Neutral Citation Number: [2016] EWHC 2224 (QB)

Case No: HQ13X05701

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/09/2016

Before:

THE HONOURABLE MR JUSTICE KERR

Between:

Mr Les O'Hare & Mrs Janet O'Hare	**Claimants**
and	
Coutts & Co.	**Defendant**

Paul O'Doherty & Darragh Connell (instructed by **Cooke, Young & Keidan LLP**)
for the **Claimant**

Tamara Oppenheimer & Giles Robertson (instructed by **Dentons LLP**)
for the **Defendant**

Hearing dates: 13-15, 18-22, 25-26 July 2016

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

THE HON. MR JUSTICE KERR

Mr Justice Kerr:

Introduction

1. A financial adviser has a duty to exercise reasonable skill and care when advising a client on making investments. In this case, the main issue is whether that duty was breached in the case of five investments made by the claimants (Mr and Mrs O'Hare, or the O'Hares) on the advice of the defendant (Coutts) in 2007, 2008 and 2010. The O'Hares also claim £250,000 under an alleged agreement between them and Coutts to settle a complaint by Mr O'Hare about the manner in which another Coutts product was sold to them.

2. Coutts denies the claims. Its defence to the main claims is that the investment advice given by its private bankers was sound and the investments were suitable; the complaints are of poor performance, informed by hindsight, which is different from unsuitability. Coutts says the alleged contract was a non-binding statement of intent to provide $250,000 (US dollars) through future discounts or credits to the O'Hares' accounts, as a gesture of goodwill.

3. In the alternative, Coutts submitted that if, contrary to its primary case, it undertook a binding contractual obligation as alleged, the obligation was to credit $250,000, not £250,000; and that it performed that obligation in whole or at least in part, by crediting the O'Hares with certain sums by way of discounts, to which the O'Hares were not otherwise entitled (the settlement agreement issues).

4. There was a dispute in that regard about the nature of certain sums passing between the parties, the amounts of which eventually became common ground at the trial and were embodied in an agreed table. Coutts said that credits shown in the table were voluntarily given to the O'Hares as a goodwill gesture. The O'Hares said the amounts shown in the table were not good evidence of performance of obligations under the settlement agreement.

5. In relation to three of the five investments in issue, made in 2007 and 2008, Coutts also pleads a limitation defence to the negligence claim in so far as brought in contract (i.e. for breach of the contractual duty to exercise reasonable skill and care) on the ground that the alleged breaches of contract pre-dated the claim by more than six years.

6. Coutts accepts that the claims brought for breach of the equivalent duty in tort were brought in time, since time runs from the date of the loss suffered, not the date of the breach of duty. The O'Hares accept that alleged breaches of contract prior to 28 November 2007 did indeed pre-date the claim by more than six years, but says this makes no practical difference, since the corresponding claims in tort were brought in time.

7. The total claim is for just under £3.3 million, plus interest. The causes of action relied on are breach of contract, negligence, breach of statutory duty and negligent misrepresentation. The statutory duties relied on are those that arise under the Conduct of Business Sourcebook (COBS), which, it is agreed, are actionable if breached. The claim for negligent misrepresentation was not developed in argument;

the O'Hares did not suggest it adds anything material to the other causes of action, and I need say no more about it.

8. A further claim was advanced for alleged wrongful "churning", i.e. sale and purchase transactions by a fund manager which, though not unsuitable in themselves, are unsuitable because they are unnecessarily frequent and, by inference, done for the purpose of generating commission. That claim was never quantified and was abandoned after the expert witness instructed by the O'Hares said in oral evidence that he no longer supported it.

9. Coutts denied causation of loss in total, as well as denying any breaches of duty. Coutts also pleaded that in respect of one of the investments, made in 2010, the O'Hares "failed to mitigate their losses, inter alia, by terminating the Autopilot investment 2 years before the end of its term", resulting in a loss of £52,000 of the £8 million invested, which would otherwise have been avoided. This contention was not abandoned but was not developed in submissions or put to the O'Hares.

Facts: Narrative

10. I come to the facts of the case. Mr O'Hare is an experienced businessman with a background in cable-jointing and, subsequently, chemical engineering. He lives in Warrington with Mrs O'Hare, his wife of many years, and they live for part of each year in Florida, USA where they own a substantial property. He built up a successful chemical engineering business which he has since sold.

11. Mrs O'Hare's background is in business administration. He consults her on any major financial decision such as whether to make a substantial investment. She acts as a sounding board. Their investment decisions are taken jointly and their investments are made jointly, after Mr O'Hare has found a proposition and put it to Mrs O'Hare, and she has approved it. Their aggregate overall wealth has been estimated at various times in a range from about £25 million to about £38 million.

12. Some of that is in US dollars (dollars, or $) which they use when living and doing business in the USA. Their wealth was held partly in their individual names and partly through a pension scheme, the O'Hare Engineering Ltd Directors Retirement Benefits Scheme (the pension scheme). Until 2006, they also held shares in O'Hare Engineering Limited, their trading company, through a different retirement benefit scheme, a Funded Unapproved Retirement Benefit Scheme (FURB).

13. At various times, the O'Hares have invested in cash and bonds, property and (aided by a stockbroker from 1999) some equities. At that time and later, they invested in some corporate business ventures, on a relatively modest scale, with investments often of less than £100,000, or little more. They also engaged in two US property deals, with varying success. When exchanging sterling for dollars, Mr O'Hare tries to get the best rate he can, sometimes by forward transactions based on a future rate.

14. Coutts is a bank of high repute, which provides private banking services to, among others, high net worth individuals such as the O'Hares. Their relationship with Coutts began in 2001, after Mr O'Hare heard about their private banking services through a business acquaintance on a golf course in Scotland. Mr O'Hare was soon introduced

to Mr Kevin Shone, a private banker at Coutts' Liverpool office, who became their main contact and relationship manager from 2001 until he left Coutts in 2008.

15. The O'Hares opened accounts with Coutts in August 2001. Straight away, Mr Shone recommended a product called Orbita Capital Return (OCR). The O'Hares invested $3 million into it, of which $1 million was cash and $2 million borrowed from Coutts. This later led to a complaint of mis-selling, which is indirectly relevant to the settlement agreement issues. Mr Shone reported to his credit committee that Mr O'Hare was "very keen" to make this investment and "keen" to consider "leveraging the [pension scheme]".

16. Coutts' case was that this keenness resulted from Mr O'Hare's sophistication and experience as a substantial investor, and owed little or nothing to Mr Shone's salesmanship and powers of persuasion. The O'Hares submitted that Mr Shone was a persuasive salesman who described the O'Hares as "keen" to denote his success in persuading them to accept his recommendations to invest in more high risk products than they would otherwise have favoured.

17. Mr Shone, indeed, in his documents repeatedly thereafter attributed keenness to Mr O'Hare to make investments which he, Mr Shone, recommended as suitable, but without mentioning any impetus from himself in engendering Mr O'Hare's keenness.

Mr Shone's Absence

18. It is necessary at this point to interrupt the narrative and address the difference between the parties about whether Mr O'Hare took the lead in asking for particular types of investment, showing his experience and sophistication as an investor and his appetite for gambling and high risk, or whether Mr O'Hare was led and persuaded by Mr Shone to make higher risk investments than was consistent with Mr O'Hare's unconditioned risk appetite.

19. Mr Shone was not called to give evidence. Mr O'Hare was. Coutts did not dispute that Mr Shone was a material witness and that its solicitors had identified him as such, though before contacting him. The only explanation for his absence was in a late witness statement, which I allowed, from Mr Dylan Williams (of Coutts) saying that Mr Shone told Mr Williams in 2016 that he was too preoccupied with other business responsibilities, following the death of his business partner, to devote time to these proceedings.

20. Ms Oppenheimer, for Coutts, submitted correctly that Mr Shone's hearsay notes are admissible as evidence of the truth of their content (see the White Book 2016, vol. 1, note at 32.2.4). Thus, there is admissible hearsay evidence to be derived from the notes that Mr O'Hare and not Mr Shone drove the content of the investments the latter said were suitable.

21. She went on to submit that despite Mr Shone's absence from the trial, they should be preferred to Mr O'Hare's evidence given in writing and at trial. In support of that, her main points were to the following effect:

(1) A party cannot be expected to call a material witness who is not willing and co-operative, by using a witness summons. The court cannot assume that Coutts is aware what Mr Shone would have said, if he had been called by Coutts.

(2) The court cannot assume that the witness's reason for non-cooperation is that his evidence is unreliable. The only evidence before the court is that Mr Shone has given a reason for not giving evidence, which is not that his evidence is unreliable.

(3) In a commercial context, contemporary written evidence should normally be treated as more reliable than self-serving oral testimony, as Leggatt J pointed out in *Gestmin v. Crédit Suisse* [2013] EWHC 3560 (Comm), at paragraph 22.

(4) "[I]f the witness is an unknown quantity, because he does not wish to assist voluntarily and would require to be summonsed, *ex hypothesi* nothing can be concluded from that about the evidence he would have given had he been called" (Coutts' closing skeleton).

(5) If Mr Shone were to be called under compulsion of law, it is no more incumbent on Coutts to call him than the O'Hares. Indeed, they did call his counterpart and successor during the period from 2008 onwards, Mr Raymond Eugeni who like Mr Shone is a former Coutts private banker.

(6) Although privilege was not waived and Coutts was aware Mr Shone was a material witness, this is not a case like other leading cases where the absent witness is co-operating with or even controlling the party choosing not to call him (cf. *Djibouti v. Boreh* [2016] EWHC 405 (Comm) per Flaux J at paras 55-56; *Prest v. Petrodel Resources Ltd* [2013] 2 AC 415).

(7) This was a case in which, to borrow Lord Lowry's words in *R. v. Inland Revenue Commissioners and another* [1991] 2 AC 283, at 300: "the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained …. [thus] the effect of his silence in favour of the other party, may be either reduced or nullified".

(8) The most that can be said is that court can enquire whether a party can reasonably be expected to call the absent witness who might be expected to have material evidence to give on an issue in an action: cf. the first of Brooke LJ's four propositions in *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, at 340). I note that these four propositions were cited and applied in *Jaffray v. Society of Lloyds* [2002] EWCA Civ 1101; (2002) 146 S.J.L.B. 214, per Waller LJ (judgment of the court) at paragraph 407.

(9) Mr O'Hare's evidence was unreliable and at times evasive. It was not (in Ms Oppenheimer's words) "open, honest, credible and consistent", virtues claimed for his evidence by Mr O'Doherty, for the O'Hares. She said he had been caught out in mistakes, had to retract certain statements and sought to downplay his appetite for investment risk; and that his evidence was "not always candid", for example about recent contact with Mr Shone which he said he rejected.

22. Mr O'Doherty, for the O'Hares, made the following main points in answer to those submissions:

(1) Mr Shone's absence was particularly telling because Coutts' witnesses lacked any first hand knowledge of his involvement and produced documents prepared by him with which they were often not familiar, about meetings they had not attended, while Mr Shone had.

(2) Mr Shone met Mr O'Hare and spoke to him by telephone many times, often without documenting these discussions; no other Coutts witness was able to contradict Mr O'Hare's account which, moreover, was honest, frank and reliable in its essential content.

(3) It was not established that Coutts had been unable to obtain a written statement from Mr Shone; their advisers had not denied contacting him. And Coutts had evidently decided not to prepare a witness summary or a hearsay notice stating, for example, that his notes of meetings and conversations (such as they were) were full, accurate and reliable.

(4) It was reasonable and practicable for Coutts to have called him; he was a UK resident still working in the financial services industry. Coutts' unspoken objective must have been to frustrate an application for permission to cross-examine him, and to prevent a proper evaluation of his documentary evidence.

(5) It was unreal to expect the O'Hares to call him as a witness; they had made allegations of serious professional negligence against him. The party reasonably expected to call him was the party with an interest in defending his exercise of professional skill and care. The O'Hares had no need to call him, since without him their account was uncontradicted on crucial points in the history.

(6) The position of Mr Eugeni was different and the comparison was not of like with like: he is, unusually, working with and for Mr O'Hare in current business ventures; while Mr Shone had left Coutts, without any falling out, to join another financial services provider, Goldman Sachs.

(7) Coutts has had no difficulty calling as witnesses Ms Amy Barlow, Mr Andrew Savill and Mr Richard Carney, all like Mr Shone ex-employees of Coutts or its parent, Royal Bank of Scotland (RBS). It has clearly chosen not to exercise its right (if he was unwilling to attend voluntarily) to require Mr Shone to do so.

(8) The words of HHJ Saffman (sitting as a judge of the High Court) in *Webb v. Liverpool Womens' NHS Foundation Trust* [2015] EWHC 133 (QB), at paragraph 102, are apt here, says Mr O'Doherty:

> "The fact that a witness no longer works for a party does not in itself strike me as being a particularly good reason for failure to produce evidence from such a witness. It may of course make it more difficult to trace such a witness and/or to secure their cooperation but I have no evidence that either of those issues was a problem."

(9) The reason Mr Shone gave Mr Williams for not giving evidence was neither credible nor first hand; the court has evidence that he gave that reason to Mr

Williams, but not that it was the true or only reason why he has chosen not to defend his professional reputation in these proceedings.

23. In my judgment, it was obvious from the start of the proceedings that Mr Shone was a pivotal witness of fact in relation to the period from 2001 to 2008. If not called at trial, he would plainly be the Banquo's ghost at the feast. No competent adviser would overlook that, and Coutts' solicitors not surprisingly recognised his importance by listing him as a potential witness in their (pre-trial) directions questionnaire.

24. It is not suggested that Mr Shone's notes are fabricated or deliberately false. What is said is that they mislead by omission, because they omit the process of exerting influence over Mr O'Hare's decision-making; and that they exaggerate his appetite for risk in its initial and natural state, when unconditioned by salesmanship. In the absence of evidence from Mr Shone to the contrary, I have to assess that issue mainly by reference to the notes themselves, which are contemporary, the surrounding circumstances, and my assessment of other witnesses, particularly Mr O'Hare.

25. Ms Oppenheimer suggested that the evidence showed Mr Shone was uncooperative, but I may have an incomplete picture because Coutts did not waive privilege. She told me on instructions that Coutts' solicitors did not contact Mr Shone before listing him as a potential witness in the directions questionnaire. She did not tell me about what pre-trial contact with him, if any, took place after his name was included in the questionnaire.

26. I am therefore not privy to whatever dialogue may have taken place under the cloak of privilege, if any. Ms Oppenheimer did not say that none did. The only other evidence I have is what he said to Mr Williams in early 2016. That is to the effect that he was too busy with his business responsibilities to devote the time required. He found time, however, to attend a charity event at Buckingham Palace on 17 May 2016, where he met Mr Williams and the proceedings were mentioned.

27. The citations from case law above do not all deal fully with the statutory provisions and rules which interact with judicial dicta on the drawing, or not, of an adverse inference where a material witness is not called. Section 1 of the Civil Evidence Act 1995 (the 1995 Act) abolished the rule against the admissibility of hearsay in civil proceedings. Section 2 tempered that, subject to rules of court, with a notification obligation on a party proposing to adduce hearsay, to enable the other party to deal with the hearsay evidence.

28. The court was made the arbiter of any pre-trial issues arising from proposed use of hearsay at trial. By section 2(4)(b) a failure to comply with relevant procedural obligations relating to hearsay "may be taken into account …. as a matter adversely affecting the weight to be given to the evidence in accordance with section 4". The procedural obligations relating to hearsay evidence are now set out in CPR rules 32 and 33.

29. The general rule is that evidence at trial is given orally by the witness who proves a fact (CPR rule 32.2(1)(a)). Where hearsay evidence is intended to be given in a witness statement or orally, a statement of the evidence in writing must be served (rule 33.2(1) and (2)). In this case, the hearsay was clearly given in the statements of witnesses called orally, notably Ms Barlow and Mr Thomas, whose statements recited

Mr Shone's meetings with Mr O'Hare simply by referring to the former's notes, which were implicitly adopted as true and accurate.

30. I therefore find no relevant procedural failure on Coutts' part. It was for the O'Hares to apply, if they chose, under rule 33.4 to call Mr Shone for the purpose of cross-examining him on his notes of the various meetings and telephone calls, and his notes of his submissions to the credit committee of Coutts. They did not do so, relying instead on the fact that Mr O'Hare's account of the relevant discussions is, in many but not all cases, uncontradicted by any other person present.

31. Furthermore, paragraph 27.2 of the Practice Direction supplementing CPR Part 32, states:

> "All documents contained in bundles which have been agreed for use at the hearing shall be admissible at that hearing as evidence of their contents, unless (a) the court orders otherwise, or (b) a party gives written notice of objection to the admissibility of particular documents."

32. Mr Shone's notes formed part of the agreed bundle and thus were admissible as evidence of the correctness of their content. In the absence of any failure to comply with procedures required under the CPR, it is unnecessary to consider here the interrelationship between the CPR and paragraph 27.2 of the Practice Direction (considered by Norris J in *First Subsea Ltd v Balltec Ltd* [2013] EWHC 1033 (Pat), reviewing earlier Court of Appeal authorities).

33. No procedural failure, therefore, falls to be taken into account under section 2(4)(b) of the 1995 Act as a matter adversely affecting the weight to be given to Mr Shone's notes and other documents. Notice of objection to them being admitted in evidence was not given. If it had been, the court might have required Mr Shone's presence for the purpose of cross-examination as a condition of them being admitted in evidence.

34. Nor was there any obligation on Coutts to serve a witness summary relating to Mr Shone's evidence. CPR rule 32.9 *permits* a party who is unable to obtain a statement from a witness it wishes to call, to apply for permission to serve a witness summary, setting out the evidence that would have been included in a written statement from the witness, had the party been able to obtain one, or if that is not known, setting out the matters about which the party wishes to ask the witness.

35. There is therefore no procedural difficulty about the admissibility of Mr Shone's hearsay notes. What weight should be given to them is a different question. Section 4(1) of the 1995 Act requires me to "have regard to any circumstances from which any inference can reasonably be drawn", including but not limited to the various matters listed as (a) to (f) in subsection (2).

36. The first is whether it would have been "reasonable and practicable" for Coutts to have called Mr Shone (section 4(2)(a)). In this case, that question is closely linked to the last factor, "whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight" ((f)). I shall return to these in a moment.

37. The second ((b)) is whether the original notes of Mr Shone were made contemporaneously. Clearly, they were made at or shortly after the conversations they evidenced. For the most part, they do not involve "multiple hearsay" ((c)). They do attribute remarks and views to Mr O'Hare, but he was a witness and thus could be asked about them, enabling me to assess their content as part of my assessment of his credibility.

38. As to section 4(2)(d), did Mr Shone have "any motive to conceal or misrepresent matters"? The O'Hares submit - but Coutts strongly disagrees - that Mr Shone had an interest in creating a paper trail in order to conceal manipulation of Mr O'Hare's risk appetite, and to make his consent to investments appear more fully informed than it was; coupled with a motive to sell Coutts' products, to make money for Coutts and, indirectly, himself.

39. It is not suggested that Mr Shone's original notes were "an edited account, or … made in collaboration with another or for a particular purpose" (section 4(2)(e)). That leaves section 4(1) and section 4(2)(a) and (f) of the 1995 Act, already mentioned. I bear in mind the following further matters.

40. First, I do not accept that the O'Hares could be expected to call Mr Shone as a witness just as much as Coutts. Coutts' hearsay evidence from Mr Shone is primarily relevant to a defence against the negligence claim. He is the person alleged to have given negligent advice in 2007 and 2008. I would expect evidence from him in rebuttal of that proposition to come from Coutts, rather than evidence in support of it to come from the O'Hares.

41. The fact that, unusually, the O'Hares were able to call Mr Eugeni, does not alter the reasonable expectation that a witness would be called by the party against whom there is a case for the witness to answer. He is still working in the financial services industry in this country. He has a reputation to protect. There is no evidence that he is medically unfit. I would expect him to answer the charge of negligence by giving evidence for the party facing that charge.

42. Next, I bear in mind the importance of the evidence he could have given. He was the only person present at sparsely documented meetings with Mr O'Hare which, Coutts says, were properly documented by Mr Shone and have been misrepresented by Mr O'Hare. The soundness of the documentary record was put to Mr O'Hare in tough cross-examination, and relied on in submissions. Yet Mr Shone did not vouch for the accuracy of his documents, nor attest to Mr O'Hare's account being misleading.

43. Further, the settlement agreement issue arises because (as is common ground) Mr O'Hare complained that Mr Shone had mis-sold him the OCR product; and Coutts was, on its own case, prepared (though on what basis is disputed) to part with money to address that complaint. Coutts denied that the OCR product was mis-sold. The issue was part of the background to the claims arising from the 2007-8 investments. Mr Shone's evidence about OCR would have been relevant.

44. Mr Shone's explanation for declining to give evidence willingly, as reported to Mr Williams, is effectively that he, Mr Shone, was too busy. I am not confident that the explanation given to Mr Williams was a comprehensive or accurate statement of Mr Shone's reasons for not wanting to give evidence. There is no document from him

giving detailed reasons for not wanting to testify. There is no explanation about why he does not trouble to protect his reputation in court.

45. I do not accept that the need for Coutts to compel him by summons to give evidence and thus call him "blind" (as Ms Oppenheimer put it) is a complete answer to his absence from the witness box at trial. She said that to call him blind would be unsatisfactory. However, it is not clearly proved (and probably could not be without a waiver of privilege) that a witness summons would have been necessary. Mr Williams' hearsay account of Mr Shone's explanation does not satisfy me of that.

46. Ms Oppenheimer cited from the judgment of Christopher Clarke J (as he then was) in *Portal v 3M* [2010] EWHC 114 (Comm) at paragraph 32. When the judge there said there that to call a witness blind was "perilous and unsatisfactory", he was recording counsel's submission, not endorsing it. The context was completely different: the potential witnesses were subject to confidentiality obligations which prevented them from cooperating with the party wishing to call them, even if they wished to. Mr Shone was under no such restriction.

47. Ms Oppenheimer suggested that it was more difficult to call a former employee than a current one, who could be "strongly encouraged to give evidence", while Mr Shone "is not anyone who's under Coutts' control". But Coutts had no difficulty (in line with what Judge Saffman said in *Webb*, cited above) in calling other former employees outside its "control" to give the second hand hearsay evidence that would have been first hand had it come from Mr Shone.

48. It is clearly to be inferred from the inclusion of Mr Shone's name in the pre-trial questionnaire, that Coutts' experienced and expert legal advisers assessed the potential benefits and risks of calling him, if necessary under compulsion of law, and concluded that the risks outweighed the benefits. It is not correct that they had no idea at all what he might say. Other things being equal, he could be expected at least to affirm that what he wrote was not misleading.

49. The observations of Leggatt J in *Gestmin* (cited above) at paragraph 22 do not resolve the issue here. He carefully qualified his remarks about documentary evidence by saying they do not mean oral testimony serves no purpose. He did not seek to elevate the status of documentary evidence above that of oral evidence. The "general rule" in CPR rule 32.2(1)(a) remains that "any fact which needs to be proved by the evidence of witnesses is to be proved … at trial, by their oral evidence given in public". The approach commended by Leggatt J in *Gestmin* is very useful, not least in this case, but does not licence failure to prove the correctness of a disputed documentary record.

50. I agree with Ms Oppenheimer that the court cannot know what Mr Shone would have said, had he been called. That is always so when a witness with relevant evidence to give is not called. I think Coutts and not the O'Hares are the main victims of that submission, since it is Coutts and not the O'Hares that needs his testimony to assist its defence. Without him, significant parts of Mr O'Hare's account remain uncontradicted except by notes that are disputed and not defended by their maker.

51. I am, nonetheless, invited to prefer the contemporaneous notes to Mr O'Hare's oral and written evidence that they are materially incorrect and misleading. This has to be considered on a point by point basis but, as a general proposition, I am not prepared to

accept that the notes are always to be preferred and that Mr O'Hare's evidence contradicting them must invariably be rejected. This is for two further reasons, beyond what I have said above.

52. The first is that I find Mr O'Hare to be an honest and truthful witness, although his recollection was not always accurate, as he was the first to admit whether or not against his interest. I do not accept that his evidence was profoundly unsatisfactory, as Ms Oppenheimer submitted. He was cheerfully candid about admitting mistakes and being corrected. And, unlike two of Coutts' witnesses, Mr Thomas and Mr Williams, he did not answer questions after considering what type of answer would best (in the witness's judgment) assist his cause.

53. Ms Oppenheimer suggested he was at times evasive in his answers. She cited the example of his answers to questions about recent contacts with Mr Shone about proposed business relations. I reject the suggestion that his answers were evasive. In my judgment his discomfort about being asked the questions reflected not a reluctance to tell the full story but, rather, a wish to restrain himself from speaking of Mr Shone in inappropriately strong pejorative language.

54. Nor do I accept that the absence of contemporary responses from Mr O'Hare disputing the content of Mr Shone's communications tells greatly against his credibility. He trusted Mr Shone at first, and had no reason to engage in guarded and cagey written exchanges with him. He is a man of few emails, of few words in writing but many said orally.

55. His style is not the cautious compliance-influenced one of creating a documentary record in case of later need. He would not have thought to dispute Mr Shone's written account until his investments started to lose money. Even then, when he complained about OCR, he did so verbally in a meeting and did not follow up with formal correspondence.

56. The second, and linked reason, is that I accept Mr O'Hare's basic proposition that Mr Shone used persuasion on him. I interject that this is not necessarily a criticism of Mr Shone or Coutts; provided the products sold are suitable, there may be nothing wrong with using selling techniques. That is part of Coutts' raison d'être and that of any bank. But Mr Shone's notes repeatedly describe Mr O'Hare as "keen" to buy the products, without mentioning the exertion of persuasion or influence by Mr Shone or anyone else at Coutts.

57. That seems to me wholly unrealistic. Clearly, it is not the habit of Mr Shone to document the persuasion part of the exercise. That is not because there was none. Mr Croft, the expert witness instructed by Coutts, stated in his evidence that he would expect Coutts to be looking for product sales to the O'Hares. That is obviously right. The contract governing the parties' relations (with the O'Hares in their personal capacity) required as much, if Coutts was to profit from its dealings with them.

58. There was internal email evidence from within Coutts of a sales drive in 2007 in respect of the Novus products, in which the O'Hares invested in 2007 and 2008. The sales drive is not mentioned in any of the typed notes. In a document dated 29 January 2008 (I do not accept the date is an error and should be 2009, in view of Mr Shone's letter sent the same day) someone unidentified, probably from Coutts, has

written "Novus Funds pushed heavily". The typed notes do not reflect this evidence of persuasive techniques being used.

Facts: Narrative (Reprise)

59. I can now return to the narrative. On 29 August 2001, the O'Hares as trustees of the pension scheme entered into a written "Investment Management Service Agreement" with Coutts. This, as the title suggests, required Coutts to manage the scheme's investments. The agreed investment profile was 25 per cent fixed income investments, and 75 per cent equity investments.

60. In around early September 2001, Mr Shone reported to his credit committee that the O'Hares were promising and potentially profitable new clients. He described Mr O'Hare as "not in need of borrowing but wishes to leverage his investments and is clearly comfortal [sic] with the concepts". He is a very sophisticated investor and 4 meetings of 2 hours plus each time hs [sic] been necessary to reach this stage of agreement".

61. There was much debate at trial and in cross-examination of Mr O'Hare about whether he was a sophisticated investor or, as it was sometimes put, an experienced investor. I find that he was to only a very limited extent. He was a private individual, not a professional investor representing, for example, an institution such as a pension fund or a hedge fund. He had dabbled in share dealing. He knew what markets were and that they go and down, and that currency exchange rates fluctuate. He had done property deals in the USA, for which he had raised mortgage finance. He had lent money to his company.

62. He was astute in business and in consequence wealthy, and in the course of acquiring wealth had got to know something about investing, but he did not have expertise to match that of Coutts; otherwise, he would not have required advice on how to invest. Similarly, an experienced commercial litigator as a party to lawsuits is not the same thing as an experienced commercial lawyer specialising in litigation. The former needs advice, the latter can give it.

63. Mr O'Hare was willing to take risk with part of his wealth, but not too much of it, and provided he was properly informed about how much risk he was taking. He had worked for many years to build up his business, and would not recklessly expose its fruits. He did not know, until he met Mr Shone, that banks in this country lend money to customers to enable the customer to invest more, or leverage the investment. That had not been his experience in the USA, as he explained.

64. He was also interested in the performance of his investments and receiving regular information about their value. I do not regard this as a sign of sophistication and experience; rather, it is a sign of business awareness and prudence. Information about the value of an investment post-dates the decision to make the investment and is not part of the thought process leading to the making of the investment. It is rather like keeping an eye on one's bank balance.

65. Mrs O'Hare did not attempt to keep abreast of market developments. Her background was in business administration. She attended meetings with Coutts sometimes, in particular when it was necessary for her to sign documents; but took her cue from her

husband after hearing from him about a proposal. She understood his explanations and their decisions on how to invest were joint, and thus agreed by her. But she was not aware of any detail and was not able to name the five investment products in issue in this case.

66. A further written contract (the O'Hares' contract) was concluded between the O'Hares in their personal capacity and Coutts, on 21 September 2001. At that time their estimated total wealth was about £26 million, of which about £7 million was in liquid form and available for investment. The rest comprised mainly the value of the trading engineering business (about £15 million) and the O'Hares' residential properties in the UK and the USA (about £4 million).

67. The O'Hares' contract was called an "Agreement to Provide Investment Advice". It required Coutts to provide, free of charge, "advice about the investment services we offer and the kinds of investment that would in our view be most appropriate for you". The O'Hares were not required to accept advice given. Thus, as I have said, Coutts could only profit from the O'Hares' contract if the O'Hares contracted separately for recommended products.

68. The O'Hares' contract was terminable by them at will on written notice. The material part of it read as follows:

> "…. we will work with you to understand your circumstances, objectives and requirements to enable us to develop an investment strategy for you. We will provide you with our advice and recommendations in writing at such time or times as we consider appropriate or as agreed between us. There will be no restriction on the types of investment about which we can advise you (including unregulated collective investment schemes, whether or not operated by members of the Coutts Group), except that these will not include derivatives or warrants. In the case of some investments, these will not be readily realisable, so that there may not be a recognised market for them, and it may therefore be difficult to deal in them or to obtain reliable information about their value or the extent of the risks to which they are exposed."

69. At trial, there was much debate about whether Mr O'Hare wanted only a 5 per cent return on investments. The figure of 5 per cent appears in various documents as a sort of benchmark. The O'Hares' case was that they were cautious investors and that this was their target rate of return. It was, after all, the interest rate at which he chose to lend to his engineering company. But if that was all he wanted, Ms Oppenheimer put to him, why not invest in bonds with a guaranteed 5 per cent return, and nothing else?

70. In my judgment, there is no reason why he would restrict himself in that way. He had no difficulty with returns on investments of more than 5 per cent per annum, but would have been dissatisfied with less. His 5 per cent figure was a benchmark or rule of thumb he used in measuring in his own mind whether he was satisfied that his money was working hard enough. If it earned only 4 per cent, it was not. But if returns should exceed 5 per cent per annum, he would not mind.

71. The O'Hares' relationship with Mr Shone and Coutts developed over the following years. They made various investments both through the pension scheme and in a personal capacity. Only the most important, involving the largest sums, need be mentioned. In April 2002, they borrowed $1 million from Coutts to invest into a bespoke "Coutts Private Equity Limited Partnership". This was classified as an investment involving a "speculative attitude to risk" with a timescale of at least 10 years. A return of over 20 per cent a year was hoped for.

72. With encouragement from Mr Shone, they borrowed to invest. In 2003, they invested (through the pension scheme) in the Coutts' products OCR and Orbita Global Opportunities (OGO). These were classified in May 2003 as cautious and moderate risk, respectively, in a letter from Mr Shone of 31 May 2003. $7.2 million was available for investment. Of that, $6.2 million was invested in OCR, classed as "cautious"; while $1 million was placed in OGO, which was re-classified as "high" risk, probably because the change of currency was considered to add to the risk level.

73. In 2004, there was a proposal to sell the engineering business which came to nought. Mr Shone wrote to the O'Hares as trustees of the FURB in March 2005, describing them as having "[a]n overall moderate attitude to risk". Following the abortive sale, the O'Hares acquired about £6 million from sales of shares in O'Hare Engineering Limited. This sum became available for investment. They wished to invest it in a tax efficient manner. On 6 May 2005, Coutts' financial planning specialist, Mr Glyn Thomas (who had joined Coutts in January 2004) discussed the matter with Mr Shone.

74. It was agreed between Mr Thomas and Mr Shone that an offshore bond would be appropriate. The O'Hares did not meet Mr Thomas at this stage, but agreed with Mr Shone that the £6 million would be invested in an offshore bond with Clerical Medical International (the CMI bond), for at least five years. Five per cent of the amount invested could be withdrawn each year without incurring any UK tax liability, apart from basic rate income tax.

75. The O'Hare's attitude to risk for this investment was described by Mr Thomas in a note of the meeting as "moderate". The proposed profile was to be 60 per cent equities and 40 per cent bonds. I accept Mr O'Hare's evidence that Mr Shone advised this split. Mr Thomas prepared a written proposal dated 18 May 2005, which included confirmation that "for this part of your overall investment strategy you have cautious attitude to risk". The fund would be managed by Coutts using its Discretionary Investment Management Service (DIMA).

76. The same day, Mr Thomas recorded that Mr Shone had told him Mr O'Hare wanted the investment to be 100 per cent in bonds, as Mr O'Hare was nervous about equity markets. The draft suitability letter from Mr Thomas had to be amended accordingly. In June 2005, the final profile decided upon was 75 per cent fixed income investments and 25 per cent equities. I accept Mr O'Hare's evidence that he accepted this split on advice from Mr Shone.

77. A mortgage over the O'Hares' main residence was taken as security by Coutts, which the O'Hares wanted released. Mr Shone's note of 13 June 2005 shows that the O'Hares preferred the investment to be based on 100 per cent fixed income, if this would enable Coutts to release that security. Mr and Mrs O'Hare were not

comfortable with their main residence being mortgaged to secure investments, but agreed to it.

78. In my judgment, during the discussions leading to the investment in the CMI bond, it is reasonable to infer that Mr Shone was influencing Mr O'Hare in the direction of accepting a higher proportion of equity investments, and thereby a higher level of risk, than that with which Mr O'Hare, with his overall "cautious" attitude to risk, was comfortable. The result was a compromise between Mr O'Hare's caution and Mr Shone's bullishness.

79. On 27 April 2006, Ms Amy Barlow joined Coutts as a junior private banker, initially working under Mr Shone. She was thereafter promoted to more senior positions, staying until 2010. In May 2006, just under a month after joining Coutts, Ms Barlow noted that "Les [O'Hare] would like to increase the alternative exposure and risk profile of the portfolio and so we are recommendig [sic] switching £1m out of fixed income into Orbita Asian Growth" (OAG), a relatively high risk fund investing in Asian markets.

80. This resulted from a meeting between Mr Shone and Mr O'Hare, not attended by Ms Barlow, on 25 May 2006. Mr Shone's note was to the same effect as Ms Barlow's. It stated that Mr O'Hare was "keen on Asia and also sees recent equity dip as a buying opportunity" and that the split in the DIMA would be altered to a 50/50 split between fixed income investments and equities.

81. Mr Shone went on to note that a "[r]isk discussion took place to confirm he is happy with move out of cautious and into moderate and higher risk" and said this was a relatively small step in the context of his overall wealth. I accept Mr O'Hare's evidence that he had no prior knowledge of Asian markets and that the idea of increasing the risk profile of the DIMA came from Mr Shone, who advocated Mr O'Hare investing £1 million in OAG.

82. Mr Shone's subsequent letter to Mr and Mrs O'Hare referred to "your view that Asian markets offer good value over the medium to long term". This does not, in my judgment, refer to a view of Mr O'Hare – still less of Mrs O'Hare – untutored by Mr Shone's recommendation. The linguistic practice is again to describe acceptance of a recommendation as the formation of a view, as if the view were not informed by the recommendation. The investment was then made, in dollars, in June 2006.

83. Another investment of $2 million, classed as high risk, was made by the O'Hares in March 2007, after Mr Shone met Mr and Mrs O'Hare at the Dorchester Hotel in London. This was invested in the Coutts Private Equity Limited Partnership. The written proposal (which I accept from Mr O'Hare, arrived after they had signed the proposal form) warned that the risk was higher than under Coutts' guidelines, but Mr Shone was happy to recommend it since the O'Hares were "a sophisticated investor" and would soon be selling the engineering company.

84. They did indeed do so about two months later, in May 2007, receiving around £18.54 million, of which about £13 million were the net proceeds in cash, available for investment. Mr Shone met Mr O'Hare on 23 May 2007 to discuss what they should do with the £13 million. As a holding (and low risk) measure, it was agreed that it

should be placed in a Coutts liquidity fund. This significantly reduced the overall risk profile of the O'Hares' total investments.

85. Mr O'Hare denied in cross-examination that receipt of that sum increased his appetite for risky investments and reduced his desire to exercise caution and moderation in the running of risk. Broadly speaking, I accept his evidence to that effect. However, having an additional £13 million made him more amenable to advice to go for higher returns, running higher risks, than he would otherwise have been. He intended to invest about £10 million of it.

86. On or about 9 August 2007, Mr Shone and Ms Barlow met the O'Hares at their new home (the move enabling release of their mortgage). An overview discussion took place, at which various options were touched upon. Ms Barlow produced the emailed note of the meeting, mentioning a new hedge fund launch and ways of altering the investments held within the CMI bond. Mr O'Hare said he needed to understand the fixed income market, about which Ms Barlow sought to obtain information from Coutts' London office.

87. Mr Thomas, Mr Shone and Ms Barlow produced written proposals in two letters both dated 6 September 2007, from Mr Thomas and Mr Shone. Mr Shone's was more specific. He explained Coutts' new risk categories (introduced in April 2007): wealth preservation (the least risky); wealth enhancement (intermediate risk level; sometimes sub-divided according to investment timescales of either 3 to 5 years or 5 to 8 years); and wealth generation (the most risky). These bear some relation, not necessarily linear, to the previously used terms: cautious, moderate and high risk.

88. Mr Shone's proposal for a total £10.1 million investment (in a mix of pounds and dollars) was to invest $4.8 million (withdrawn from the pension scheme) and £7.7 million into the CMI bond, with an accompanying investment strategy. Of the £7.7 million, he suggested that £1.7 million should be in wealth preservation customised deposits, and the remaining £6 million should be invested in Coutts wealth generation products, half in a DIMA and the other half in new "Novus" funds. Of the $4.8 million, he suggested, $3 million should be invested in OCR, classified as wealth enhancement, and $1.8 million in OGO, also classed as wealth enhancement.

89. These proposals were set out in bespoke presentation documents, which were shown to the O'Hares (or to Mr O'Hare) by Mr Shone. They included a table which was controversial at trial, comparing the expected annualised performance and volatility of the new Novus funds with the existing Orbita funds, using (as the table stated) "simulated returns" for the former, based on how they would have performed had they existed in the past, presumably over the period beginning with the inception of the Orbita funds.

90. There were signs of turbulence in markets at that time. For example, in September 2007 there was a run on the Northern Rock Building Society. Mr O'Hare discussed his concerns about the performance of OCR with Mr Shone. It had lost value. The latter emailed him on 14 September 2007 "following our chats". He referred to volatility in markets, "a marked lack of global liquidity" and concerns about "whether the worst is over".

91. He advised Mr O'Hare in the email to weather the storm and stick with OCR, and hoped that his assessment gave him "the comfort that you are looking for". Evidently, it did not. I accept Mr O'Hare's evidence that he (not Mr Shone, as Mr Thomas's note indicates) called the meeting that then took place on 20 September 2007, because he wished to withdraw from the OCR investment. Mr Shone took Mr Thomas with him for the meeting at the O'Hares' home.

92. They had never before met Mr Thomas. Both he and Mr Shone made separate notes of the meeting. The main features for present purposes were as follows. Mr O'Hare complained that the value of his investment in OCR appeared to have fallen by 2.2 per cent in August 2007. Mr Shone's note is a tribute to his own view of his powers of persuasion: he managed to soothe Mr O'Hare by spending "a long-time [sic] going through recent and historic performance of all existing investments and at end of this Les was happy that everything performing as expected".

93. Mr Thomas downplayed Mr O'Hare's complaint as "a little moan regarding the recent draw down on [OCR]" but recorded that, after Mr Shone's "detailed discussion", Mr O'Hare "still very much likes the investment profile of [OCR] and would like to significantly increase exposure in the next quarter to this investment". It is clear that Mr Shone sought to persuade Mr O'Hare to regard the fall in value in August 2007 as a temporary phenomenon or blip.

94. I pause to note an unsatisfactory feature of Mr Thomas's evidence. In his witness statement he attempted, generally, to compensate for Mr Shone's absence, producing documents of which he, Mr Thomas, professed little knowledge, about discussions between Mr O'Hare and Mr Shone when Mr Thomas was not present. He was less concerned with recalling events than with portraying Mr O'Hare as a man who could not be influenced (especially at paragraph 28 of this witness statement).

95. Mr Thomas's note records that they "discussed with him the new Novus options, particularly in view of his familiarity with the existing Orbita range of options". Both notes trumpet Mr O'Hare's enthusiasm for the new Novus products, to which he was "exceedingly attracted" according to Mr Thomas, "particularly again because of his knowledge and experience of OCR".

96. This twice repeated point supports Mr O'Hare's evidence, which I accept, that Mr Shone drew parallels between the Orbita products and the new Novus products, and commended them on the basis of their similarity with OCR products. I accept Mr O'Hare's evidence, not contradicted by Mr Shone, that Mr Shone advised that NGCO was similar to OCR in terms of risk and return and was subject to 2-3 per cent maximum volatility; and that Mr O'Hare agreed to the investment on the basis that it was in line with their overall moderate attitude to risk, which had not changed.

97. I accept Mr O'Hare's evidence that he remained unhappy about OCR, contrary to Mr Shone's note and Mr Thomas's account of the meeting in his witness statement (paragraph 28ff) and in cross-examination. Mr O'Hare was persuaded at the meeting of 20 September 2007 not to withdraw his investment from OCR at that stage (as he was to do the following year; he had just missed a cut-off date on 19 September), but he regarded the product as having been mis-sold to him as lower risk than it actually was, which is why he subsequently sought compensation for that.

98. He agreed at the meeting actually to increase his OCR investment in dollars, and to invest £6 million in the new Novus products recommended by Coutts; £4 million into Novus Global Credit Opportunities and £2 million into another Novus product, Novus Natural Resources which was not yet ready to receive funds. He appreciated that these were wealth generation products, classified as high risk, but was advised that they were suitable investments. He left for the USA the next day.

99. Mr Thomas wrote to the O'Hares on 30 October 2007, attaching a "report" and "product summaries". The attachments may have included an updated version of the presentation documents, dated November 2007. The proposals were as follows.

100. The first was to allocate $6 million (an increase from the $4.8 million originally envisaged) from the Coutts liquidity fund to the dollar version of OCR, held via the CMI bond. This product was now classified as wealth enhancement, described by Mr Thomas as "higher risk" because, he explained, the investment was in dollars not pounds; it would have been classed as wealth preservation had the investment been in pounds.

101. Next, the proposal was to invest £4 million into Novus Global Credit Opportunities (NGCO), via the CMI bond. This investment in various credit markets was classed as wealth generation, or high risk. The product was described in a written product summary, which stated that it was new and had no track record; that the capital invested was spread across a portfolio of hedge funds and was not protected against loss; that it could take about seven months to exit the investment; and that it would not be suitable for someone not prepared to risk losing the capital or unfamiliar with the risks of investing in credit markets.

102. I interject that on 1 November 2007, the new COBS provisions entered into force. The O'Hares then returned from the USA and a further meeting was held on 22 November 2007, with Mr Shone, Mr Thomas and Ms Barlow present. I accept Mr O'Hare's evidence that Mr Shone recommended that the O'Hares should withdraw from the fixed income investments in the DIMA and invest the dollar equivalent of £2 million in Novus Global Emerging Markets (NGEM). They accepted that advice.

103. It was at that meeting that the final form of the investments made in 2007 and 2008, which are the subject of challenge in this case, took shape. They were as set out in a brief supplemental suitability letter from Mr Thomas dated 26 November 2007, to be read in conjunction with the previous one dated 30 October 2007. The actual investments were purchased on 18 December 2007 and 26 March 2008.

104. The result was a significant shift towards higher risk investment than previously, in three new hedge fund products. As Mr Shone noted in a letter dated 29 January 2008, the O'Hares' total estimated wealth (including their two residences) was then about £38 million, of which about £9 million was invested in Coutts wealth generation products. The £9 million was soon to rise by a further £2 million to be invested in NNRS.

105. The investments made were:

(1) £4 million invested in NGCO, purchased on 18 December 2007;

(2) £2.125 million invested in Novus Natural Resources Strategy (NNRS) purchased on 18 December 2007 and 26 March 2008; and

(3) £2 million invested in NGEM, purchased on 18 December 2007.

106. Coutts' case is that the investments were suitable: the O'Hares were fully and properly informed and were happy with the increased risk; they were sophisticated and experienced investors who had cash to spare from the sale of the business, could afford to hazard the money in the hope of high returns, and preferred to do so rather than leave it earning lower returns in the CMI bond or in fixed income investments.

107. The O'Hares' case is that Mr Shone and Coutts were recommending unsuitable investments with no capital protection; that Mr Shone unjustifiably played down the substantial increase in risk involved; that the investments meant that an unjustifiably high proportion of the O'Hares' wealth was exposed to losses; that they were not sophisticated investors; and that agreeing to make the investments meant only being persuaded to accept the advice that they were suitable; that the advice was accepted did not mean it was correct.

108. Global financial markets deteriorated through 2008, as is now well known. Interest rates started to fall and there were some spectacular business failures. Mr Shone left Coutts on garden leave in April 2008, en route to his next employer, Goldman Sachs. In August 2008, Mr O'Hare asked Ms Barlow to liquidate the NNRS, OAG and NGEM investments. They had lost value. He did not want to be exposed to hedge funds given the state of the market.

109. Mr Ray Eugeni took over from Mr Shone as the relationship manager for the O'Hares. He had joined Coutts in February 2007. He first met them when he visited their home with his assistant, Ms Charlotte Johnson, on 11 September 2008. This was at a time of turmoil in the markets; the Lehman Brothers bank filed for bankruptcy in the USA four days later.

110. Mr Eugeni later fell out with Coutts and now works with businesses associated with Mr O'Hare. Coutts intimated that his evidence was influenced by a desire to harm Coutts by helping the O'Hares, and even described his second witness statement as seeking to "settle a score" with Coutts. This is odd, because his evidence is quite favourable to Coutts.

111. I reject these accusations against him. His second witness statement resulted from a late statement from Mr Williams attempting to discredit him, which he was entitled to answer. I found him to be a truthful witness with reasonably good recall. He had no quarrel with Coutts until 2012, and we have documents from him dating from September 2008, which are in my judgment reliable and more candid than Mr Shone's or Mr Thomas's.

112. For example, in a note dated 24 November 2008, he wrote that he had "pitched quite heavily to Les [O'Hare]" certain products. I have already observed that Mr Shone did not in his notes acknowledge having used persuasive techniques on Mr O'Hare, though he undoubtedly did so. Nor did Mr Eugeni habitually describe Mr O'Hare as "keen", as Mr Shone had done (Mr Thomas continuing the practice in a note of his dated 30 March 2009).

113. Mr Eugeni and Mr O'Hare had a general discussion on 11 September 2008 about his investments and appetite for risk. Mr Eugeni noted that Mr O'Hare "does not mind, in his words, taking a punt on something, but he wants it to be something that he knows is a punt …".

114. They met again on 22 September. They discussed his investments and Mr Eugeni's note describes Mr O'Hare as a "natural risk taker and gambler" who "would welcome a more hands on approach". He agreed that "an advisory approach" would suit him. They discussed "low risk ways of taking bets on certain things" and this led to a discussion about structured products. They kept in touch and Mr Eugeni liaised internally with Mr Thomas about potential future investments.

115. At meetings on 18 and 24 November 2008, they discussed the position further. On 18 November, Mr Eugeni recorded Mr O'Hare's acknowledgment that he had invested in NGCO and OGO "with his eyes wide open", knowing they were risky, and that he took their poor performance "on the chin". He also recorded Mr O'Hare's complaint about "how OCR was pitched to him". On 24 November, he advised Mr O'Hare to sell some holdings.

116. They agreed that he would sell about £6 million worth of OCR and £800,000 of NGCO, and that he would put the proceeds into a "Tailored Portfolio Managed Service" (TPMS) and into the CMI bond, and then consider investments with capital protection. At the end of the meeting, Mr O'Hare referred to lodging a complaint and seeking some sort of fee refund, arising from the Orbita investment and that "the risk profile of the fund was not fully explained to him". He asked if there was an informal route and Mr Eugeni said there was not and that he would have to "raise a cedar", which is the jargon for registering the matter as a formal complaint.

117. They discussed the complaint again in January 2009, after Mr Eugeni had liaised internally about it with a Mr Nigel Pitigala and Mr Dylan Williams. The nub of the complaint was, as Mr Eugeni recorded, that Mr O'Hare "feels that the [OCR] fund was pitched to him as a cash alternative and that it's [sic] performance should have little or no correlation to the wider markets". The Novus products, by contrast, he "has had no gripe with … because he knew what he was getting into"; though he also "tried to drag NGCO into the discussion feeling that it was sold along the same lines as OCR". Mr Eugeni tried to "nip this in the bud".

118. They discussed compensation. Mr O'Hare sought a refund of some "upfront fees"; pressed by Mr Eugeni, he said that "$100k would be too little and $500k would probably be too generous". Mr Eugeni recorded those words in quotation marks. I accept his note as accurate. The reference to dollars makes sense, in that the investment in OCR (and therefore the fees) had been made in dollars. I accept that Mr Eugeni's note is correct and that he refers to dollars not pounds correctly, without error. I prefer that evidence to Mr O'Hare's mistaken (as I find) recollection that the agreed currency was pounds.

119. Mr Eugeni recorded that in his prior conversation with Mr Pitigala, Mr Eugeni had suggested: "[s]hould the client receive compensation to his satisfaction I feel we will be able to move on and continue what is a very rewarding relationship for the bank." Coutts was clearly considering making an offer of compensation for the sake of

preserving the relationship and dealing with the complaint about the way OCR had been pitched to Mr O'Hare.

120. Mr Eugeni's note referred to the risk of losing the O'Hares' business and cause bad publicity for Coutts, unless Mr O'Hare were appeased. He proposed: "if we offered him something in the region of $200-$250k and as opposed to writing him a cheque we agreed to discount future business until this sum was achieved, that this would placate him. We could agree to disagree about the advice given and assume no blame but simply put it as a goodwill gesture given that he is such a valued client".

121. Against that background, Mr Pitigala then wrote to the O'Hares on 3 March 2009, saying their complaint was formally rejected, after Coutts had investigated it. The letter stated at length reasons why Coutts said the product had not been mis-sold, and explained its poor performance by reference to the instability and upheavals in world markets. The letter ended by saying the complaint would be considered closed after eight weeks, unless the O'Hares responded before that.

122. The next day, Mr Williams, Coutts' managing director in London, confirmed in an internal Coutts email to Mr Eugeni that an annual management charge of 0.5 per cent had been "signed off across the board". The email continued: "[w]e are allowed to consider a good will gesture up to US$250K, as per our discussions, and we will look to be as competitive as we can be with any credit deals". The email was not clearly drafted. It was purely internal and never sent to the O'Hares.

123. Mr Eugeni telephoned Mr O'Hare in Florida on 19 March 2009. Over the following months they discussed structured products and Mr O'Hare invested (through the pension scheme) £1 million in one such product provided by Barclays (i.e. a non-Coutts product), which was not fully capital protected, though the contingency in which part of the capital would be lost was remote: a 50 per cent fall in the FTSE 100 index.

124. Mr O'Hare then returned after nearly two months in Florida and visited Mr Eugeni at Coutts' Liverpool offices on 5 May 2009. They discussed various things, including his complaint. Mr Eugeni's note, which I accept as an accurate statement of the position, records:

> "Another item was just in regard to his complaint about [OCR]. We had agreed to provide him with a refund of $250,000. This was not to be paid as a refund but simply be recouped by way of a reduction in fees over a certain period of time until the amount was paid off. While Les had accepted this initially, he offered an alternate plan whereby he would invest the £11 million that he currently holds in [the CMI bond] into a TPMS with Colin McKenzie [of Coutts] and instead of us charging him the agreed ½% we would charge him a full 1% but in return we would credit his account immediately with $250,000 as opposed to clawing it back over a two to three year period initially. …."

125. Mr Eugeni concluded that item with a note that he needed to speak to Mr Williams and another Coutts manager, a Mr Nick Pollard, about Mr O'Hare's suggestion, to see whether they were amenable to it. A week later on 12 May 2009, having done so, Mr

Eugeni visited Mr O'Hare at his home. In his note, he recapped that the complaint about OCR had been "resolved by us saying that we would refund him $250k in one form or another".

126. He then said that Mr O'Hare's proposed way of doing this would be "difficult, given that centrally his complaint had been turned down …". He told Mr O'Hare, as his note records, that Mr Williams and Mr Pitigala had turned down Mr O'Hare's suggested method of refunding him $250,000. Mr O'Hare, the note records, was "not too pleased", but "realised there was nothing we could really do about it".

127. I accept that that note as fairly and accurately stating the position that had been reached in the negotiations on how to resolve the complaint, which had by 12 May 2009 narrowed to the issue as to how the benefit of $250,000 was to be bestowed by Coutts on the O'Hares. At the meeting on 12 May, Mr O'Hare accepted that his proposed method was not acceptable to Coutts. It therefore became the common position of the parties at the meeting that it was for Coutts to bestow the benefit over a period, in such manner as it chose.

128. On 20 May 2009, Mr Eugeni met Mr O'Hare at Coutts' Liverpool office, with Mr Colin McKenzie present. Mr McKenzie, of whom Mr O'Hare had and still has a high opinion, was to manage the TPMS, into which funds were to be invested. Mr Eugeni's note of the meeting is, once again, reliable and accurate.

129. On the subject of the complaint about OCR, Mr Eugeni merely recorded as "[b]ackground information", by way of recap, that: "[w]e had resolved a complaint in regards to OCR and agreed that we would discount future investment business where possible until a sum of $250k had been refunded to the client". That was consistent with the position reached at the previous meeting of 12 May 2009. There was nothing more that needed to be said on the subject and no further discussion about it occurred at that meeting.

130. The note also referred to the "de-risking and de-leveraging exercise" that had been undertaken since the last quarter of 2008, while the client had previously been "60% invested in hedge funds through various Orbita and Novus investments", which "was inappropriate". The note went on to record that Mr O'Hare was not happy with returns on cash (the base rate had by then dropped to 0.5 per cent) and "wants to be in the markets".

131. The proposed solution was the TPMS which was "to be managed on a holistic basis taking into account his numerous other holdings including private equity and NGCO". The note recorded that he "has an appetite for risk but does not like a) not knowing what or how funds are invested and b) no being able to exit the market quickly if circumstances change. … . He is happy to look at both 100% capital protected and partially capital protected."

132. Mr Eugeni recorded Mr O'Hare's appetite for risk as "medium to high". He recorded Mr O'Hare as being someone who "could be considered an experienced investor". He said (not correctly for once) that Mr O'Hare had "invested in markets for over 30 years" and (correctly, with reference to wealth available for investment) that he had "up to recently had as much as 60% of his wealth tied up in hedge funds".

133. On 23 June 2009, Mr Eugeni formally wrote to the O'Hares proposing that they invest £9.7 million into the TPMS, on terms they had discussed. Their current total wealth was stated as being about £35.5 million. The basic annual management charge was stated to be 0.5 per cent (plus VAT); the pricing policy having been "discussed with you".

134. The O'Hares signed the necessary documents and departed for Florida. On his return, Mr Eugeni met Mr O'Hare on 18 August 2009 at a restaurant at Chester Racecourse. Delays had ensued in making the investments, and Mr McKenzie was off work for medical reasons. An assistant of Mr McKenzie, Mr Daniel Shea, attempted to stand in for McKenzie during his absence, but was not very successful at making contact with Mr O'Hare who, evidently, preferred to deal with Mr McKenzie and Mr Eugeni or Ms Johnson.

135. He met Mr Eugeni on 27 October 2009. They discussed, among other things, the performance of the TPMS portfolio, with which Mr O'Hare was content. He queried the fees and Mr Eugeni provided him with a fee tariff. His note, which I accept, recorded that "[w]e had agreed a reduced fee of 0.50%". Mr O'Hare was unaware of the commission charges. Mr Eugeni made him aware of them and Mr O'Hare made no objection.

136. They then discussed future investments. I accept from Mr Eugeni's note that Mr O'Hare was coming to the view that the worst of the financial crisis was over and that he would be willing to consider investing in hedge funds again, including by leveraging. He had $4 million to invest, raised by mortgaging his US property, taking advantage of low interest rates. He discussed this at a further meeting with Mr Eugeni on 13 November 2009.

137. Mr Eugeni proposed leveraging the $4 million to about $7 million, charge "some sort of fee" but "if we did it within the [CMI bond] … we could potentially waive the upfront charge for Orbita so the only cost to the client would be the 1¼% annual management charge and the 1½% margin for the borrowing".

138. They then had a detailed discussion about structured products, which Mr O'Hare had also been discussing with Mr Shone at Goldman Sachs. Mr Shone had come up with a proposal. Mr Eugeni sensed competition but Mr O'Hare said he wanted advice on Mr Shone's proposal since he "had had a number of complaints with Kevin". It was for Mr Eugeni, his note records, to come up with an alternative, which he undertook to do.

139. In an expanded note of the same meeting, Mr Eugeni added further observations. He wrote that "we had agreed to discount further business to the tune of $250,000 in recognition of the amount of the investment business Les had done with us and his dissatisfaction with the high fees charged on a couple of investments".

140. Mr Eugeni's expanded note continues:

> "We had discounted the AMC [annual management charge] for TPMS to 0.50% per annum which would address $82k of this per annum. At this rate it would take 3 years to realise this sum though. We had therefore agreed to reduce the upfront charge on credit facilities. I have intimated to Les that the usual

commission on these facilities would be 1% and therefore a further circa £30k is being allocated towards the deficit we are to make up. This along with the waived fee for the US Mortgage, TPMS discount and fee for the Everton Developments Loan that was never drawn (£10k) means that total discounts in 2009 have totalled £96k."

Mr Eugeni does not say there that he communicated to Mr O'Hare the attribution of those amounts towards the bestowing of the $250,000 benefit, as analysed in that passage.

141. In his analysis, Mr Eugeni mixes pounds and dollars, but his evidence in the note is that $82,000 plus £40,000 in respect of the year 2009 was being allocated to performance by Coutts of its undertaking to benefit the O'Hares to the tune of $250,000. I infer that he equates $82,000 with £56,000, the latter figure being the difference between his sterling figure of "£96k" and the total of £40,000 in sterling ("£30k" plus "£10k").

142. That implies an exchange rate of 1.4643 dollars for every pound. Using the same rate of exchange, the sterling element of £40,000, equates to $58,572. If that figure in dollars is added to $82,000, the resulting figure is $140,572. It follows that, according to Mr Eugeni's evidence, as at 13 November 2009 Coutts believed that it had notionally allocated, in respect of the year 2009, just over $140,000 to performance of its undertaking to benefit the O'Hares to the tune of $250,000. That would leave a further $110,000, approximately.

143. Coutts case is broadly that this further amount, and more, was bestowed on the O'Hares through continued application of discounts, including on the annual management charge (0.5 per cent reduced from 1 per cent) for the TPMS. The O'Hares' case, by contrast, is that the discounts in question were separately negotiated and were not applied in satisfaction of Coutts' obligation to benefit the O'Hares to the tune of £250,000 (or $250,000).

144. Mr O'Hare considered the reduction in the annual charge for the TPMS from 1 per cent to 0.5 per cent to be separate and distinct from Coutts' obligation to pay to the O'Hares £250,000. He said he had separately negotiated this discount and that it did not form part of Coutts' agreement to benefit him by £250,000 by way of addressing his complaint that OCR had been mis-sold to him. He said the same logic applied to other discounts negotiated by him in respect of other instruments, and that Coutts had yet to perform its obligation to credit him with £250,000.

145. In about March 2010, Mr O'Hare informed Mr Eugeni that he was going back into business, wished to buy various businesses and needed cash to do so. Mr Eugeni wrote to Mr McKenzie that Mr O'Hare wished to borrow money and the "loanable values" (i.e. the amounts available as security for borrowing) would not suffice to cover this. Mr O'Hare instructed that the TPMS portfolio be liquidated immediately. Mr Eugeni added that this "[b]ad news" did not reflect on Coutts' management of the TPMS portfolio, but was "simply a case of the credit tail wagging the dog".

146. By the time of their next meeting, on 26 April 2010, the portfolio had been liquidated. Mr Eugeni made a note and it is again a reliable document. He and Mr O'Hare went through the latter's updated "requirements for both interest and capital over the next

couple of years". Mr O'Hare had around £12.5 million available from the liquidation of the TPMS and another portfolio. He took Mr O'Hare through presentations prepared by Mr Andy Savill, who could not make the meeting.

147. The presentations were of newly available RBS International (RBSI) products called Autopilot and Navigator. Mr Eugeni records that O'Hare was happy with those funds and said he would like to invest £8 million in Autopilot and £4 million in Navigator. Mr Eugeni "highlighted the fact that both Autopilot and Navigator had only been running for short periods and that performance prior to this had been illustrated as simulated".

148. This was a necessary corrective to misleading written product information issued by RBSI, which used the heading "Past Performance" for a product that had never performed, and the sub-headings "6 Year History of the RBS UK Navigator Index" and "10 Year History of Autopilot" to describe products that had no history. The revelation that the "history" was "simulated using actual historic market prices …" was relegated to a footnote in such small print that I infer RBSI would not mind it being overlooked.

149. Mr Eugeni's note clearly shows, however, that he brought the simulation point to Mr O'Hare's attention. I accept the latter's evidence that he did not take it in, and later became indignant – with some justification – that RBSI could publish such a description of its products. Mr O'Hare agreed to invest in the two products provided they were, as Mr Eugeni's note shows, "capital protected, provided a risk adjusted return, allowed for the 5% per annum distribution and had a loanable value in excess of the 65% that TPMS did …".

150. Mr Eugeni commented that the O'Hares had 22 per cent (of their investable wealth) in wealth enhancement products, and that they wanted to be more conservative than previously as Mr O'Hare "has gone back into business" and they were "generally derisking". He described the nature of the two products thus:

> "Autopilot reverts to cash when indicators are bearish whereas Navigator takes a directional bet [i.e. on the direction of market movement]. This is deemed as being more aggressive…. ."

151. The details of the investments were then agreed at meetings between Mr O'Hare, Mr Savill and (possibly later) Mr Richard Carney, in May 2010. Mr Carney set out the details of the products in a suitability letters dated 10 June and 16 June 2010. He estimated the O'Hares' total wealth at about £38.825 million. He recommended the investments in Autopilot and Navigator. They were both 100 per cent capital protected, unless terminated earlier than the five year term. In his letter, Mr Carney set out the details of the products.

152. He referred to Mr O'Hare in the first letter as a "very experienced investor" and, in the second letter, referred to Mr O'Hare's "discussions with myself, Ray Eugeni … and Andy Savill … regarding investing in RBS International Autopilot and RBS International Navigator structures on a bespoke basis". The amount to be invested in Navigator (the fund seen as more "aggressive") was reduced to £2 million, which was

more conservative than the £4 million originally envisaged. The amount to be invested in Autopilot remained £8 million. Both products were classified as wealth preservation.

153. The letter recorded that the O'Hares were "happy with the counterparty [RBSI] and financial strength of the chosen strategies and are willing to proceed with the outlined split of the funds". RBS, the parent of the "counterparty", was mainly owned by the government at this time, which made it unlikely, in Mr O'Hare's view, that it would be allowed to fail. This prediction has proved correct, as RBS is still trading.

154. The charges were recorded in the second suitability letter. The total invested was £10 million. This comfortingly round number makes calculating percentages easy. The "upfront commission" was 1 per cent (£100,000) out of a total of 2.5 per cent (£250,000). The balance of 1.5 per cent (£150,000) was to be "rebated back into your bond" to cover ongoing charges. A further 0.5 per cent (£50,000) was also rebated within the CMI bond "and represents an agreed reduction in set up costs by Andy Savill".

155. I interject that there is a dispute between the parties, the nature of which I have already mentioned, over whether that £50,000 represents a further instance of Coutts bestowing a benefit on the O'Hares pursuant to its agreement (whether or not legally binding) to do so, discussed above, by way of resolving the complaint about the alleged mis-selling of OCR to Mr O'Hare by Mr Shone. There is no evidence of any notification by Coutts to the O'Hares that this amount was being applied towards the $250,000 figure.

156. In the first version of Mr Carney's suitability letter, dated 10 June 2010, for the Autopilot product the "underlying indices" were listed. They included "S&P [Standard & Poors] 500" and "European & Asian Real Estate Equities". Complaint is made by the O'Hares that the Autopilot product in fact invested in Exchange-Traded Funds (ETFs), emerging markets and developed property sectors rather than directly in indices, and that Coutts did not inform the O'Hares of this.

157. Coutts says the use of funds as well as indices was necessary and justified, and that it was disclosed in a "key features" document, which I was shown. It included, under the heading "Description of the Index or Asset", against four market sectors, two of which were described as "Emerging Equity Markets" and "Developed Property Markets", words which do describe the investments made in those markets. I accept that this document was made available to the O'Hares.

158. Finally, at the end of the second letter of 16 June 2010, further sums to be paid to Coutts from the CMI bond were added, these having been negotiated with CMI. They were: an initial commission payment of 0.25 per cent of a new sum (£1.5 million) invested in the CMI bond by the O'Hares; and "trail commission" debited by CMI from the CMI bond and paid to Coutts of £23,594 per annum, representing 0.2 per cent of the total sum invested (which later rose to 0.44 per cent in 2011).

159. The two investments in, respectively, RBS International Autopilot (£8 million) and RBS International Navigator (£2 million) were made the same day, 16 June 2010.

160. Coutts' case is that they were suitable. They were both capital protected except in the event of early termination, before the end of the five year term. They were described by Mr Carney in oral evidence as follows: "A structured deposit is cash, effectively, so it falls quite clearly in the wealth preservation category. No matter what you put under the bonnet of that, it's not going to change in its risk profile". Although the amount was unusually large to place with a single counterparty, it was RBSI, which Mr O'Hare had specifically endorsed because RBS was state owned.

161. The O'Hares submitted that the 2010 investments were unsuitable: too much money was placed with one institution, and Coutts should have advised against that, and should have looked beyond itself and its parent, RBS, for suitable investments spread across the whole market, as envisaged in the O'Hares' contract. They submitted that the charges were not properly disclosed, and that it was not properly disclosed that the Autopilot product included investment in ETFs and emerging markets, not just indices.

162. Mr Eugeni's witness statement (which stood as his evidence in chief) included paragraph 63, which stated that at "around this time" (August 2010, after the two investments were made):

> "I felt that the [O'Hares'] investments were properly balanced and in the right place in terms of where they wanted to be. They were capital protected, locked in only in the medium term and had a moderate rate of return."

163. In September 2010, Mr O'Hare was discussing further structured products with Mr Eugeni. In a note from Mr Eugeni dated 24 September 2010, Mr O'Hare is described, reliably in my judgment, as having said that "given RBS' government ownership he was more than happy with them from a counterparty standpoint". Mr Eugeni let him know that if he wanted to put more money into structured products he would have to agree to be considered an "insistent client". He was happy with that and invested a smaller sum (£0.5 million) into a wealth generation product.

164. A note from a Mr John Price dated 27 November 2012 records that Mr Price informed Mr O'Hare that day that Mr Eugeni had given his notice to leave Coutts. During the conversation, Mr O'Hare mentioned that he was not happy with the Autopilot and Navigator investments within the CMI bond which, he felt (in the words of Mr Price's note) "in his opinion … were misrepresented to him when the initial advice was provided".

165. On investigating the matter, Mr Price discovered that the 25 per cent of the developed markets content of the Autopilot product (corresponding to 6.25 per cent of the whole product) had been placed in the Nikkei index instead of the S&P index which had been referred to in the two suitability letters and the "key features" documents.

166. In relation to the Navigator product, Mr O'Hare complained that he did not accept the reporting information and why it had declined 12-15 per cent in value against the run of the markets, in his view. Assisted by Mr Eugeni and contrary to his normal practice, he put his complaints in writing by letter of 10 December 2012.

167. The replacement of the S&P index by the Nikkei turned out to be the result of human error. On comparing the relative performances of the two funds over the relevant period, Coutts determined that the performance of the latter was such as to enhance slightly, not diminish, the value of the Autopilot investment.

168. Coutts agreed to honour the higher amount when, in March 2013, the O'Hares decided to "encash", i.e. liquidate the Autopilot and Navigator investments early, before the end of the five year term, which would not expire until June 2015. Mr Price of Coutts advised against this, as it meant that the capital invested was not protected. The O'Hares insisted. About £50,000 of the capital invested in the Autopilot product was lost.

169. Coutts' records of monies considered by it to have been appropriated to meet its undertaking (which it considered not to be legally binding) to benefit the O'Hares to the tune of $250,000, were undisclosed until mid-trial, unsatisfactory, and said by Mr Williams to have been prepared by Mr Eugeni or his team; yet Mr Eugeni was not asked about the then undisclosed records. They were not provided to the O'Hares contemporaneously; indeed, not until part way through the trial. Neither party asked for Mr Eugeni to be recalled.

170. It was left to a different former employee, Ms Barlow, to produce, as part of her witness statement, figures which she said she had seen from "Coutts' file". In her statement, she said they showed that "Mr and Mrs O'Hare received effective discounts with respect to fees as follows". She then set out various figures which she said were fee credits to the O'Hares, well exceeding $250,000, though without any exchange rate calculation.

171. In her oral evidence, it turned out that she had no knowledge or understanding of what the figures represented, and had taken them on trust (together with the accompanying narrative which was not in her own words) from Coutts' advisers; and that she had accepted from the advisers that the figures were correct, without understanding why. This vividly belies the notion of a former employer being in difficulty calling its former employee to give evidence.

172. Mr Williams produced a second witness statement during the trial, belatedly attempting to deal with this issue. His answers to questions on his narrative and the electronic records from Coutts system (called Quasar) were guarded, wary and verging on obtuse. Despite that, the parties to their credit managed to agree a table which, at least, explained the complex arithmetic in the figures Ms Barlow had produced but not understood. The Coutts employee who obtained and explained the figures, a Ms Katie Downes, was not called.

173. In those unsatisfactory circumstances, I am at least able to discern what Coutts says it did to satisfy the undertaking it considered not to be binding. But I do not have the benefit of answers to the questions Mr Eugeni, who was responsible for the records, would and should have been asked, had they been timeously disclosed. The evidential burden was on Coutts to show that which Coutts, not the O'Hares, asserted: that it had performed any obligation it had.

174. The new evidence did not tally fully with Mr Eugeni's contemporaneous note of the meeting of 13 November 2009, already mentioned, indicating that waiver of Coutts'

fee for the mortgage of the O'Hares' US property, and for a loan that was never drawn, formed part of its discharge of its undertaking. Mr Eugeni was not asked about that note at the trial. Mr Williams' late evidence produced the new revelation that for six months from 17 July 2009, Coutts applied a 100 per cent discount (i.e. to zero) on its charge for monies belonging to the O'Hares and held in its liquidity fund.

175. Mr O'Doherty submitted in closing that while the arithmetic in the table was agreed, the figures did not support the proposition that Coutts was performing its obligation, if (as he submitted) the obligation existed. He fairly and without exaggeration described Coutts' figures as "a mess". Even on Coutts' case, he said they did not show discounts totalling $250,000 being applied and then stopping when that figure was reached. He submitted (in his written closing, paragraph 54) that the figures showed overcharging (or under-discounting) even on Coutts' case.

176. Furthermore, the sums mentioned in the records are all in sterling and there is no evidence of a contemporaneous exchange rate calculation; though Mr Williams (paragraph 19 of his first statement, *ex post facto*) posited that based on the figures in paragraph 35 of Ms Barlow's statement, the discount amounted to $252,282.81, based on an exchange rate taken from a website (www.xe.com) as at 3 June 2013 - a date the use of which he did not further explain, presumably intended to coincide roughly with the end of the O'Hares' active relationship with Coutts.

177. That exchange rate calculation, speculative as it was, is not reflected in any contemporary Coutts records and is based on a sterling figure that includes Ms Barlow's figure of £40,525 at her paragraph 35c, which is not addressed at all in Mr Williams' late second statement, nor by Ms Downes in the documents produced late. That figure was said by Ms Barlow to represent the fact that "[i]n relation to various credit facilities, Coutts waived its fees and applied a reduced margin", for example in one unexplained instance in March 2013, when there was a discount from 0.5 per cent to 0.4 per cent.

178. Ms Oppenheimer accepted that the contemporaneous records produced late, during the trial, were disclosable documents and said their non-disclosure had been an oversight. She accepted that Mr Eugeni had not been asked about them, having given his evidence before the documents were produced by her client. She submitted, nonetheless (written closing, paragraph 59), that they were clear evidence of Coutts doing what it said it would do: discount future business by an amount up to $250,000, in so far as such business was done, but not otherwise.

179. Some difficulty arises from the fact that Mr Eugeni did not have the opportunity to deal with this issue in his evidence, but neither party applied to recall him. Mr Williams' cross-examination included the following exchange with Mr O'Doherty:

> Q. But I think what you said this morning, just a moment ago, is that this 100 per cent discount was linked to the 250,000 goodwill gesture. Is that right or is that wrong?
>
> A. I believe it is. However, you can see later in the statement some of the comments that I make around it. It's not normal practice to have discounted at this level and this aggressively, but again, that was a conversation between Les

and Ray, and Ray was very much in charge of working with this to make sure that those refunds were given.

Q. Well, let's not shovel all the blame on to Ray. We see clearly from your email that you are involved in the negotiation of the compromise, the goodwill gesture. You must have known whether or not this 100 per cent discount was linked to the goodwill gesture or not?

A. So as I said yesterday, this was about rebuilding the relationship with Mr O'Hare from Mr Eugeni, we've given him the licence to look at discounting fees up to USD 250,000, he has taken that forward and, looking at this, this seems out of kilter with what we would normally have done and relates to the overall TPMS' portfolio, which was the starting point of those discounts, and that's shown there from the narrative in the paragraph 6.

180. It is clear from that exchange that Mr Eugeni was the protagonist for Coutts in taking responsibility for applying the discounts. It was not suggested to either him or Mr O'Hare that the two had any conversations about when and how particular discounts or reductions in fees or waivers of fees would count or not count towards the $250,000. This is surprising given the rejection of Mr O'Hare's proposal for a cleaner solution whereby the sum would simply be credited to him.

181. The rationale for his proposal had been transparency, i.e. that the parties would know where they stood in relation to the deal. Good banking practice required no less, rather than the exasperating opacity of the transactions and their interpretation. I would have expected Coutts to have drawn to Mr O'Hare's attention particular instances of Coutts applying discounts or credits towards the $250,000 figure. I find no evidence of that.

182. Nevertheless, on the evidence I have, unsatisfactory as it is, I find that amounts in excess of the sterling equivalent of $250,000 were discounted or credited to the O'Hares in the period from May 2009 onwards. Whether that was done in performance of Coutts' obligation, if any, under the settlement agreement, or whether it was done in pursuance of separately negotiated arrangements is a different question, to which I will return below.

183. I have evidence from Mr Eugeni's note that, as at 13 November 2009, Coutts had allocated around $140,000 towards the satisfaction of what it called its goodwill gesture, in respect of the year 2009. I have further evidence that £50,000 was discounted from Coutts' charges for the Autopilot and Navigator investments, representing a reduction of 0.5 per cent from the usual 1 per cent.

184. If you take (purely as a rough and ready approximation) the same rate as that apparently used by Mr Eugeni about six months earlier (1.4643 dollars for every pound), that equates to a little over $73,000, which I conservatively round down to $70,000 because of exchange rate uncertainty, bringing the total amount up to $210,000 and leaving a further $40,000 to come, in order to reach the figure of $250,000.

185. If you then add the discounts evidenced in the table of agreed amounts, it seems tolerably clear that the amounts there represented, exceed the equivalent of $40,000 and that therefore the aggregate credits exceed $250,000, without it being necessary to perform further arithmetic. Although Mr Eugeni was not asked about the point, and should have been, I accept Mr Williams' evidence that Mr Eugeni took the lead in recording the discounts internally on the Quasar system, and that he or his team made an attempt to do so.

186. He was clearly responsible for two notes on the Quasar system produced by Ms Downes. These provide evidence of recording internally the discount of 0.5% in respect of the TPMS, and the discount lasting 6 months, from 1 per cent down to zero, in respect of "liquidity, cash and deposits". I am satisfied that those entries provide contemporary support for the rationale underlying the entries on the Quasar log which founded the calculations ultimately leading to the table of agreed amounts bestowed on the O'Hares.

187. The claim was brought in November 2013, after the O'Hares had instructed and obtained a report from Mr Ian Barton, a director of Mazars Financial Planning Limited (MFP). Ms Oppenheimer criticised that procedure, saying the expert must have prejudged the issues by opining before seeing Coutts' response to the claim. I think this is a merely forensic point. Had the claim been unsupported by expert evidence, Coutts might have complained that there was no expert evidence to support negligence under the *Bolam* test.

188. The case proceeded towards trial in the usual way, with exchanges of pleadings, disclosure and witness statements, and expert evidence. It is unnecessary to go through the procedural history. Coutts instructed Mr David Croft, a director of GBRW Limited. Both experts have considerable experience in advising on banking and financial markets and investments. Both did their best to assist me, for which I am grateful.

189. They produced a main report each; Mr Barton produced certain supplemental reports and memoranda, and there was a joint statement dated 27 May 2016, agreeing on little. They did not reassure me that there is a clear consensus within the private banking and financial services industry about the boundaries that delimit the proper role of a financial adviser, and the extent to which use of persuasion to run risk, and thereby achieve sales, is acceptable practice.

190. They agreed that the COBS rules applied from 1 November 2007. The rules may provide a useful starting point for determining what investments are suitable, but do not by themselves define whether an investment is suitable in particular factual circumstances. They disagreed about whether the investments at issue were too risky to be suitable, as Mr Barton considered; or whether they were suitable for investors with the wealth, experience, sophistication and risk appetite of the O'Hares, as Mr Croft thought.

<u>The Issues: Reasoning and Conclusions</u>

191. I come next to my reasoning and conclusions in this case. The case was argued in various ways and founded on various causes of action, as mentioned above. Very broadly, the main issues are, in chronological order:

(1) whether the 2007-8 investments were suitable, or whether it was negligent to recommend them;

(2) whether Coutts undertook a binding legal obligation to resolve the complaint about OCR, and if so what it was and whether it was fully or partly performed;

(3) whether the 2010 investments were suitable, or whether it was negligent to recommend them; and

(4) if the issue arises, the measure of damages and the quantum of damage suffered, if any.

192. Before addressing those issues in turn, it is convenient to address certain matters common to the first and third issues. The first is the nature of the O'Hares' contract, under which Coutts undertook to advise them in their personal capacity. The O'Hares' contract was not like that concluded for the pension scheme, requiring Coutts to manage the scheme's investments in accordance with an agreed investment profile.

193. The O'Hares' contract required Coutts to "work with" the O'Hares "to understand your circumstances, objectives and requirements to enable us to develop an investment strategy for [them]". It was not limited to any portion of the O'Hares' wealth, whether available for investment or otherwise. But there was no obligation to provide a constant stream of advice and recommendations. The obligation was to "provide you with our advice and recommendations in writing at such time or times as we consider appropriate or as agreed between us".

194. Mr O'Doherty submitted that Coutts' obligation to "develop an investment strategy" meant that it had to produce a holistic and coherent plan for the investment of the whole of the O'Hares' wealth that was available for investment, excluding wealth that was not, such as the value of their two residential properties and, until May 2007, the engineering business. That, said Mr O'Doherty, included an obligation to research and recommend non-Coutts products as well as Coutts products.

195. I respectfully disagree with that submission. Read in its proper context, the obligation to "develop an investment strategy" meant no more than that Coutts would liaise with the O'Hares and recommend products as and when agreed or as and when Coutts considered it appropriate to recommend a particular product, which could be a Coutts product or someone else's product. The advice and recommendations had to be put "in writing", but obviously that did not preclude prior verbal discussions, such as those that took place.

196. I reject Mr O'Doherty's overarching submission that Coutts failed in its duty to provide an investment strategy for the O'Hares. Nor was it a breach of contract as such that Mr Shone and Mr Thomas did not recommend non-Coutts products, although Mr Eugeni did. The commercial basis of the O'Hares' contract, from Coutts' perspective, was that it was a platform enabling it to sell its products to the O'Hares, as well as the opportunity to earn commission from third party products sold to them.

197. The obligation on Coutts was to work with the O'Hares to develop an investment strategy and advise from time to time on investments to implement that strategy. That is what happened. Mr Shone and later Mr Eugeni held frequent discussions with Mr O'Hare about what the strategy should be and what investments should be made. Subject to the question whether the five investments at issue here were suitable or negligently recommended, Coutts performed its contractual obligation.

198. The duty it undertook to advise "about… the kinds of investment that would in our view be most appropriate for you" meant no more than that Coutts would need to discuss and consider the O'Hares' objectives, wealth and willingness to take risk and, in the light of those things, advise whether and to what extent they should choose to invest in cash, bonds, structured products, equities, and so forth. Again, that is what happened.

199. It is common ground that the contract included an implied duty, and the law of tort imposed an identical duty, to use reasonable skill and care when recommending investments. In the financial context, this is often paraphrased by saying that the recommended investments must be "suitable". The *Bolam* test applies (derived from *Bolam v. Friern Barnet Hospital Management Committee* [1957] 1 WLR 582).

200. The question is "whether the defendants, in acting in the way they did, were acting in accordance with a practice of competent respected professional opinion"; that is to say:

> "in accordance with a practice accepted as proper by a responsible body of … men skilled in that particular art."

(McNair J's address to the jury in *Bolam* at 587, omitting the word "medical").

201. So far as the giving of advice is concerned, the standard is that of a reasonably competent practitioner in the relevant sector of the profession: *Matrix Securities v. Theodore Goddard (a firm)* [1998] PNLR 290 per Lloyd J at 321E. The relevant sector here is private banking. The question is whether "reasonable practitioners professing the expertise of the defendants could properly have given advice in the terms they did" (per Roth J in *Barker v. Baxendale Walker Solicitors a firm)* [2016] EWHC 664 (Ch), at paragraph 126).

202. In the medical context, the explaining of risks to a person to whom advice is given has recently been held not to be governed by the *Bolam* test: *Montgomery v. Lanarkshire Health Board* [2015] AC 1430, per Lord Kerr and Lord Reed JJSC (with whom the other Justices agreed) at paragraphs 81-88. Rather, the duty is normally:

> "to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments" (*ibid.* at paragraph 82).

The test of materiality is:

> "whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor

is or should be aware that the particular patient would be likely to attach significance to it" (*ibid.*).

203. More recently in *Baird v Hastings* [2015] NICA 22, the Court of Appeal of Northern Ireland, dealing with a claim against a solicitor for allegedly negligent conduct of conveyancing transactions, noted the Supreme Court's decision in *Montgomery* and commented that while the relationship of doctor and patient is not a true analogue of that of a solicitor and client, "as in the medical context, the advisory role of the solicitor must involve proper communication and dialogue with the client" (per Girvan LJ giving the judgment of the court, paragraph 34).

204. In the context of investment advice too, there must be proper dialogue and communication between adviser and client. In respectful disagreement with Ms Oppenheimer's submission, I do not think the required extent of communication between financial adviser and client to ensure the client understands the advice and the risks attendant on a recommended investment, is governed by the *Bolam* test.

205. While Ms Oppenheimer is right to point to differences between the medical and financial contexts, they are not such as to lead to the conclusion that how much to say to a client is a question to be decided according to whether the adviser acted in accordance with a practice accepted as proper by a responsible body of persons skilled in the giving of financial advice.

206. The reasoning in *Montgomery* is not, in my judgment, irrelevant outside the medical context. The expert evidence in the present case tends to indicate that there is little consensus in the financial services industry about how the treatment of risk appetite should be managed by an adviser (a point to which I shall return). As in the medical context, the extent of required communication with the client should not depend on the attitude of the individual adviser.

207. Furthermore, as Ms Oppenheimer accepted, the regulatory regime is strong evidence of what the common law requires; since "the skill and care to be expected of a financial adviser would ordinarily include compliance with the rules of the relevant regulator" (per HHJ Jack QC in *Loosemore v. Financial Concepts (a firm)* [2001] Lloyds Rep PN 235, 241; see also *Green v. Royal Bank of Scotland (Financial Conduct Authority intervening)* [2014] Bus LR 168, per Tomlinson LJ at paragraph 18).

208. A duty to explain in terms not dissimilar to the *Montgomery* formulation is found in the COBS rules. I will not set them out here; see, in particular, rule 2.2.1(1) and 2.2.2(1)(b); rule 4.2.1(1); rule 9.2.1, 9.2.2, 9.2.3 and 9.2.6. I would find the content of those rules very difficult to square with the application of a conventional *Bolam* approach. They do not include reference to a responsible body of opinion within the profession. Compliance with them is ordinarily enough to comply with a common law duty to inform, forming part of the duty to exercise reasonable skill and care; while breach of them will ordinarily also amount to a breach of that common law duty.

209. It is common ground that, as well as being strong evidence of a breach of the common law duty of skill and care, breach of those and other COBS rules is actionable at the suit of a private individual (see, at the material times, the former section 150 of the Financial Services and Markets Act 2000, since replaced by section 138D; read with regulation 3 of the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001).

210. In the different context of remoteness of damage, and with reference to the "COB" rules, the predecessor of the COBS rules, Rix LJ made observations in *Rubenstein v. HSBC Bank* [2013] PNLR 9, at paragraph 115, which I find very helpful:

> "… the statutory purpose of the COB regime pursuant to FSMA is to afford a measure of carefully balanced consumer protection to the 'private person'. That purpose is elucidated not only by the content of the COB rules themselves, but also by s.2 of FSMA, which speaks of 'the protection of consumers', i.e. 'securing the appropriate degree of protection for consumers' (s.2(2)(c) and s.5(1)) as among the regulatory objectives. The rules to be created by the regulatory authority are to be informed by a proper regard for 'the differing degrees of risk involved in different kinds of investment … the need that consumers may have for advice and accurate information … the general principle that consumers should take responsibility for their decisions' (see s.5(2)). …. These basic principles and purposes are reflected in the imposition under the COB rules of onerous duties (albeit in a well conducted operation these should not be difficult to achieve and they are couched for the most part in terms of 'reasonable care') designed to ensure that the investment adviser understands his client and his client understands risk.

211. The same judge, after referring to cases of common law negligence, said this at paragraph 82 in *Zaki v. Crédit Suisse (UK) Ltd* [2013] EWCA Civ 14, [2013] 1 CLC 341:

> "Those were cases in the common law of negligence. I would accept that where as here the issue arises in the context of statutory duty, it is possible that the statutory requirements may to a greater or lesser extent mould their own solutions, so as to give greater weight to requirements of process. Nevertheless, what is aimed at is the provision of suitable advice (COB 5.3.5) or suitable lending arrangements (COB 7.9.3), and not merely suitable advice or lending arrangements in the abstract, but suitable advice or arrangements for the client and his proposed investments. The complex rules are an attempt to hold the balance between the parties fairly, giving weight both for the need to protect investors from ignorance or even from themselves *and* for the need to permit ultimate autonomy to the properly informed investor to make and take responsibility for his own mistakes (see FSMA section 5(2)). Where it is ultimately to be found, giving all due weight to the statutory requirements, both of form and substance, that personal recommendations or lending arrangements are suitable, they cannot be rendered unsuitable by some incidental and essentially immaterial failure of mere form."

212. In the present case nothing turns on any question of process; failures of process do not matter unless they lead to a failure of substance. "The need for an explanation of the risks has … to be seen in the overall context of suitability, bearing in mind the client's investment objectives, risk tolerance, knowledge, experience and financial standing" (per Cooke J in *Al Sulaiman v. Crédit Suisse Securities (Europe) Ltd* [2013 EWHC 400 (Comm) at paragraph 19).

213. On the facts here, the COBS rules relied on by the claimants (listed at paragraph 31 of Mr O'Doherty's opening skeleton argument) add nothing to the obligations implied into the O'Hares' contract and imposed by the common law of negligence, to ascertain the clients' requirements and objectives and to advise on, and explain and inform them, about investments that are suitable. The factual history spanned more than a decade and there were countless discussions between Coutts' private bankers and Mr O'Hare about their investments.

214. Those discussions were very full and were supplemented by letters, emails and presentations. The misleading product information about the two RBSI structured products was corrected orally by Mr Eugeni, as already noted. I do not accept that there was any lack of adequate communication and explanation given to the O'Hares over the years. The first and third issues therefore turn on whether the 2007-8 investments and the 2010 investments were objectively suitable and not on any failure to inform the O'Hares fully about them.

Were the 2007-8 investments suitable, or was it negligent to recommend them?

215. As I have found, the O'Hares were wealthy and intelligent, but not particularly sophisticated or experienced investors. Mr O'Hare was astute in business and willing to take risk, but would always balance risk against caution. For example, he did not favour cash investments in 2010 when interest rates stood at only 0.5 per cent. On the other hand, their investments were relatively conservative before Mr O'Hare's dealings with Mr Shone.

216. The latter's persuasiveness influenced Mr O'Hare in the direction of taking considerably higher risk than hitherto. This is not surprising. The terms of the O'Hares' contract meant that Coutts had to sell products to them (or earn commission from third party sales to them) for the relationship to be commercially viable for Coutts. Mr Shone succeeded in making the relationship profitable for Coutts.

217. As I read the authorities and the COBS regulatory scheme, there is nothing intrinsically wrong with a private banker using persuasive techniques to induce a client to take risks the client would not take but for the banker's powers of persuasion, provided the client can afford to take the risks and shows himself willing to take them, and provided the risks are not – avoiding the temptation to use hindsight – so high as to be foolhardy. The authorities include mention of the adviser sometimes having to save the client from himself, but also of the principle that investors take responsibility for their investment decisions including mistaken ones. The duty of care must reflect a balance between those two propositions, which pull in opposite directions.

218. Thus, an investment adviser must not take advantage of a reckless gambling streak in a client, nor advise him to hazard all he has in a very high risk product. But I do not think it is the law that a private banker breaches his duty of care if, without

irresponsibly encouraging foolhardiness, he advises a client to take higher investment risk than he would otherwise take. I do not see that proposition in the authorities. I do not think it can be right. In my judgment, the authorities do not exclude the proposition that in an appropriate case, advice from a private banker may condition the client's risk appetite, rather than the other way round.

219. A lawyer may advise a cautious client who is minded to accept a very low offer of settlement, not to do so, on the basis that the risk of going to trial is well worth running (even though the lawyer will certainly take more payment from the client for going to trial). Indeed, it could in principle be negligent for a lawyer not to give such advice, if the offer of settlement were sufficiently derisory and the merits at trial sufficiently overwhelming.

220. Similarly, a private banker may have a client whose untutored risk appetite (at a time of very low interest rates for cash investments) is so risk-averse that he would lose out on a bonanza of high returns unless advised about the virtues of equities during a time of sharply rising share prices. In principle, an adviser who failed to advise the client to take more risk than he had hitherto taken, might even be negligent.

221. Neither of the experts ruled out this possibility, as a matter of acceptable banking practice; though both tended to the view that it was safer for the adviser to err on the side of caution. From the expert evidence, it is not clear that there is (or was in 2007 and 2010) any clear consensus on such issues within the industry. I note that the COBS rules do not rule out the use of persuasion, though they do stress the need for full information to be given, and conflicts of interest to be properly managed.

222. In this case, Mr Shone knew the O'Hares would receive about £13 million net from the sale of the business in mid-2007. The sub-prime crisis and the subsequent banking crisis was not yet in full swing. The O'Hares were ready to invest about £10 million. Although that was a large proportion of their investable wealth, they would remain wealthy beyond the dreams of most ordinary mortals even if they were to lose a substantial portion of it.

223. The extent of the financial crisis which took hold during the year that followed was not predicted by many private bankers and it cannot be that all who failed to predict it were incompetent. The O'Hares might well have made significant gains from investing in the Novus products, as other investors in hedge funds had done. The products were spread across numerous hedge funds, which alleviated the extent to which the "eggs were all in one basket".

224. I must also bear in mind that, as I have said, the exchanges of information and discussions between Mr O'Hare and Mr Shone (and to a lesser extent, from 2007, Mr Thomas), were very extensive and full. Although I accept Mr O'Hare's proposition that Mr Shone played down the risks of the Novus products by likening them to OCR, the presentations in September and November 2007 left no room for any suggestion that Mr O'Hare did not fully understand the Novus products.

225. That included an understanding of their higher risk classification as wealth generation products, albeit that Mr Shone probably played down the significance of the classification; and Mr O'Hare was willing to accept that the risk was worth taking. It is significant that Mr O'Hare did not complain at the time that the Novus products had

been mis-sold to him, unlike in the earlier case of OCR. He did consider doing so, but Mr Eugeni was able (in his phrase) to nip that idea in the bud.

226. The fullness of the information Mr O'Hare was given meant it was impossible to complain that the products were mis-sold to him. That explains why he later told Mr Eugeni that unlike in the case of OCR, he was willing to take the performance of the Novus products "on the chin", having gone into them with "eyes wide open". That is consistent with the view that the O'Hares cannot be considered as ignorant investors who needed saving from themselves and their own ignorance.

227. All these points tend to support Mr Croft's view that competent practitioners at the time – avoiding hindsight - would not regard investment in the Novus products as foolhardy for persons in the position of the O'Hares, with their wealth and investment objectives. I conclude that this was a case where responsibility for the investment decision, even though taken under the influence of Mr Shone's salesmanship, could fairly be taken by the investors and that the Novus investments were not objectively unsuitable.

The settlement agreement issues: did Coutts undertake a binding legal obligation, and if so what was it, and was it fully or partly performed?

228. Ms Oppenheimer submitted that the settlement agreement was not binding; it was merely a "gesture of goodwill" made without any intention to create legal relations. She also submitted that the content of any obligation undertaken by Coutts was too vague to be enforceable and was void for uncertainty. Mr O'Doherty submitted that the settlement agreement was a classic case of parties agreeing to a binding compromise of a dispute.

229. Ms Oppenheimer relied on the two judge Court of Appeal decision in *Clarke v. Nationwide Building Society* (1998) 76 P&CR D5 (Millett and Chadwick LJJ), in which a refund by a building society, described as a "gesture of goodwill", of the fee (£105) paid by a house purchaser for an allegedly negligent survey "in full and final settlement of this matter" was held, in the context of the correspondence, not to be an offer capable of acceptance; with the consequence that the cashing of the cheque by the purchaser did not preclude him from later suing in respect of the survey.

230. Chadwick LJ characterised the offer of a refund as a gratuitous statement of intent rather than a contractual offer to settle all claims arising from the matter. Millett LJ described the offer of a refund as intended to perform a moral obligation and close the correspondence. The decision clearly turns heavily on its facts and context. There was no evidence of a prior continuing contractual relationship between the parties before the purchase of the property. The plaintiff was a consumer obtaining mortgage finance in a one-off purchase transaction.

231. In my judgment, *Clarke v. Nationwide Building Society* is not authority for any general proposition that offers made as a "gesture of goodwill" are not capable, on acceptance, of binding the offeror. As Lord Steyn famously said, in the law context is everything. A gesture of goodwill can be binding or not binding, just as a payment said to be made "ex gratia" can be binding or not (*Edwards v. Skyways* [1964] 1 WLR 349). It all depends on the circumstances.

232. Where an offer is made in the course of pre-existing legal relations, the onus on the party claiming not to be bound is a heavy one: per Megaw J in *Edwards* at 355, which is among the well-known cases cited by Elias LJ in *Dresdner Kleinwort v. Attrill* [2013] ICR D30, [2013] EWCA Civ 394, at paragraphs 61-64 (see also paragraph 89, approving the judge's analysis based on them). In this case, I do not think Coutts comes near to discharging the heavy onus on it to show that, determining the matter objectively, the parties did not intend to be legally bound by the settlement agreement.

233. The reasons are obvious. There was a pre-existing contractual relationship between the parties which had lasted about six years. The parties had conducted an ongoing commercial relationship during that period. The relationship was threatened by Mr O'Hare's grievance about the manner in which OCR had been sold to him by Mr Shone. Coutts wished to preserve its commercial relationship with the O'Hares, and was prepared to part with money to do so.

234. The complaint about OCR had been formally rejected by Coutts, just as a party who settles a litigious issue before trial often first serves a defence denying liability. The prior denial of liability does not make the subsequent compromise any less binding. Here, there were several meetings at which the terms of the settlement were discussed. There was consideration moving from both sides; the O'Hares' forbearance to sue, and Coutts' willingness to pay them for it and thereby help preserve ongoing commercial relations. Apart from the use of the words "gesture of goodwill", the facts could not be much more different from those in *Clarke v. Nationwide Building Society*.

235. I am satisfied that Coutts undertook a binding obligation. What was that obligation? In my judgment, it was intelligible and not void for uncertainty. It was to bestow a future benefit on the O'Hares adding up to an amount not less than $250,000 during the period of their future contractual relations, by applying credits or discounts against amounts otherwise chargeable. I have already found that the agreed currency was dollars not pounds and that Mr O'Hare's genuine but contrary recollection is mistaken.

236. Mr O'Doherty submitted that Coutts' obligation remained unperformed; the discounts that were subsequently applied were separately negotiated and not applied in performance of the obligation. Ms Oppenheimer disagreed, and I find myself constrained to accept her submission that the obligation has been performed. I have explained above that the sums applied by way of discount exceed, on the evidence, $250,000. I cannot find any basis for not counting those sums towards performance of Coutts' obligation.

237. Mr O'Hare, during the negotiations, in vain sought clarity about the transfer of $250,000 from Coutts to him. He wanted it in a lump sum. Good banking practice should have led to clarity about what sums were, or were not, to count towards the $250,000. But Coutts did not want that and did not offer it. Evidently, it preferred the opaque position presented at trial, which was the antithesis of the transparency Mr O'Hare had sought.

238. Thus, there was no agreement for an accounting mechanism or a process for designating or appropriating specific discounts towards performance of the obligation. I do not think an obligation on Coutts to provide such a mechanism or process can be

implied into the settlement agreement. It is not enough that good banking practice required one. Coutts evidently did not. Indeed Mr O'Doherty, rightly in my view, did not contend for one.

239. I am therefore unable to agree with Mr O'Hare's proposition that the discounts he negotiated in respect of various investments, including the TPMS, were separate and distinct from Coutts' obligation to bestow $250,000 worth of benefit on him and Mrs O'Hare. I am sure that he genuinely believed they were separate and distinct but, objectively, he was not entitled so to conclude as a matter of contractual relations. The obligation was to discount future business. That was done.

240. I have sympathy for the O'Hares because the deal was a poor one for them: in return for dropping the complaint about OCR, Coutts offered only discounts it might very well have been prepared to offer anyway. But I recognise that Mr O'Hare agreed to the terms and did not press further his alternative suggestion that he be credited with a lump sum of $250,000. In the absence of separate agreement for subsequently negotiated discounts to be excluded from the sum, he cannot assert that they were excluded from it. I must therefore dismiss the claim under the settlement agreement. It has been performed.

Were the 2010 investments suitable, or was it negligent to recommend them?

241. In my judgment, the O'Hares do not succeed in showing that the 2010 investments in the RBSI Autopilot and Navigator products were objectively unsuitable, even though they involved placing a large amount of money, £10 million, with a single banking institution, RBSI. The O'Hares' fundamental difficulty is that the 2010 investments created a significant reduction in the proportion of their investable wealth that was exposed to the risk associated with products classified as wealth generation.

242. Indeed, short of early termination before expiry of the five year term, and short of insolvency of RBSI, the capital was protected. This comfort explains why these structured products were not regarded by Coutts, Mr Eugeni or Mr Carney as wealth generation or high risk products. Mr Eugeni gave unchallenged evidence quoted above, at paragraph 63 of his witness statement, not that he was negligent, but that after the 2010 investments were made, he regarded the portfolio as suitable and properly balanced.

243. When in 2008 Mr Eugeni took over the relationship from Mr Shone, he regarded the portfolio as over-exposed to risk, at a time when the severe economic turbulence of the time had taken hold. His evidence was that it was appropriate to "derisk" the portfolio. He advised on how to achieve this. The result was the replacement of the Novus fund investments with the TPMS and subsequently the 2010 investments in the two RBSI structured products.

244. In addition, the 2010 investments served the specific purpose of adding to the loanable values within the portfolio, enabling the O'Hares to borrow more than previously, for the purpose of financing new business transactions Mr O'Hare wished to undertake. This was the reason for the liquidation of the TPMS, as communicated by Mr O'Hare to Mr Eugeni, and dubbed by the latter "the credit tail wagging the dog". There is nothing wrong with the logic.

245. There is no suggestion that Mr Eugeni downplayed the risk of the 2010 investments. Complaint is made that the product information was simulated, and that it was not disclosed that the products lacked any track record; but Mr Eugeni was careful to point that out to Mr O'Hare, who cannot complain that he was misled by the product information, given that the simulation of the data was explained to him by Mr Eugeni, even though he did not properly absorb and digest the explanation and later became aggrieved about the simulation of the data and the misleading product information.

246. It is contended quite simply that Coutts should have advised against placing so much money with a single institution, making the "counterparty risk" too high. But Mr Eugeni and Mr O'Hare discussed this point fully. The latter was fully aware that the capital would be at risk if RBSI should become insolvent but was happy to run that risk because, he reasoned, RBS was effectively state owned. I do not think it was negligent of Coutts not to "save him from himself" by talking him out of this confident attitude.

247. I reject also the suggestion that insufficient information about the products (including costs and charges), and insufficient comparative information about alternatives, was provided. Mr O'Hare's relations with Mr Eugeni were fruitful and their discussions constructive. Mr Eugeni's notes show full consideration by him of Mr O'Hare's requirements, and full and adequate disclosure about the products recommended in order to meet them.

248. The further complaint made is that the investment content of the Autopilot product was misrepresented, because it included investment in ETFs, emerging markets and developed property sectors rather than directly in indices, and that Coutts did not inform the O'Hares of this. If this complaint were proved, it might have been better framed as a claim for an operational breach of contract, i.e. the breaching of an obligation to invest in indices rather than ETFs, emerging markets and developed property sectors, rather than as a complaint of unsuitability of the investment.

249. But I do not think the O'Hares can succeed in proving that the product was misrepresented as alleged. Mr Carney's two suitability letters in June 2010 were supplemented by the "key features" document, which included, under the heading "Description of the Index or Asset", against four market sectors, two of which were described as "Emerging Equity Markets" and "Developed Property Markets", words which do describe the investments made in those markets.

250. Finally, complaint is made about the substitution of the Nikkei index for the S&P index during the period of performance of the Autopilot investment. This was an operational breach of contract in the administration of the investment, not a reason why it was unsuitable. The breach did not cause any loss, as shown by the action taken when it was discovered on investigation. There was even a small gain because Coutts honoured the amount recoverable on liquidating the investment based on the higher value represented by the performance of the Nikkei as compared with the S&P index.

251. For those reasons, I dismiss the claim founded on the proposition that Coutts was negligent in respect of its recommendation of the 2010 investments in the Autopilot and Navigator products. That aspect of the overall claim was bound to be an uphill

struggle given the decision of the O'Hares to call Mr Eugeni to give evidence of what was effectively a cogent defence of his own advice to them.

The measure of damages and the quantum of damage suffered

252. It follows from the above that the claim has to be dismissed and the issues concerning the measure of damages and the quantum of damage do not arise. I will therefore deal with them only in the briefest terms.

253. If I had found that the 2007-8 investments were objectively unsuitable and actionable, I would ordinarily have determined that the appropriate measure of damages would be the contract measure, which seeks to put the innocent party in the position he would have been in if the contract had been properly performed.

254. The Court of Appeal has recently confirmed in *Wellesley Partners LLP v Withers LLP* [2016] 2 WLR 1351 that where concurrent causes of action in tort and contract arise, the test of remoteness should be the more restrictive contract test, since the contract reflects the consensus between the parties which ought to be reflected when dealing with issues of remoteness (per Floyd LJ at paragraph 80).

255. However, in the present case, it is common ground that in the case of the 2007-8 investments (but not the 2010 investments), the O'Hares' cause of action in contract is statute-barred, because the cause of action arises on the date of the breach and not when loss is suffered. If the claim had succeeded, the successful cause of action would be negligence or breach of statutory duty or both.

256. If the measure of damages for the cause of action in tort had been more favourable to the O'Hares than under the statute-barred cause of action in contract, I would not have allowed them to benefit from the more favourable measure of damages in tort, since that would mean they would be benefitting from their failure to bring the contract claim less than six years before the cause of action in contract arose.

257. In the event, however, I doubt whether the measure of damages in tort would be different from the contract measure. Loss of profits that would have been earned from suitable investments (assuming the 2007-8 investments, contrary to my decision, were negligently advised and unsuitable) would be recoverable in tort: see *Parabola Investments Ltd v Browallia Cal Ltd (formerly Union Cal Ltd)* [2011] QB 477, CA, upholding Flaux J's judgment and reasoning to that effect (albeit in a deceit case, but citing among other authorities *Esso Petroleum Co Ltd v Mardon* [1976] QB 801, a negligent misstatement case).

258. As regards the quantum of damage suffered, if I had found that the 2007-8 investments and the 2010 investments were unsuitable and negligently advised, I would have been prepared to accept, as a starting point for calculating the damage suffered, the reasoning of Mr Barton and his illustrations based on the use of the MFP portfolio, as a reasonable proxy for more cautious investments that would have been made by the O'Hares if those actually made had been found negligently advised.

259. I would not have accepted Ms Oppenheimer's and Mr Croft's objection that use of that relatively cautious portfolio is inappropriate as a measure of loss suffered, because its investment strategy is more cautious than the O'Hares wanted. The

premise of the contention that the MFP portfolio could legitimately be adopted as a starting point for calculating loss must be the proposition that the investments actually advised were (contrary to my decision) too risky.

260. There is therefore nothing wrong with using a lower risk model to calculate loss. The risk level of Mr Barton's approach does not seem to me to be lower than the amount of risk the O'Hares were taking before they started investing through Coutts. However, I would not have computed the actual damages only using Mr Barton's modelled calculations. The exercise would have to be more nuanced and I would probably have applied a discount to reflect ordinary market and other contingencies. I do not attempt to perform any of the calculations here, since it would be disproportionate to do so.

Conclusion

261. For the reasons given above, the issues concerning damages do not arise, and the claim must, not without considerable sympathy for the O'Hares, be dismissed in its entirety.