ORD 2009/5

IN THE HIGH COURT OF JUSTICE OF THE ISLE OF MAN
CIVIL - ORDINARY PROCEDURE

Between:

SEAMUS MICHAEL MOHAN
and
HSBC BANK PLC

Judgment delivered by
Her Honour Deemster Sullivan
the 25th day of March 2010

THE CLAIM

1. This case, as presented at trial, is a claim for negligent investment advice which resulted in loss to the Claimant, Seamus Michael Mohan. The advice given was by employees of the Defendant, HSBC Bank plc.

BACKGROUND

2. The background is essentially agreed. In 1999 the Claimant, a solicitor, retired from his clinical negligence practice in the Republic of Ireland. He is now 65 years of age and he decided in 1999 to move to the Isle of Man for his retirement. He approached the Defendant in 2000 seeking investment advice. He acted on that advice and, inter alia, invested 1.5m Euros in a Scottish Mutual International, International with profit investment Bond ("the SMI Bond"). In April 2005 he wished to redeem the SMI Bond but at that time a penalty on withdrawal, a Market Value Adjustment ("an MVA") of 33% would have been applied so reducing his capital investment by 33%. He did not therefore surrender the bond but in April 2006 he borrowed money from Barclays Bank and invested the sum so obtained which subsequently produced a loss. The Claimant's case is that he was never warned that an MVA might be applied if the bond was surrendered before the eighth anniversary of the original investment and that had he been so aware he would not have invested in the SMI Bond.

THE FACTS

3. There is a dispute as to what the Claimant's requirements were expressed to be in 2000 and as to what was said by the Defendant's employees at the time.

4. The Claimant's statement, dated 13 August 2009, at paragraph 23 records that the Claimant "required full access to my investments immediately after the expiration of 5 years". In his evidence he said both that he did not specifically say this but it was a reasonable inference from what he did say, and later in cross-examination he said that if it was in his statement it was true and that therefore he had indicated that specific requirement. The Claimant, in his evidence, on several occasions, said that he

did not recall a number of events. All witnesses had to recall events that took place nearly 10 years ago without the benefit of contemporaneous notes and some lack of memory is unsurprising. The Defendant's case is that if the Claimant had been as specific as alleged it would have featured in the records made at the time.

5. On this one issue of fact, I find that, on the balance of probabilities, the Claimant did not make it a specific requirement that he have full access to all of his investments after 5 years. That finding is by no means decisive of the case because the Defendants had a duty to give advice to the Claimant which took into account all that was known or should have been known about the Claimant's circumstances.

6. The first meeting between the Claimant and the Defendant was on 13 March 2000 when the Claimant met with Carl Darnill. Mr. Darnill made two written records as a result of that meeting, one a hand-written Confidential Questionnaire ("the CQ") dated 13 March at 3pm and a type-written "Filenote-Investment Services" note, dated 14 March 2000. Mr. Darnill did not feature in this case and the Defendant accepted that Mr. Darnill had declined to take part in the proceedings. The CQ is not signed by the Claimant but the declaration box is "ticked" in a number of places purporting to indicate that at that meeting on 13 March the Claimant was handed "Introductory Statement/Business Card, Terms of Business, Product Brochures, and Product Particulars". The Defendant accepts that the Claimant was not handed all of these documents on 13 March 2000. It was the Defendant's evidence that the Claimant's potential investment of a total of 3.1m Euros was the largest investment it had ever dealt with in the Isle of Man offices at the time. As a result of this Mr. Darnill was not permitted to deal with the Claimant and the Claimant was sent to see Simon Moore. The CQ of 13 March 2000 records the Claimant's personal details including the fact that he had 4 young children, that he was retired, details of his other accounts and monies in those accounts, that he had an investment portfolio through Ulster Bank and £200,000 as "work in progress". There is a box printed on the CQ form headed "Brief Background Notes (e.g. investment term required)". In this box Mr. Darnill wrote "Income of £40k p.a. required for income purposes. Client looking for discretionary management for existing portfolios currently held with Ulster Bank. Client looking to invest for income and growth, over the medium term with a balanced risk profile, including low and medium risk, but is happy to extend up to R/C 8 for a maximum of 15% portfolio". It is unclear in my judgment whether the "medium term" and "balanced risk profile" was intended to refer to the existing share portfolio with Ulster Bank /Colin Stewart ("CS") or the prospective investment of 3.1m Euros. In the Filenote of 14 March 2000 Mr. Darnill records he handed a copy of his business card and "a copy of the terms of business letter for HSBC Bank PLC" to the Claimant. He does not suggest that product details were handed to the Claimant as was "ticked" in the CQ. With reference to the fund of 3.1m Euros Mr. Darnill records "The funds held in cash he is looking to protect, although his primary consideration is income and he is prepared to take a medium risk approach to receive the income he requires. He is familiar with the With Profits concept, which will provide protection to his capital, and he feels happy to invest a proportion of funds in this area." I accept the Claimant's evidence that he would not have used the words "Medium Term" in conversation with Mr. Darnill as that was not a term with which he was familiar.

7. On 31 March 2000 Simon Moore was to meet the Claimant for the first time. Prior to the meeting he sent a fax to Alan Herbert in Jersey. The only information Mr. Moore

could have had at this stage was the CQ of 13 March 2000 and the type-written Note of 14 March 2000. The relevant parts of this fax are as follows: "In summary he has EURO 3.145 million held here, £155K in his current account, in addition to 650K in an equity portfolio currently managed by Ulster Bank", "His objectives are ...2) to generate income of £40K p.a. from either the portfolio or other sources 3) to protect his capital whilst achieving capital growth (He is aware of and comfortable with With Profits philosophy". In terms of investing 3.1m Euros Mr. Moore asked Mr. Herbert for comments on his provisional recommendations of 1.6 m Euros into the SMI Bond, £350,000 into the Friends Provident International Investment Bond (Open Managed Portfolio) and £150,000 into Aberdeen Technology Fund. There is no documentary reply to this fax disclosed.

8. The same day Mr. Moore met with the Claimant at 3pm. There is no contemporaneous note of this meeting from Mr. Moore although he agreed that it was his normal practice to produce one. In evidence Mr. Moore said that on this day he gave all the Product details of the proposed investments to the Claimant and that he updated the CQ of 13 March 2000 by transposing some of it onto a new CQ and agreed it with the Claimant and that this was eventually dated 6 April 2000. There is no written record of the recommendations made to the Claimant on 31 March 2000. Mr. Moore, in evidence, said he "did" give all the Product Information to the Claimant on 31 March 2000 and he also said he "would have" given all the documentation to him on that day. Mr. Moore also said in evidence that he explained what an MVA was on 31 March 2000 and all the advantages and disadvantages of all the proposed investments. The Claimant denies that he was given any product literature or any advice about an MVA and its implications.

9. From the dates provided on the documents two were generated by Mr. Moore on 3 April 2000. The first is headed "Reference Book Note". In this document Mr. Moore purports to record comments made by Mr. Herbert, the recipient of the fax of 31 March 2000 and discussions with the Claimant on 31 March 2000. There is no mention of the SMI Bond in this Book Note. What is recorded is that the Claimant's "income requirements for the next five years will be met via remuneration originating from outstanding business in Eire."

10. The second document bearing the date of 3 April 2000 is headed "Investment Recommendation". It refers to a CQ dated 13 March 2000, not to any document produced on 31 March 2000. That date is the date of the CQ completed by Mr. Darnill, not by Mr. Moore. Mr. Moore said in evidence that this must have been a typing mistake showing "13" instead of "31" and should not be taken as evidence that Mr. Moore was only making reference to Mr. Darnill's CQ and not to any information Mr. Moore had obtained on 31 March 2000. The recommendations there made are the ones that the Claimant ultimately agreed to make. Amongst the "reasons why" the investments were chosen, in relation to the SMI Bond Mr. Moore wrote that it and other recommendations "are all investment Bonds which, under current legislation, if held for a reasonable period of time (Usually 5 years) without regular withdrawals, will not attract a tax liability". If, by that time Mr. Moore had been through the details of all the proposed investments and their individual advantages and disadvantages he would have known the actual periods of time for each investment and would not have had to use the word "Usually".

11. On 5 April 2000 Mr. Moore had a meeting with employees of Scottish Mutual who had travelled to the Isle of Man, inter alia, to meet Mr. Moore. They confirmed that the Defendant would receive an enhanced commission in respect of the SMI Bond of 6.5%, namely some 95,000 Euros. Mr. Wannenburgh, representing the Claimant, suggested to Mr. Moore that this made him more enthusiastic in promoting this particular product. Mr. Moore refuted this suggestion pointing out that it was the Defendant's gain and not his own, although he accepted that his bonus would reflect the commission the Bank made.

12. On 6 April 2000 the Claimant met Mr. Moore for the second and final time. At this meeting the Claimant was presented with many documents: the application forms, the Investment Recommendation dated 3 April 2000 and a document headed "HSBC Costs and charges/early surrender penalties". On this last document each recommended investment was recorded in a box under its name. The box for the SMI Bond held the following information:

"Scottish Mutual International

No initial charge

1% p.a. Establishment Fee over first 5 years

1.1% Annual Management Fee (Deducted prior To Annual Bonus Declaration)

Early surrender penalty – Year 1 – 9%

Year 2 – 7%

Year 3 – 5%

Year 4 – 3%

Year 5 – 1%"

The Claimant accepts he signed this document on 6 April 2000. It bears an "X" by the signature which Mr. Moore accepts he wrote as he did on all the documents to indicate where the Claimant should sign. Mr. Moore dated the document 6 April 2000. The Claimant said that he specifically asked how long the SMI Bond would last and that Mr. Moore told him 5 years and that he, the Claimant, asked for and was provided with an office copy of the Investment Recommendation on which he wrote "5 ys" indicating 5 years. The Claimant was cross-examined on this evidence and it was put to him that he had placed this writing on the document at some time after this meeting to enhance his case. The Claimant denied such behaviour and I accept his evidence on this point. All the application forms for the various investments were signed by the Claimant at this meeting. Mr. Moore accepted the Claimant's account that these forms were not all completed at the time the Claimant signed them and that there was insufficient time for the Claimant to read the declarations on the forms and Mr. Moore observed that the Claimant did not read them. Mr. Malcolm King, the senior premier manager for the offshore region of independent Wealth Management at the Defendant, said that such a practice was not the proper procedure of the Defendant at the time. The Claimant also signed a "Client Transfer of Funds Authority".

13. The final document that the Claimant signed on this day was the CQ dated 6 April 2000. This is the document which Mr. Moore said he had filled in on 31 March 2000 with some of its contents having been transposed from the CQ of 13 March 2000 prepared by Mr. Darnill. Apart from the Claimant's signature the whole of the hand-writing on this document is that of Mr. Moore. Under the heading of "Occupation" the entry is "retired", the "Gross Annual Income or Other" is filled in to be approximately 100,000 Euros. The "Brief Background Notes", where relevant, record "We have established that your income requirements will be met from 'work in progress' due and that these will continue for the next 4/5 yrs.". At the bottom of the form there is the similar box to the CQ of 13 March 2000. Mr. Moore said that he ensured that the Claimant understood he was signing in the box to record that he had received, inter alia, "Product Brochures" "Product Particulars" and "illustrations". The Claimant accepted he signed the document but denied he had received any of this documentation.

14. The same day Mr. Moore completed a document Headed "Single Premium Investments, Investment Services" which recorded the commission Mr. Moore anticipated would accrue to the Defendant through the SMI Bond. This time the figure was expressed in sterling as £58,500. The following day the monies were invested.

15. The application form for the SMI Bond was signed and dated by the Claimant under a 6 step Declaration and also on a specific Declaration Form but the date appears to have been added by someone-else. The Application form has a "Step 4" headed "Market Value Adjustment-Free Guarantee Date." underneath the form states "Please specify the policy anniversary you wish as the Guarantee Date. Note: This must be the 8^{th} or later policy anniversary". The box has been left blank. Mr. Moore said it was unnecessary to complete this if the usual anniversary was the date likely to be required.

16. The Claimant was adamant in his evidence that had the MVA been explained to him, namely that if he withdrew his funds prior to the eighth anniversary of the Bond they might be subject to a penalty, he would not have so invested. He said that Mr. Moore never mentioned an MVA or its consequences and that he, the Claimant, was never provided with any product details or brochures. He learned of what an MVA was several years later from an independent source.

17. On this point I prefer the evidence of the Claimant to that of Mr. Moore. There are a number of reasons for this conclusion. On the Claimant's evidence I am satisfied that he genuinely believed and told the Defendant that he had an income supply from his "work in progress" for up to 5 years but that after that he would or might need access to his capital funds, the largest of which was the SMI Bond. It was submitted that in 2000 he was not interested in having access to his capital after 5 years and that access only became necessary as a result of his divorce, the financial affairs of which covered 2003 to 2004, and that as the Claimant had signed over the other investments made through the Defendant to his ex-wife he could only have potential access to the one remaining fund, namely the SMI Bond. I reject that submission. I am satisfied that it was impossible to predict precisely what flow of income would come from his "work in progress" and that in 2000 the Claimant wanted to have the ability to draw on all his capital funds in 5 years time. Faced with the risk, however

remote, that a large percentage of the funds would be lost in a penalty MVA I accept that had he known this he would not have invested in the SMI Bond.

18. Assessing the Defendant's account I reject Mr. Moore's evidence for a number of reasons: he had already decided to recommend the SMI Bond before he even met the Claimant; it had been represented to him by Mr. Darnill that the Claimant was a knowledgeable and experienced investor. As a matter of fact I reject that assertion. The Claimant said in evidence, and I accept, that he left his equity portfolio entirely to the discretion of the managers of CS or their earlier incarnations. When Mr. Darnill met the Claimant it was anticipated that the Defendant would take over from CS in the management of the equity portfolio and the attitude to risk identified by Mr. Darnill of 10-15% risk in categories 7-9 may well have been applicable to the equity portfolio and not the 3.1m Euro investment. Whether it was the case or not, Mr. Darnill had indicated that the Claimant has "comfortable with 'With Profits philosophy'" and Mr. Moore accepted that that was the case when communicating with Alan Herbert on 31 March 2000, before he had met the Claimant to verify this assertion. In 2000 MVAs were not being applied and had not been so applied for many years, 15 or so in Mr. Moore's belief. Mr. Moore had no direct experience of one being applied, and so may well have been less focussed on the need to provide such information. I find it surprising that Mr. Moore should have given all the Product Brochures and explained the detail of them and their advantages and disadvantages on 31 March 2000 when the Written Recommendation was not produced until 3 April 2000, 4 days later. There were some changes made from the original recommendation run past Mr. Herbert on 31 March 2000 because in a Memo dated 7 April 2000 Mr. Moore records that subsequent to the original recommendation of 31 March to Mr. Herbert he, Mr. Moore, had added other investment recommendations including the Prudential Prudence Bond because the Claimant had indicated he had a further 800,000 Euros to invest. It is of course possible that this was mentioned by the Claimant on 31 March 2000 but it could also have been after the meeting and thus those product details could not have been discussed on 31 March 2000. Mr. Moore, in his evidence, said on a number of occasions that he "would have" given these details to the Claimant on 31 March 2000 and that he relied on the Claimant's signature against the declaration he had received the documentation by 6 April 2000. However the original CQ of 13 March 2000 was "ticked" to the effect that the Claimant had received product details when in fact he had not. I therefore place less reliance on the signature of the Claimant, per se, to prove that he had received them. Next there is the fact that Mr. Moore accepts that on the application forms the Claimant signed them in blank and he, Mr. Moore, filled in certainly some, if not all, of the details after the Claimant had left. As that method was adopted for the Application Forms I am not satisfied that the Claimant's attention would have been drawn to the declarations on the CQ dated 6 April 2000. I also accept the point made by Mr. Wannenburgh, that there is broad agreement as to the length of the meeting on 31 March 2001: the Claimant considered it lasted for about an hour; Mr. Moore considered it lasted for an hour to an hour and a half. At this meeting not only were there discussions as to the investment of the 3.1m Euros but there was discussion of the transfer to the Defendant of the Claimant's equity portfolio from CS and discussion about a bridging loan that the Claimant held with the Defendant. If each and every proposed investment was explained to the Claimant together with the advantages and disadvantages; the potential for MVAs; early withdrawal penalties; and provisions to withdraw some income not subject to income tax, the meeting

would have lasted for much longer than it did. I rely on the fact that Mr. Moore had many clients, albeit the Claimant was the most wealthy in terms of investment, yet he made no contemporaneous notes to help him recall in detail what happened during these two meetings. I do not accept that there was a typing error on the "Investment Recommendation" such that "13" appeared by mistake for "31" and I hold that by 3 April 2000 when Mr. Moore compiled the "Investment Recommendation" the only completed CQ held by Mr. Moore was the CQ of 13 March. The final matter I rely on is the details listed under the "Costs and charges/early surrender penalties". Whereas early surrender could lead to a penalty of between 1% and 9% the MVA actually applied was 33%, a very large penalty indeed. Mr. Moore said it was not necessary to put the details of the MVA in this document because it was referred to in the Product literature but then so were the early surrender penalties yet they were included in this document. Mr. Moore also made the point that an MVA was discretionary and might not apply whereas the early surrender penalties were not subject to market conditions. In my judgment the lack of any written advice to the Claimant on the issue of MVAs signified the lack of importance attributed to it by the Defendant and Mr. Moore at the time. In 2000 the markets were buoyant and no MVAs had been applied for many years. I consider it likely that the chances of an MVA being applied were so small in the opinion of Mr. Moore that he was not sufficiently careful to bring it to the Claimant's attention. I reject the submission that he was intent in persuading the Claimant to sign up come-what-may because of the commission the Defendant and to some extent, he, would have received.

LIABILITY

19. Initially there was an issue as to whether the SMI Bond was an appropriate investment for the Claimant irrespective of the MVA but by the time of the trial the only issue was whether advice had been given about the MVA or not.

20. There was no dispute that it was negligent not to advise the Claimant as to the effects of an MVA. I therefore hold, on the balance of probabilities, that the Defendant was negligent in not bringing to the Claimant's attention that the SMI Bond was subject to an MVA. I accept that had the Claimant been told of the MVA he would not have invested in the SMI Bond. I also conclude that the Claimant was not handed all the relevant product literature. An almost identical case was decided in Scotland in 2008, *Chrysalis Scotland Ltd v.Clydsdale Bank Insurance Brokers Ltd [2008] CSOH* 144. Such a case is not binding on this Court but I adopt the findings of that Court where it held that it was insufficient for an advisor to rely upon the written literature alone and that a personal explanation of an MVA was necessary, essentially because the advisor was there to advise. Lord Glennie, at paragraph 58 referred to the equivalent of the SMI Bond literature:

"These documents do of course provide the material which would enable the investor to form a view and, if necessary, to withdraw from the proposed investment up to the end of the cooling off period. It may be said that Mr. Robinson should have read the KFD after the meeting of 11 July and raised questions with Mr. Lind. But this seems to me to put too heavy a burden on an investor. The financial advisor is the person who explains to the investor what the advantages and disadvantages are of any particular investment. To hold a financial advisor liable for failing to give proper advice, but then to reduce the damages flowing from that because the investor, having the written materials, has not carried out his own research, would undermine the duties owed by the financial advisor. I do not think it is reasonable to criticise an investor for failing to second guess the advice given to him by the financial advisor from the materials which have been left with him. The main purpose of leaving the materials with the investor, or sending them to him, is to enable the investor to reflect upon what he has been told, and if what he has been told has left any nagging doubt in his mind, to look further into that issue in the documents with which he has been provided. The starting point must be what the investor has been told; and that will inform any consideration which he is minded to give to the written material sent to or left with him."

In that case the issue of contributory negligence was raised and there was no dispute that the investor had received the product literature but the reasoning remains relevant. There is reference to a "cooling off" period in relation to the investment in *Chrysalis*, in this case neither party referred to such a period and there does not appear to have been that opportunity afforded to the Claimant, namely 14 days within which to change his mind before the investment was binding upon him.

QUANTUM

21. Although the Claimant said that had he been properly warned as to the MVA he would not have invested in the SMI Bond in the first place, both parties have approached the question of quantum on the basis that the Claimant should have had unfettered access to the SMI Bond without the application of an MVA after 5 years of the original investment. The basis of the assessment of Damages in such cases is not set in stone and in the complicated circumstances of this case I accept that this is a reasonable approach.

22. There are several discrete issues as to the correct approach to Damages. The Defendant offered to loan money to the Claimant at a preferential rate whereas the Claimant obtained a loan from Barclays Bank at a commercial rate, that is a more expensive one. The Claimant said that he did not want to have anything more to do with the Defendant as he had lost faith in the Bank as a result of the negligent advice. The Defendant submits that the Claimant failed to mitigate his loss by accepting the Defendant's cheaper offer. The Claimant has to take reasonable steps to mitigate his loss and I accept the Claimant's evidence that it was unreasonable to expect him to continue relations with the Defendant in the form of a further loan when he had lost all faith in them. In any event the difference in costs is not great, namely 6,566 Euros.

23. The second issue is the date at which the Claimant should have received the funds from the redeemed SMI Bond. I accept that had the Claimant redeemed the SMI Bond in 2008 with reasonable expedition he would have received the funds by 14 April 2008 whereas in fact Barclays Bank did not receive them until 2 May 2008. In my judgment the Defendant cannot be held liable for this extra period as it was entirely in the Claimant's hands to redeem this Bond. The additional interest charged for the period 14 April 2008 to 2 May 2008 is 7,284 Euros but this sum should not be awarded to the Claimant. The Claimant gave no explanation as to why he did not receive the funds until May.

24. The agreed figures for the cost of the loan from Barclays Bank is 80,879 Euros and

that sum is awarded to the Claimant.

25. If the SMI Bond had been realised in 2005 it is agreed that the sum so generated without an MVA being applied would have been 1,654,000 Euros. It was further agreed that there was no loss to the Claimant between 2000 and 2005 in respect of this Bond. It is further agreed that there was no loss to the SMI Bond between April 2005 and April 2008, the Bond was still worth 1.654m Euros when it was redeemed in 2008. The Claimant accepted that he would have given this sum to CS to invest in the same manner that they invested the loan monies which they received in April 2006 and that he would have reinvested any income generated. The period 2005 to 2008 was a highly fluctuating one for the financial markets and in the earlier years the Claimant would have made a profit whereas in the latter years he would have made a loss. The investment of 1.654 m Euros in 2005 would have had a more profitable path than the investment of the loan monies in 2006.

26. Both parties called experts to advise on Quantum, Mr. John Humphreys FCA for the Claimant and Mr. Grahame A. Goodyer IMC MEWI AEW for the Defendant. They had a difficult time in preparing their reports because details of CS's actual investments on behalf of the Claimant were not received by them until shortly before the Trial. Their Final Joint Report had to be produced at speed and the bases of their calculations changed significantly during the preparation for trial. CS's investment strategy for the Claimant's monies changed from 2006 to 2008, although CS set themselves targets for the spread of investments those targets were not always met. Therefore there was a dispute as to what spread should be applied to the Claimant's hypothetical investment of 1.654m Euros in April 2005. Whether the monies were invested in 80% equities and 20% bonds and cash at one end of the scale or 40% equities and 60% bonds and cash at the other end of the scale made a substantial difference to the outcome. If the former profile were applied the Claimant would have made a substantial profit with this hypothetical investment whereas if the latter profile were adopted the Claimant would have made a loss.

27. Both experts split the period from April 2005 until April 2008 into two periods: one where the Claimant invested his loan monies from April 2006 to April 2008 where therefore there were actual figures available; and the period April 2005 to April 2006 where there were no actual figures. For the latter period Mr. Humphreys, to the end, submitted that a hypothetical split between equities and bonds and cash should be applied in an attempt to average out the different strategies adopted by CS from April 2006 to April 2008. Mr. Goodyer on the other hand advocated the use of the actual investments made by CS for the period. It is a basic principle in the assessment of Damages that when an actual figure is known that that should be preferred to an estimate and I see no good reason for departing from that principle and so prefer Mr. Goodyer's approach. Although there were disputes as to the sums generated by these hypothetical investments and as to the charges that CS would have applied to them, in the end there was agreement between the experts such that it is possible to calculate how the hypothetical investment would have progressed from April 2006 to April 2008. The result is that the capital invested would have suffered a loss of 10.39%.

28. For the earlier period of April 2005 to April 2006 there are no actual figures and the dispute therefore centred on the split that should be applied between equities on the

one hand and cash and bonds on the other. Schedule 2.1 to the experts final Joint Statement lists the split actually applied from April 2006 to April 2008:

Equities Bonds and cash

6/7 weeks to 30 June 2006 33.9 % 66.10%

Quarter to 30 September 2006 57.53 % 42.47%

Quarter to 30 December 2006 65.94 % 34.06%

Quarter to 31 March 2007 65.35 % 34.65%

Quarter to 30 June 2007 80.35% 19.64%

Quarter to 30 September 2007 82.19% 17.81%

Quarter to 31 December 2007 94.36% 5.64%

Quarter to 31 March 2007 92.52% 7.49%

Period to 13 May 2008 94.85% 5.15%

There was little evidence to explain the change of strategy between March and June 2007 but the change may be indicated by fluctuations in the market or by actual or inferred instructions from the Claimant. Much evidence centred on whether the strategy which was or should have been adopted by CS was low risk, medium risk, balanced risk, or moderate risk. Although there was broad agreement as to the meanings of these terms they must be client-specific and I reject arriving at a split based upon these terms. The period to 30 June 2006 was unrepresentative because the monies had only just been received by CS and it would take time for the portfolio to become established. The 3 following quarters approximate to a split of 60% equities and 40% bonds and cash and I consider that that is the correct split to be applied to this calculation.

29. Allowing for agreed charges the capital invested from 15 April 2005 to 4 April 2006 would have increased by 14.63%. The net return for the whole period of 5 April 2005 to 15 April 2008 therefore is 14.63% less 10.39% making an overall profit of 4.24%. This represents a sum of 70,129.60 Euros. These calculations are based on an end date of 15 April 2008 being the date when it would have been reasonable for the Claimant to have received the funds from redeeming the SMI Bond.

30. In 2006 the Claimant borrowed money from Barclays bank and CS invested it on his behalf. This venture made a loss between 2006 and 2008. The agreed sum of that loss is 71,173 Euros. I am satisfied that in taking out the loan from Barclays in 2006 the Claimant was acting reasonably in an attempt to mitigate his loss by using the loan monies to provide a return on his investment while the Claimant could not reasonably have had access to the sums invested in the SMI Bond. Had the Claimant borrowed the money a year earlier he would have made a profit by April 2008 as can be seen from paragraph 29. He could not reasonably be expected to anticipate in either 2005 or 2006 that by delaying a year the state of the financial market would alter so dramatically. Had the Claimant made a profit from such venture I have no

doubt the Defendant would have sought to reduce the damages awarded by that amount. It follows in my judgment that the Claimant is entitled to the loss he made between April 2006 and April 2008.

31. There will therefore be judgment for the Claimant for those sums referred to in paragraphs 24, 29 and 30 herein.

32. The matter will be listed for a formal handing down of this judgement when the issue of interest on Damages and Costs will be considered.

33. I should record my grateful thanks to the two experts who gave evidence. They both had to produce their final calculations at speed and the bases for them substantially changed at the last minute as a result of the late disclosure of CS's actual figures. I can understand that much "midnight oil" was spent to produce their most helpful final Joint Statement of Quantum Experts, dated 5 February 2010.

Linda Sullivan Q.C.