesman as saying this was not an indication that discussions were collapsing. She also said: "these are two huge companies ... there is really too much to deal with in that period of time" and that talks were continuing but that a new deadline had not been set.

4th August, 1994

AM Best, a US rating company, downgraded its rating of Confed Life from A- to B++ citing *"the apparent inability of Confederation Life to finalise its initial letter of intent with Great West ... which was expected to occur by the initial target date of July 31st"* and said that *"AM Best will continue to monitor the expanded discussions with the group of industry participants which continues to include Great West Life. The review process will also monitor the probability of the consortium investing C$ 600 million in Confederation Life, the composition and timing of the proposed infusion, and the ongoing commitment these participants will have to Confederation's continuing operations."*

5th August, 1994 (Friday)

Standard and Poor's downgraded Confed Life's CPA rating from A- to BBB+ and the subordinated debt rating to BBB- saying that "following due diligence by Great West Life, issues such as asset quality suggest more capital is needed than previously had been anticipated ... as a consequence, Confederation life is negotiating with a group of other insurers to increase the commitment to Confederation Life to C$600 million. absent successful completion of the negotiations, the claims-paying ability and debt ratings might be lowered further."

Duff & Phelps, another major US rating agency similarly reduced its credit ratings commenting "Duff & Phelps Credit Rating Company will be monitoring the progress of these discussions with the expectation that expedient and comprehensive solutions will be forthcoming, and a definitive agreement will be signed on a timely basis."

Canadian Bond Rating Service withdrew its current ratings placing the debt securities under review with negative implications.

The"Financial Post" contained an article covering Confed Life's negotiations with the industry group. It begins:

"Ten insurance companies will pump C$600 million into troubled Confederation life Insurance Company because they believe it will be cheaper to help the insurer now than to risk its collapse later, sources said last night."

and continues:

" "This is guys' calculating their own narrow interests and saying what is the least costly solution" the source said. "The best solution is to keep Confed going so it can work through its problems." "

The insurance industry compensation fund (CompCorp) is funded by a levy on all insurance companies operating in Canada. In the event of a major insolvency, additional levies are made as required.

<u>6th August, 1994 (Sunday)</u>

The "Financial Post" carried another article which quoted two rating agency analysts, Kevin Ceurvorst of Duff & Phelps and Brian Neysmith, president of the Canadian Bond Rating Service.

Ceurvorst was quoted as saying:

"I think clearly the situation from our point of view is going to lead to much lower ratings ... I think the C$600 million is the proper amount to stablise the company, but not enough to fund future growth opportunities".

Neysmith was reported to have said that:

"We don't know if we have to downgrade it just a little or a lot, so we simply withdrew the ratings right now".

Commenting further he was said to be *"worried Confed will be weakened if it sells its group insurance operations and its highly profitable British insurance operations to raise cash."*

The article concludes with a quotation from Neysmith that:

"If they end up shedding a lot of their good assets, you might have a company that is completely solvent but you have a much smaller company and the business potential is much less."

<u>8th August</u> (Monday)

Although announced to Reuters and Bloomberg on Friday 5th August, Standard & Poor's own publications service "CreditWire" did not carry the report until Monday 8th August and it is only really at this point that the market in London absorbed this news and the developments over the weekend and most market makers effectively ceased trading in the various Confed bonds pending clarification of the position. During this period up to and including 10th August, Confed negotiated to seek a support package with two investor groups; one Canadian (including Great West) and one US. (Refer Bestwire article of 10th August 1994, page 20 of Appendix 6).

It is at this stage (Monday 8th August) that the first report of what we now know was the gathering crisis appears in the "Financial Times" in London. On page 17, under the headline *"Insurers form group to rescue Confederation life"*, the correspondent writes from Toronto:

"A Group of Canadian Life insurance companies has banded together to rescue financially-troubled Confederation Life ... details of the bail-out have yet to be finalised, but it is expected to involve about ten companies which would inject C$600 million into Confederation Life ... its operations, which include a successful UK banking and insurance arm, are relatively healthy, but its balance sheet has been weakened by heavy losses in the depressed North American real estate market."

<u>11th August, 1994</u>

The Office of the Superintendent of Financial Institutions ("OSFI") seized control of Confed Life in order to protect policyholders and creditors. The OSFI is the regulatory body in Canada responsible for the supervision of insurance companies.

<u>12th August, 1994</u>

Standard & Poor's and other agencies downgraded their credit ratings. In the case of Standard & Poor's this was to "D" indicative of being in default of the insolvency of the issuer.

<u>15th August, 1996</u>

The Superintendent of Financial Institutions was appointed provisional liquidator by the Court under the Winding-Up Act (Canada).

That then, is the information in general terms that was available to Jefferson Seal and upon which they exercised their judgment not to inform these three plaintiffs . We must in that context consider the evidence of the four experts and relate the assistance that they gave to us in relation to the information which was available at the time to Jefferson Seal.

On the question of expert evidence, in <u>Bolam v. Friern Hospital Management Committee</u> (1957) 1 WLR 582 at 587 McNair J said *"Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus because he has not got this special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."* Advocate Hoy argued on that basis that preferring one set of experts to another is no basis for a conclusion of negligence. It merely needs one or more of the experts to point to an accepted standard and that will be sufficient. He cited the case of <u>Alchemy (International) Ltd. v. Tattersalls Ltd. and Another</u> (1985) 2 EGLR 17 in support. That case contains these words:

"A judge's "preference" for one body of distinguished professional opinion to another also professionally distinguished is not sufficient to establish negligence in a practitioner whose actions have received the seal of approval of those whose opinions, truthfully expressed, honestly held were preferred. For in the realm of diagnosis and treatment negligence is not established by preferring one respectable body of professional opinion to another. Failure to exercise the ordinary skill of a doctor (in the appropriate speciality(if he be a specialist) is necessary."

We must constantly bear in mind that any views (however impartial) must perforce be coloured by the fact that this Bond utterly failed. We must not set too high a standard but in time we have to decide whether we agree with Mr. Cobb when he said that Mr. Scott and Mr. Morley-Kirk were preaching a counsel of excellence. His view was that he had thirty years of experience and he did not believe that the feet of those two experts walked the same ground as his. But this practical no nonsense approach has its difficulties. Mr. Sholl in his system had a ruled pad for taking notes of conversations; he had a telephone pad for telephone conversations. It was, in his view, a question of judgment whether matters were noted down. Had he been the managing director of Jefferson Seal he would have required Jefferson Seal to follow his procedures and he regarded himself as a prudent and reasonable stockbroker. We have no doubt on that basis that the Securities and Futures Authorities were criticising Jefferson Seal for the very reason that a lack of system can lead to the very problems realised in court over the past three and a half weeks.

Advocate Hoy appears to be contending that where the experts give conflicting evidence about professional standards the Court cannot (because it does not have the necessary expertise) find against the defendant simply because it prefers the evidence of one expert to the other. Fortunately, this case is not a case where we are lost in a cloud of technical complexity and we cannot at this point see much difference in this case from any other case where a professional person has to understand the needs and limitations of a client and who has to make a decision based on a judgment which is founded on his knowledge and experience.

Advocate Hoy attempted in his final address to diminish the stockbroking expertise of both Mr. Scott and Mr. Morley-Kirk. Advocate O'Connell in his turn put a critical spotlight on both Mr. Cobb and Mr. Sholl and what he considered to be their lack of critical appraisal.

Advocate Hoy submitted that Mr. Scott (for example) on the question of the stockbroker and client relationship was *"simply not in a position to give expert advice on this topic."* whereas *"Jefferson Seal's experts have between them a wealth of experience in advising clients."*

Mr. William Scott is, at 36, an Assistant Director of Rea Brothers (Investment Management) Ltd. a position that he has held since 1994. He is currently in charge of Pan European equity stock selections within the Group but continues to manage personally a wide variety of client portfolios, including private clients and he also advises the firm's offshore offices on the management of several trust portfolios. He has been an assistant fund manager with the London Residuary Body Superannuation Fund (formerly the Greater London Council) assisting in the management of funds in excess of £1.5 billion. He is a chartered accountant and the holder of the Securities Industry Diploma. He has a wide experience of institutions but was quick to tell the Court that the number of years that he has spent in the profession has been spent dealing with a range of private individuals. He felt that the clients in the Jefferson case were typical of the cases and portfolios that he had dealt with. His client base included offshore trusts and a wide range of individuals looking for capital growth. He has obviously not worked as a stockbroker in Jersey but he has clients in the branch in Guernsey and he provides advice to some one hundred or so Guernsey clients. We have no doubt that Mr. Scott was fully conversant with Eurobonds and particularly he did not agree that an onshore adviser would have less experience than an offshore stockbroker. He used Eurobonds all the time. Rea Brothers are not members of the Stock Exchange but they are regulated by the Investment Management Regulations organization, by the Securities and Futures Authority, by the Bank of England and by the Financial Services Commission. There is no need for Rea Brothers to be members of the Stock Exchange. Mr. Scott is not a stockbroker, but he had no difficulty in advising on this case. Essentially, investment managers, investment advisers and stockbrokers carry on the same business. Rea Brothers have the same information sources and material and the same access to the market as stockbrokers. The firm speaks to the Wholesalers (such as BZW) every day. Rea Brothers are, however, clients of stockbrokers.

Mr. J. C. R. Morley-Kirk, the second witness for the plaintiff, qualified as a chartered accountant in 1986. He qualified as a general representative of the S.F.A. for U.K. investment business and qualified in N.A.S.D. Series 17 for U.S. investment business. His City career started in 1986 with Samuel Montagu & Co. Ltd. and finished in 1995 as a director of S.G. Warburg Securities Ltd. He worked in a financial management capacity until 1988 when he moved into debt swaps and then Eurobond market making, mainly in US dollar denominated instruments.

He moved to Jersey in 1995 to become a director of Quilter & Co. Channel Islands with specific responsibility for its Eurobond desk. Quilter & Co. is a large stockbroking and investment management company. His work involved advising private clients, trustees and corporations on Eurobond investment matters. In April 1997 he joined Continental Capital Management Ltd. as a director. That work is similar to that undertaken at Quilter & Co., Channel Islands.

From 1989, Mr. Morley-Kirk moved into market making, but he was ready to admit that his experience of private investors only came since he moved to Jersey. He now advises only on Eurobonds.

Mr. John Cobb is aged 65. He left the Royal Navy at the age of 38 and entered the stock market with Sheppards and Chase. He went on to lead the department first as a partner then as a director for seven years. He holds the highest qualification for a stockbroker, being a member of the Securities Institute with Diploma. He also was instrumental in forming APCIMS (the Association of Private Client Investment Managers and Stockbrokers) and was the chairman of that organization. He has written a booklet called "You and Your Stockbroker?" and he has vast experience of the investment business for private investors inshore and offshore. Although he has retired from day to day stockbroking for five years, he is in regular contact with many different firms.

Mr. Stephen Sholl is a stockbroker, a former member of the London Stock Exchange, a current member of the Securities Institute and a holder of the Securities Industry Diploma.

His work over the last 30 years has been varied, advising a large number of different types of investors including both private investors and financial institutions. Since 1983, he has lived and worked in the Channel Islands and during that period he has gained particular experience of the investment requirements and practices of Channel Island investors.

In 1989 he helped to establish Rowan & Company where he encountered Eurobonds on a daily basis and most of his investment clients held Eurobonds in their portfolios.

This was, by any standard, a formidable array of expertise but, as we have said, the decision to which the Court has to come do not involve matters of such technical complexity that we are reliant entirely on expert advice.

It would be impossible to analyse all that was said by the four experts in this Court but we have had no difficulty where there has been disagreement in reaching a decision based on all the advice. Where we have weighed in the balance and agreed with one expert, the contrary view of the other has been extremely helpful to us.

One thing is certain. Having been recommended to purchase Confed Life none of the plaintiffs heard another word about it from Mr. Beadle. One can, of course, sympathise with him when he says that with the aid of hindsight, alternative Eurobonds were available, but he was not expecting Confed Life to go into liquidation. Mr. Seal held Confed Life Bonds for clients. Mr. Scott held Confed Life Bonds for clients. It is perhaps significant that up to Friday, 5th August, 1994 most firms continued to make a market on normal terms (£250,000 to £1,000,000 nominal). Indeed on 5th August 1994, Barings, one of the firms making a market, bought a block of £6million nominal.

The Confed Life Bond had ten years to run to maturity. (When it collapsed, it still had 8 1/2 years to run) but it was a subordinated bond, issued by a Canadian mutual.

There was sadly much dispute between the experts on each side. Mr. Scott told us that no holding should be so large as to have the ability to damage a portfolio seriously and it is for that reason that a prudent stockbroker should diversify. For Miss Richardson, for example, to have all her bond investments in Confed Life moved the field from that of the prudent investor to that of the gambler. Mr. Cobb was somewhat disparaging of Mr. Scott's approach. He referred to the difference between a practical solution (because he said that every equity has the seeds to damage a portfolio) and a standard of excellence. What he was saying, of course, is that intellectual theorizing is no substitute for practical common sense.

But is that fair to Mr. Scott? We do not think for one moment that it was. We came to accept the calm and helpful comments of Mr. Scott as being of great assistance to us.

We have to consider what the attraction of Confed Life was to Jefferson Seal that led them to purchase £13 million pounds nominal of a bond which only issued £100 million pounds nominal. There is some merit in the argument of the defendants that the size of the holding may not be entirely relevant if, during May, June or July (as Mr. Scott asserts) it might have been possible to have sold this holding without incurring significant losses relative to the overall market in Sterling Eurobonds. As one approached the 5th August it would have become more difficult. Of course, we entirely refute Mr. Mark Able's enthusiastic boast that he could, through the firm, have got rid of this holding in one hour albeit with some effect on the stock value. As the time grew closer to the 5th August even Mr. Cobb, who we felt defended the interests of those retaining him with some skill said that a position has been reached for action. Not immediate panic action (those were his words) but, for a considered review of the portfolio and movement out of the stock. It would have been impossible on 8th August (when the time zones allowed Jersey to trade) to have rid the firm of the enormous holding that it had. But, perhaps a portion might have been sold at distressed prices during the day. No action was taken and none of these three clients were consulted at any time. Mr. Cobb said to us that there was time for considered action but *"regrettably for everyone here, that was not the case."*

We cannot help but note that in the Wednesday Waffle issued by Jefferson Seal (but not sent to any of the three plaintiffs) on 2nd March 1994 Mr. Beadle's opening sentence is this:-

> *"In this week's edition we strongly advise bond holders not to panic."*

Later on in the bulletin we read this:-

> *"Yields for sterling bonds have now retreated almost to 9% for 10 year bonds, a level which we consider extremely cheap and have no hesitation in recommending purchases for income and long term capital growth. Such a bond worthy of consideration is Confederation Life 9 7/8% 3.3.03 at a current price of 105 1/2p, yield 8.93%."*

We have, as Bingham L J said in Eckersley v. Binnie and Partners to be most careful to have regard to the standards of the profession prevailing at the time, and not to judge this case by the "wisdom of hindsight." This Bond was a mutual, subordinated Bond. Mr. Scott explained that subordinated bonds rank below all other creditors and above only share capital and reserves. There were, of course, no shareholders in this Canadian mutual. It is obvious (or should be obvious) that in the case of a liquidation, it is very likely that (as in this case) subordinated bondholders will lose most, if not all their investment and particularly more so than with those bonds which are secured by fixed or floating charges or even unsecured bonds.

Mr. Scott went on to say this:-

> *"What is more in the event of an erosion of its financial standing a limited company has the option of replenishing its capital base by issuing further shares. A mutual society having no share capital does not have this option and can only seek to strengthen its capital base by a merger with another organization. This means that in the event of difficulties, survival is dependent on finding a suitable and willing*

partner. This means that the risk of failure at that stage is greater for a mutual."

All this would have been known to Mr. Beadle, who was a competent, shrewd and astute stockbroker. It was obviously known to Mr. Scott, who freely admitted that he had a client with a small holding of Confed Life. There may be stockbrokers all over the United Kingdom with similar stories. If Mr. Sholl is right and stockbrokers use Bonds as low risk areas to fortify the portfolio overall, then we have to consider not why the Bond was held, but whether the client agreed for the Bond to be held at all and whether Jefferson Seal were right to tell them nothing about the ratings.

There is clearly a divergence (and a strong divergence) between the experts on the question of subordination. Mr. Cobb made a point which has some logical thrust to it. He said that matters which were important to a client were the types of grading that had been granted by a credit agency. Within that type of grading, subordination was one of the factors that would have been taken into account. Even the details of rating were not essential to the lay client, provided that he understood whether a Bond, according to his requirements, was high risk or low risk. The fact that a Bond was subordinated and was a mutual was not in Mr. Morley-Kirk's words "earth shattering" but he still felt that the information should have been supplied to clients. Mr. Cobb and Mr. Sholl both had their reservations. We have to a certain extent to sympathise with Mr. Cobb, who said that he would not *"dream of immersing himself in the level of complication heard in the Court."* That must be right and what you tell your client as stockbroker is clearly a matter of judgment. It is when that judgment is flawed that the Court will interfere.

It must be said, of course, that no stockbroker could possibly rely solely on the ratings of Standard & Poor's without knowing more of a Bond, particularly a Bond which he had recommended to his clients in such a substantial form by taking 13.1% of the whole issue. Jefferson Seal had a very clear understanding of the Canadian market. The Wednesday Waffle of 27th July, 1994 prepared by Mr. Beadle was devoted entirely to Canada and was praised by Mr. Morley-Kirk. (None of these three investors saw the Wednesday Waffle).

There was a steady stream of information coming in to Jefferson Seal. Let us put ourselves into Jefferson Seal's position when Mr. Beadle (and the other directors) read the Bloomberg screen on 29th April 1994. The company has already been downgraded and put on credit watch with negative implications. At last the news broke that there was a "proposed strategic alliance" with Great West Life (a stock company as opposed to Confed Life, which is a mutual company). The news flash says that there is a "signed letter of intent". It says "If this option is exercised" and "If this transaction is closed".It says that the proposed alliance is subject to "due diligence, policyholder and regulatory approval."

On 30th May, Bloomberg announced that revenue in Confed Life had fallen to $853 million from $1.15 billion. There was an increase in loan loss provisions to $24.1 million in the latest quarter from $18.3 million a year earlier. There was an increase of non-performing assets to $804 million. There is again mention that Confed Life had signed a <u>non-binding</u> letter of intent with Great West.

It was shortly after all this that Mr. Beadle recommended Confed Life to Mr. Dixon and Miss Richardson on 13th June, 1994.

Jefferson Seal (with a holding of £13.1 million) remained relaxed. There is no doubt that a decision not to inform was taken. Mr. Beadle said so. He said that the firm (and there must have been discussion) took the decision not to advise the clients that Confed Life had been downgraded. The downgrading was in any event by now historic. The future was "quite good". The AAA Great West Life tie up would lend further support. The company was still well within investment grade and, according to Standard & Poor's own definition of its grading, must have had a strong capacity to repay interest and capital. It is clear that these clients were not given an overall picture. It is difficult to see how they could form a proper assessment of the risks to which the portfolio might be exposed.

Mr. Cobb said that when he saw that a letter of intent had been signed and had considered the Bloomberg screen report of 29th April 1994 he would have given a "muted hooray". He would have told neither Mr. Dixon nor Miss Richardson of what was proceeding. As he said, if a decision is made to advise a client to purchase, then the past history is one of the matters that you assimilate in order to make a decision. What you would give, however, said Mr. Cobb was an indication of the risk of the investment, the life of the investment, the income that you would expect to get from it and any particularities such as whether it was zero rated, as zero coupons are rather special. Again we are back to what Mr. Cobb called "the standard of excellence".

There is no clear duty to inform, said Mr. Cobb, but "it would be nice."

Even Mr. Beadle had to concede that he had not given Mr. Dixon (and we include Miss Richardson) the full picture. It does seem to us a fatal flaw in the defendant's argument that nothing whatsoever was put to Mr. Dixon nor to Miss Richardson about this Bond before they purchased. Both Mr. Dixon and Miss Richardson decided to invest substantial sums but they were seeing through a glass darkly.

The fact that a relatively small firm of stockbrokers held such a large holding (which we eventually found was 13.1% of the total issue and not 10% as pleaded) leads to problems of liquidity and due diligence. We need not go into the problems of ridding oneself of such a large holding by choosing between the "knock out" approach and the "dribbling out" approach. The concentration of so much of this Bond into what were very limited portfolios shows us a counsel of imperfection. In any event, Jefferson Seal did not sell. Mr. David Seal said there was a fine line between advice and telling clients of events and leaving them to their own decision. The trusts of whom Mr. Seal was a director were dismayed, but Mr. Seal took the view that an immediate panic sale was not required. Mr. Seal said that despite the downgrading in Confed Life, Jefferson Seal would not recommend clients to sell. So be it. That was their decision, but it was as breathtaking to us as it was to Mr. Scott that Miss Richardson should have had her whole Bond portfolio in this single issue. It was also totally inappropriate for Mr. Dixon to have had 20% of his portfolio in this Bond.

On the facts of this case we are able to reach these conclusions.

Reeb Investments should never have been put into Confed Life. In any event, Mrs. Beer should undoubtedly in the light of her investment experience and her agreed strategy have been told at least by May 1994 of the problems facing Confed Life.

Mr. Dixon and Miss Richardson should never have had Confed Life recommended to them in June 1994 without being apprised of the then current situation concerning the position of the company. On those conclusions, we find for the plaintiffs in all three cases.

If the principal object of an award for damages for professional negligence is to put the plaintiff in the position he would have occupied if the breach of duty had not occurred so far as money can do it (and subject to any rules as to remoteness and mitigation of damage), we do not feel on the facts of these three cases that there is any different result in regard to the general damages for breach of contract. The defendant owed each of the three plaintiffs a duty to act in their best interests, a duty to exercise the standard of skill and care of a competent and prudent investment adviser and the duty to keep the plaintiffs advised of all material information and developments which might have a material bearing on the investment held by the plaintiffs. There was also a duty constantly to review all investments within the plaintiff's portfolio. On what we have found within the facts of these three cases, we do not conceive that the question is a subjective investment judgment. It seems to us that what is required is an objective analysis of what information was available at the time and whether or not it was reasonable for a prudent stockbroker to withhold that information from a client who was considering making an investment. We find that the duties of a stockbroker have always included a requirement to know the client, to recommend suitable investments for that client and to keep the client apprised of developments which may materially affect the client's agreement to retain those investments. If a professional adviser declines to give his client any material information about the Bond in the particular circumstances of the Confed Life Bond, then he cannot escape his legal obligations. Reeb Investments are entitled to the repayment of the monies lost in the purchase of the Bond on 22nd February 1993 and an order for interest at the Court rate until date of repayment. Any monies received under the Bond is, of course, to be set off against that sum. Precisely the same criteria applies to Mr. Dixon and Miss Richardson and again, in their case, we order repayment of the monies lost on the Bond from the date of purchase on 13th June 1994, plus interest at the Court rate to date of repayment.

Authorities

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