IN THE SUPREME COURT OF GIBRALTAR

Case Number 2012-G-179

BETWEEN:

(1) WILLIAM VAN GEENS

(2) BECKETT LTD

(A company incorporated in Belize)

Claimants

-and-

JYSKE BANK (GIBRALTAR) LTD

Defendant

Mr Charles Salter and Mr Andrew Cardona for the Claimants

Mr Paul Greenwood and Ms Emma Labrador for the Defendant

JUDGMENT

JACK, J:

1. On 13th September 2007 depositors queued to withdraw their savings from Northern Rock. It was the first run on a British bank since 1866. The flames of the economic catastrophe which was to engulf the world claimed its first victim. The firestorm spread to the United States of America. On 15th March 2008 Bear Stearns was rescued by JP Morgan. The fire worsened. Over the weekend of 13th and 14th September 2008, Hank Paulson, the United States Treasury Secretary, decided that government money would not be extended to bail out Lehman Brothers. On 15th September 2008 the firm filed for bankruptcy. This turned the blaze into an inferno. Among those burnt in the conflagration was William Van Geens, who lost his life savings.

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2. The Gibraltar subsidiary of the Jyske Bank gave the advice which resulted, Mr Van Geens says, in his putting money into a wholly ruinous investment. The bank persuaded him, a semi-retired 61 year old, to borrow monies totalling €500,000 in loans denominated in Swiss francs and Czech koruna and then to invest that money in junk bonds, including one issued by a Kazakhstani bank and another payable in Brazilian reals. Moreover, when he was unable to pay the bank's margin calls the bonds were sold at a massive loss because liquidity in the market for junk bonds had evaporated.

3. He says that, in consequence, not only did he lose the whole investment, but he suffered additional losses consequential on the bank realising its security, including losses from property investments on which he was unable to complete in Panama. The total loss is said to exceed €900,000 or about £755,000 at March 2011 exchange rates.

4. Mr Van Geens, the first claimant, owned a company incorporated in Belize, the second claimant, Beckett Ltd ("Beckett"). It was from 2006 the vehicle by which he made the investments which are the subject of this action. Nothing turns on the identity of the claimants. The claims of Beckett have been assigned to Mr Van Geens. The defendant bank accepts that both were retail investors and that it owed both exactly the same duties. Throughout his dealings with the bank Mr Van Geens acted either on his own behalf or on behalf of Beckett. I, like the parties' advocates, shall make no distinction between the two and shall refer to Mr Van Geens without saying expressly when during the events of which they complain he was acting on behalf of Beckett.

5. The key event relied upon by the claimants is a meeting on 10th May 2007 between Mr Van Geens and Ms Bodil Groes, a personal investment advisor employed by the defendant. As a result of that meeting, it is common ground he invested €500,000 of borrowed money in an investment called the "Invest Loan Product".

6. By order of Dudley CJ of 6th January 2014 this is the trial of liability only. At the outset of the trial, there was some discussion as to what this entailed and it was agreed that issues of damages, including causation of damage, foreseeability and mitigation of loss did not stand to be tried. A point flagged in the openings was that liability for negligence and breach of statutory duty required there to be some proof of loss. However since it was common ground that the bank owed a contractual duty of care in like terms to the duty of care in negligence and (in relation to those of the breaches of statutory duty which were actionable) under statute, the point is irrelevant: the claimants will be entitled to at least nominal damages if liability is proved.

The outline facts

7. Mr Van Geens was born on 26th November 1946. He spent his early childhood in Belgium, but after being orphaned in 1958, he came to England to live with an aunt. He was educated at a Secondary Modern school and obtained a City and Guilds certificate in catering. He had no further education.

8. After leaving school he acquired a Heavy Goods Vehicle licence and in 1973 started his own haulage firm, originally with only one 13½ ton lorry which he bought in cash for £2,000. He expanded the business organically, without borrowings, until the mid-1980's when he had ten or twelve lorries and an annual turnover of some £125,000. At that point he sold the business. In 1985 with the

proceeds he purchased a restaurant and wine bar called "Beckett" in Southsea in Hampshire. He had not previously owned a restaurant. He renovated the premises and developed it by establishing a self-contained flat above.

9. Again, having developed the business he sold it and purchased a florist's about two miles from Heathrow Airport. He had not been in any similar business before. Again he was able to expand the business and indeed became the main supplier of flowers to the airport. He sold the business in about 1995.

10. Thereafter until 2000, he purchased buy-to-let properties in and around Reading and Woking. He always bought houses, because as part of the business he wanted to be able to service the properties himself, by, for example, doing the gardening himself. He did not use an agent to manage the properties. When buying houses he took out mortgages to cover half the cost of purchase. By the end his portfolio was seven or eight houses.

11. Throughout his business career, Mr Van Geens had been a sole trader. He had a long-standing accountant who handled his tax affairs and he left all accounting matters to him.

12. In 2000 he wanted to starting winding down and was attracted by a move to the south of Spain. He started to sell off his right-to-buy houses. Initially he put the proceeds of the sales into an account with Barclays Bank on the Isle of Man, but he became dissatisfied with the level of service he was being given, and moved his main account to Sabadell Atlantic Bank in Spain. After learning Spanish in Granada, he purchased a house in Marbella. He also bought two off-plan properties there. Around this time he converted most of his money into euros, because "the exchange rate was very favourable at the time".

13. Around this time too in the early twenty-first century, Mr Van Geens was considering setting up a letting business, rather like that which he had had in Reading and Woking, but he discovered the legal position in Spain was unfavourable, particularly because tenants had security of tenure. He looked into buying a bowling alley in Nerja, but eventually decided it was too expensive for him. He became interested in the possibility of moving to Central America and decided that Panama was potentially an attractive destination. In the meantime he carried on with some modest property speculation. He sold the three properties in Marbella and bought a flat in Nueva Andalucia. He also bought two properties in a development called "Magna Marbella". One of these he sold fairly quickly.

14. By this time, Mr Van Geens had been introduced to Jyske Bank in Gibraltar. He held a meeting on 13th February 2002 with Mr Brennan, who was appointed as his first investment advisor at the bank. This meeting explored his background. At a second meeting on 26th February 2002 Mr Brennan carried out a "fact find". This is a term of art for the investigation of the circumstances of the client, so that sensible advice can be given in the light of the client's needs and desires and his attitude to risk. The fact find itself no longer exists, but an account of it is given in an internal bank memorandum at **[4/36/1362]**, which says:

> "Did an Intellix which suggested Stable Strategy. Decided on Balanced Strategy nonetheless, as he was bullish on shares. Invested EUR 330,000. Two year outlook. Emphasises the risk in stock investments for such short period."

15. "Stable strategy" refers to a client who seeks low risk investments. "Balanced strategy" refers to somewhat greater or medium risk, whilst "growth strategy" is an aggressive, high risk, approach. No claim has been brought in the current action in respect of this

advice in 2002, not least because in fact the strategy of buying shares was quite successful. However, no letter was sent to Mr Van Geens confirming the advice which was given. I shall return to my consideration of the bank's practices later, but Mr Van Geens was not told by the bank in black and white that his investment strategy was contrary to the bank's assessment of willingness to assume risk. Indeed, it shows the bank altering its risk assessment of the client to accommodate the investments which he wished to make.

16. On 1st November 2002 Mr Van Geens told Mr Brennan that he had decided not to invest in business in Spain. Instead he said he wanted to invest all his cash, some €325,000 at that time, in the bank's British Equity Fund. Mr Brennan records **[4/36/1376]** that he "[p]ointed out that he was changing from euros to £, and made him clear re fees and spreads, which he accepted. Takes a medium term view, but reckons that FTSE is close to bottoming out at current level of 3970."

17. Subsequently Mr Van Geens moved away from collective investment vehicles and started to pick stocks and shares himself. These were always blue-chip household names.

18. Mr Van Geens took out bridging loans from the bank for his Spanish property purchases. Short-term loans were needed because sales of his English buy-to-let properties had been agreed but the proceeds had not yet come through. These loans were secured against Mr Van Geens' investment portfolio as a cheaper and easier way of providing security than granting a mortgage over the Spanish property which was to be purchased.

19. One feature of Mr Van Geens' relationship with the bank was that he gave a standing instruction not to invest dividends. This was because, as the bank knew, he relied on the dividends for income.

Indeed it was when he dropped into the bank, at roughly quarterly intervals, to collect his euros in cash, that he tended to see his investment advisors.

20. An issue which had been argued before trial by the parties was whether the bank was giving investment advice as regards equities. There were equities which were outside the bank's "investment universe", but because Mr Van Geen chose very mainstream companies the bank was able to give him the benefit of their analysts' assessments of many, though not all, of the companies in which he was interested in investing. Most of Mr Van Geens' knowledge of companies came from his reading the *Sunday Times* and from watching Bloomberg TV. The bank suggested that its rôle was one of "active sparring", where it was giving merely limited advice. At trial the bank accepted that there was no halfway house between providing an "execution only" service and a full advice service, but the point was irrelevant to the issue before me, because it was always common ground that in giving the advice which it did on 10th May 2007 the bank owed a duty to provide full advice.

21. In March and April 2006 Mr Van Geens, on the bank's advice, established the second claimant in order to mitigate tax. It was managed by nominees in Gibraltar. His investments with the bank were transferred to Beckett.

22. By this time (the precise date of purchase is not in evidence) Mr Van Geens had purchased three corporate bonds. One was from First Investments, for which he had had paid €50,000; another from FS Funding at a cost of €48,000; and a third from NXP BV at a cost of €45,000. The bonds and their coupons were all in euros. It is unclear what, if any, advice was given in relation to these purchases or by whom.

23. There are two character traits shown by Mr Van Geens during his time with the bank and of which the bank were aware. Firstly he was particularly averse to cutting his losses, in other words selling an investment which had gone wrong. Instead he hoped for a turn in market sentiment and would hang on. Secondly, he disliked paying commission or charges to the bank. Thus, for example, on 20th July 2006 there was a dispute about the bank's safe custody charges: see **[3/36/1371]**.

24. On 22nd February 2007 Mr Albert De Las Heras, who was the investment advisors' manager, introduced Mr Van Geens to Ms Bodil Groes. Her note of that meeting (*ibid*) says:

> "We spoke about the portfolio, which he pretty much conducts himself. He is interested in our recommendations though, both on markets/sectors and shares and bonds... He will be in Panama for 6-8 weeks and I have promised to call him when he gets back. We spoke about the LPX – Private Eq structured product and would get back... His portfolio contains a large proportion in the oil business and he was interested in knowing what expectations we had for the market."

In evidence Ms Groes said that she could not remember the LPX structured product, but said the structured nature of it probably meant it was lower risk.

25. There may subsequently have been one or possibly more phone calls between Mr Van Geens and Ms Groes, but the evidence on this is very limited. It does not seem that substantive advice was given; at most it was Ms Groes getting to know her client a little better. Certainly no formal risk assessment was carried out. Mr Van Geens also thinks there may have been a meeting on 14th April 2007, when he went into the bank to collect his money in euros, and that Ms Groes first raised the question of borrowing to invest in bonds. Again the discussion does not seem to have been very in-depth and may well have been quite short, given that the

primary purpose of Mr Van Geens' visit was simply to collect cash.

26. The critical meeting was that on 10th May 2007. I shall return later to my key findings in relation to that meeting. Ms Groes' oral evidence was that the first mention of the Invest Loan Product to Mr Van Geens was at this meeting. It is common ground that Ms Groes did carry out a form of fact find at this meeting, but the adequacy of that fact find is hotly disputed. Again, it is common ground that Ms Groes had a lap-top computer with her during the meeting and was able to generate documents on it. Which documents were printed out is in dispute.

27. One document which was produced on the computer was the fact find. (This is sometimes referred to in the documentation as the IVT. None of the witnesses knew what the initials stood for, although it might be "investment tool"). It reads **[2/20/366]**:

> "*Basis of investment*
> In which Jyske Bank unit do you want to hold the account? – Gibraltar
> What degree of involvement do you want in the on-going investment decisions? – Considerable involvement
> What is your base currency? – Euros
> How much do you want to invest today? – 1300000
> *Investment horizon*
> Your anticipated investment horizon? – More than 10 years
> *Attitude to risk*
> Which statement suits your attitude to risk the best? – Moderate
> How large a negative return can you accept in a single year? – Minus 50%
> What would you do, if in a single year the value of your investment declines below the acceptable level? – Keep my investment
> How dependent are you on the funds you want to invest today? – Fairly dependent
> *Strategy*
> How do you want to invest to match your risk profit? – By gearing
> Which investment strategy do you want to follow? – Trading strategy"

28. As will be seen, when I make my findings about this meeting, this document cannot be read just on its face. Save for the amount to be invested, all the answers are chosen from a drop down menu which Ms Groes' computer provided. There was no scope for giving more complex individualised answers.

29. There is a dispute as to whether Ms Groes gave Mr Van Geens a copy of this fact find, however, it is agreed that Ms Groes did not print out a copy for herself and did not have Mr Van Geens sign it to show his agreement with its contents.

30. There is no dispute that two further documents were given to Mr Van Geens at the meeting. The first is what I shall neutrally refer to as the "worked example" **[1/15/219]**. (Whether it is a projection or the giving of a contractual guarantee is in dispute.) It shows Mr Van Geens investing €142,000 (in fact €143,000), which is the purchase price of the three bonds which he already owned. It then shows him borrowing €300,000 in Swiss francs at 4.03% and €200,000 in Czech koruna at 4.48% (it was common ground that these were variable rates of interest). The annual interest on these loans was €21,050.

31. The proposal was that Mr Van Geens buy a further six bonds, three denominated in euros, one in United States dollars, one in sterling and one in Brazilian reals. The cost of these new bonds varied between €64,200 and €77,040. In addition he would invest €25,680 in each of three bond funds run by the bank.

32. The document then shows the rate of return. This is *not* the running income from the coupons on the bonds. What precisely it was and what explanation Ms Groes gave of these figures I shall discuss shortly. The bond funds were roll-up funds which did not

pay dividends, so the rate of return figures for these were based on the notional income generated by those funds.

33. The last column in the document shows total annual income from the bonds and the bond funds of €48,512.80. Set against the interest payable of €21,050, this left a gross income of €27,462.80. On the assumption that Mr Van Geens' investment was €142,000, that gave an annual return of 19.34%.

34. Because Mr Van Geens was about to fly to Panama, he needed to sign documentation to allow the investment to proceed. The two documents it is agreed that he signed on 10th May 2007 were firstly a personal guarantee of the debts of Beckett **[2/18/374]** and secondly an instruction to the nominee directors of Beckett **[2/18/382]** to execute on behalf of Beckett (a) the Invest Loan facility of €500,000, (b) the deposit agreement (which would secure the loan against the rest of his portfolio), (c) the investment credit line of €500,000 and (d) the terms and conditions for forward contracts. The letter recites that he had received copies of those four documents, but Mr Van Geens says that this was not true. Ms Groes' evidence was that these four documents which were to be executed by Beckett had to be prepared by the credit department. Her first witness statement **[2/17/335]** does not say that he was shown these four documents. It is much more likely (and I find as a fact) that the four documents to be executed by Beckett came into existence around 5th or 7th June 2007, when they were sent to the nominee directors: see **[2/18/370, 384, 391 & 399]**. There is no evidence that any copies were ever sent to Mr Van Geens personally subsequently. I find as a fact that they were not.

35. The bank has failed to disclose any meta-data for the four documents. This would be a record from the relevant computer showing when the documents were created. If it had been

necessary, I would have drawn an inference against the bank from its failure to produce the meta-data or explain its absence. The inference would be that the documents came into existence only after 10th May 2007, but the facts are in my judgment sufficiently clear for me not to have to rely on such an inference.

36. The Invest Loan agreement says, buried in middle of page 4 of the document **[2/18/387]**:

> "Specifically the bank emphasises that the transactions, that you have agreed to enter into by accepting this loan, involve a high risk of loss. You acknowledge and declare that you are aware of the high risk involved in relation to the transactions."

I find as a fact that Mr Van Geens never saw this document before the loan was entered or subsequently until litigation was in contemplation.

37. The necessary documentation was signed by the nominee directors of Beckett shortly after 7th June 2007 and completion of the Invest Loan product was on about 12th June 2007. During that time, Mr Van Geens was in Panama and was given no further advice on the investment. It is common ground that the bank never gave Mr Van Geens a "Reasons Why" letter, in other words a letter giving the details of the proposed investment and explaining why the product was appropriate for the customer. Mr Van Geens thus never had any realistic opportunity to reconsider the appropriateness of the investment between 10th May 2007 and 7th June 2007, when the deal completed.

38. Events after completion on the investment are more relevant to the issues to be decided at the trial on quantum, but the bank rely on them to show something of Mr Van Geens' character and knowledge of and attitude to risk. I shall therefore deal with them briefly.

39. In November 2007 Ms Groes was going home permanently to Copenhagen and Mr Michael Damager was assigned as Mr Van Geens' investment advisor to replace her. Mr Damager says that in December 2007 he advised Mr Van Geens to switch part of his Czech currency loan (10% of the total, 25% of the Czech exposure) into a Japanese yen loan, but that Mr Van Geens instead switched the whole of the loan to yen, which Mr Damager said was a more risky option. In cross-examination he said that this advice was probably given at lunch in Sacarello's, near the bank's branch in Gibraltar. There is no documentary evidence showing this advice being given or Mr Van Geens' response to it. There is in my judgment a strong possibility that Mr Demager is misremembering. In March 2008 he advised Mr Van Geens to reduce yen exposure from 40% to 10%: see his email of 17th March 2008 **[4/29/1140]**. It may be this of which he was thinking. I can draw no conclusions from the December 2007 transactions.

40. In April 2008 there was discussion about moving between the Swiss franc and the Japanese yen: **[4/29/1147]**. This shows, the bank says and I find as a fact, that Mr Van Geens knew about putting stop losses on currencies and understood that if the currency of the loan strengthened against the euro he stood to lose money. This does not, however, necessarily mean that he understood the full implications of currency risk.

41. In the aftermath of Lehman Brothers' collapse on 15th September 2008, the value of Mr Van Geens' equity portfolio reduced dramatically. Unfortunately his ability to deal with the resulting problems was limited by the effects of a serious horse-riding accident on 2nd October 2008, which meant he was unable to react to his steadily worsening financial position. Again I can draw no conclusions from this period.

Assessment of the witnesses of fact

42. I turn then to my assessment of the witnesses of fact. The bank sought to portrait Mr Van Geens as an experienced businessman who understood the various risks which he was running with the Invest Loan Product. They suggested that his evidence was self-serving.

43. They attacked as untruthful his assertion that he needed his solicitor to explain what a bond was: see his first witness statement **[1/15/130]**. This, however, in my judgment was somewhat unfair to him. There are numerous types of bonds, some of which (such as insurance bonds) are quite different to fixed term bonds with regular coupons. Further, as discussed below, even an ostensibly simple bond such as this latter type can be quite complicated because of the possibility of making a capital gain or capital loss on holding the bond to maturity. I find what Mr Van Geens says at para 60 of his first witness statement **[1/15/145]** about his discovering only later that bonds can go up and down plausible; many investors would not know that the price of bonds can vary if sold before maturity. Moreover, there are significant variations among bonds with fixed coupons; some, for example, give a right on the part of the borrower to call the loan early. Given that there is, as noted above, no evidence of the advice given him in relation to the original three bonds, I accept his evidence that he needed his solicitor to explain what precisely a bond was.

44. In my judgment the description of Mr Van Geens as an experienced businessman exaggerates his degree of sophistication. He had indeed been successful in a number of businesses, but they had all been quite small affairs, which he ran as a sole trader without any financial director. The ventures succeeded because of his own personal hard work and dedication, rather than due to any

particular financial talent. His rather stubborn personality also probably helped in the businesses he ran, but in those businesses he took a balanced and sensible approach to risk.

45. It is noticeable that in general he avoided bank lending during his business career. The only exception was when he purchased buy-to-let properties, where he took out 50 per cent loans. Now it is true that analytically such loans are a form of gearing, so that, if the capital value of a property increases, the capital profit is doubled (likewise a capital loss is doubled). However, Mr Van Geens (in common, I suspect, with most house purchasers) did not think of these mortgage loans in that way. He simply viewed the loans as the only way he could afford the houses (as opposed to flats) which he wished to buy, so he could maintain the gardens etc. The loans were not a means of increasing profit, but of being able to start the business at all.

46. When Mr Van Geens started banking with the defendant in 2002 he found that he enjoyed picking stocks and he effectively made it his hobby. However, his approach to his selection of shares was unsophisticated. His sources of research were few: his Sunday newspaper and later Bloomberg TV. He had no articulated investment strategy, beyond investing in household-name companies which had what he considered good businesses.

47. Now such investments in stocks did once have judicial support. Lord Diplock sitting in the House of Lords recommended growth stocks as a suitable investment for widows who needed to invest damages awarded them for the death of their husbands: *Mallett v McMonagle* [1969] 2 All ER 178 at 190. Unfortunately Lord Diplock's investment advice was shortly followed by the secondary banking crisis, which resulted in the FT-30 index (the main index at the time of stocks on the London Stock Exchange) losing 73% of its value between 1972 and 1973. Modern

investment advice has moved on from the simplistic approach of Lord Diplock and Mr Van Geens.

48. Mr Greenwood for the bank [written closing para 10.3] relied on what he said was Mr Van Geens'

> "utter unwillingness to accept that he remembered having owned bonds from 2005, or [the fact] that he'd managed never to notice a recession, or didn't realise he was giving a guarantee or security in 2007, or that he didn't understand currency exchange risks, despite having apparently talked about them quite often and explicitly with his advisors, over several years."

49. I do not accept these points. I found Mr Van Geens a witness of truth. I do not find it particularly surprising that, after he entered the Invest Loan Product, he forgot that he had previously owned some of the bonds which were brought into the new portfolio. Likewise the giving of the guarantee was simply one of the *pro forma* documents signed on 10th May 2007 to start the process of setting up the new investment. The deposit agreement (which is the security agreement referred to) **[2/18/391]** was executed by Beckett and was, as I have found, never seen by Mr Van Geens.

50. As regards Mr Van Geens' evidence about recessions, his business ventures do not seem to have been adversely affected by any general economic downturns in the United Kingdom economy. I do not regard him as lying when he says that the 1990 recession did not affect trade in flowers at Heathrow Airport and that he had little awareness of it or any other recessions during his business life.

51. It was conceded by Mr Salter that Ms Groes was a witness who was endeavouring to tell the truth. However, he submitted that the accuracy of her evidence should not be accepted. I agree with this

submission. After going back to Denmark, Ms Groes' first involvement in the matter was in January 2009, when Mr Perez, the bank's Gibraltar compliance officer, contacted her by phone. No detailed record of the conversation exists. There is a short confirmatory email **[5/80/2064]** in which she said:

> "I can hereby confirm with outmost [*sic*] certainty that the client, Mr Van Geens and I went through the investment tool questionnaire during a face-to-face meeting. To my best of knowledge the meeting was held on the 10th of May 2007. Mr Van Geens answered the questions personally and agree with the risk profile "Growth strategy". As with all my clients I addressed the issue of risk, which means that Mr Van Geens and I discussed the risks involved with both an invest loan and investments in general."

52. Given the seriousness of the allegations made by Mr Van Geens it is surprising that no detailed statement was obtained from her at that time. Determination of the adequacy of the investigation of the bank's compliance officer is not a matter for me. However, the fact that the first time she was asked to set out in writing a detailed recollection of events was after litigation had begun in 2012 does allow me to doubt the extent that she has actual memory of the events in question and to what extent her evidence is a reconstruction of what she thinks occurred.

53. In her first witness statement at para 9 **[2/17/333]**, she said that if Mr Van Geens "was not sure on a particular product he would certainly ask as many questions as necessary for him to be satisfied that he understood." However, in oral evidence she was unable to recall any products and, when it was put to her that she had advised on the LPX product, she had no recollection. In my judgment paragraph 9 was an example of her reconstructing what she thought "must have happened".

54. Where there is a difference between Mr Van Geens' and Ms Groes' evidence, with one exception I prefer the evidence of Mr Van Geens. The one exception is where he said that he had understood Ms Groes to say that the bank "guaranteed" the additional €27,000 per annum income from the Invest Loan Product: 1st wit stat para [69] **[1/15/148]**. Now Ms Groes accepted in evidence that she was very enthusiastic about the Invest Loan Product. It is very likely that that enthusiasm was conveyed to Mr Van Geens. To raise what she said into a formal guarantee of the return, however, is in my judgment a lawyer's construction. It does not, however, affect my overall view of Mr Van Geen's veracity.

55. I deal below with further aspects of the meeting of 10th May 2007 which reinforce my preference for the evidence of Mr Van Geens to that of Ms Groes.

56. The other three witnesses called by the bank were Mr Damager, who took over as Mr Van Geens' investment advisor after Ms Groes' return to Denmark; Mr De Las Heras, who was the line manager for the investment advisors and occasionally saw Mr Van Geens if his regular advisor was unavailable; and Mr Perez, the bank's compliance officer. I have already dealt with Mr Damager's evidence about currency switching in December 2007. Apart from that evidence, there was little challenge to the primary evidence given by these witnesses, though the inferences they drew were challenged.

The law

57. In May and June 2007, the relevant legislation governing financial advisors in Gibraltar was the Financial Services (Conduct of Business) Regulations 1991 (Subsidiary legislation 1991/094).

Part 2 of the Regulations sets out Statements of Principle. Particularly relevant are:

> "5. A licensee shall act with due skill, care and diligence in the conduct of its financial services business.
> 7. A licensee shall seek from customers it advises... any information about their circumstances and investment objects which might reasonably be expected to be relevant in enabling it to fulfil its responsibilities to them.
> 8. A licensee shall take reasonable steps to ensure that a customer it advises is given, in a comprehensible and timely way, any information needed to enable him to make a balanced and informed investment decision."

58. It was common ground that breach of the Statements of Principle was not actionable *per se,* but that such a breach had to be taken into consideration when deciding whether there was a breach of the duties in Part 3 of the Regulations, which it was conceded did give rise to a cause of action for breach of statutory duty. The main duties in Part 3 on which reliance was placed were:

> "20. A licensee shall not-
> (a) recommend a transaction to a customer... unless it has taken all reasonable steps to enable to the customer to understand the risks involved; or
> (b) mislead a customer as to any advantages or disadvantages of a contemplated transaction.
> 27. A licensee shall take all reasonable steps to ensure that it does not give financial advice to... a customer unless that advice... is suitable for him having regard to the facts disclosed by that customer and other relevant facts about the customer of which the licensee is or ought reasonably to be aware."

59. It was also common ground that these Regulations stood to be considered in assessing the standard of care to be expected both in negligence and under the contractual duty of care.

60. The (Gibraltar) Financial Services Commission ("FSC") is also a source of industry standards, albeit that a breach of FSC guidance

is not directly actionable. In its newsletter (No 2 of 2004) it said **[5/85/2120]**:

> "The fact finding exercise needs to include a thorough and proper assessment of a client's risk profile in terms of impact and likelihood. What this means is that it is not sufficient to solely record a particular client's attitude to risk in terms of 'high – medium – low' or 'adventurous – balanced – conservative'... Correctly identifying a customer's attitude to risk is a complex task and should not be relegated to a box-ticking exercise or asking the customer for their own self assessment. Few customers will be able to [do] so without considerable assistance. The risk profile therefore needs to be clearly recorded **and** clearly explained to the client." (Emphasis in original)

61. The newsletter went on to say **[5/85/2121]**:

> "The Commission considers that the use of 'Reason Why' letters or suitability reports should be an integral part of the process and firms are therefore required to implement the use of these, if not already doing so."

62. For completeness, I should say that in May and June 2007, there were regulatory changes which were shortly to come into effect in November 2007. Although Mr Samuel, one of Mr Van Geens' experts, deals with the changes, I am not going to set them out for reasons which I shall explain in the next section.

The expert evidence

63. Pursuant to the Chief Justice's order of 6th January 2014 **[1/12/96]**, Mr Van Geens was permitted to call two expert witnesses: Mr Roger Grenville-Jones, a consultant actuary to give evidence on the nature and marketing of the Invest Loan Product and related financial investment and on the calculation of loss; and Mr Adam Samuel, a financial services compliance consultant on the required standards to be observed by a financial adviser on the nature and marketing of the Invest Loan Product and related financial

investments. By contrast the bank limited itself to one expert, Mr Marc Egerton, who covered both areas.

64. All of the experts were experienced in their fields. Both Mr Samuel and Mr Egerton on occasions overstepped their rôles to give views on evidence (for example, Mr Samuel at section 3 **[3/26/992-993]** and Mr Egerton at para 46 **[3/25/1058]**), however I am satisfied that all the experts were attempting to assist the Court and were not acting as advocates.

65. Both Mr Samuel and Mr Grenville-Jones considered that the bank had miscategorised Mr Van Geens' risk profile: on the basis of Ms Groes' fact find there were inconsistencies which the bank could and should have investigated further. Mr Egerton's opinion was that in the light of the extensive conversations Ms Groes said she had with him, she could properly have concluded that Mr Van Geens had a high appetite for risk. Since these expert views depend on the facts, I shall come back to these points.

66. In the current case, all the experts were agreed that Mr Van Geens' investment portfolio from 2002 until May 2007 was overweight in shares and that diversification into other assets, including more bonds, would have been desirable. Mr Van Geens was, however, convinced of his investment prowess in shares and resisted the bank's advice to buy more bonds. The bank's case is that this showed that he had become "more experienced": Defence para 27.3 **[1/3/44]**.

67. Mr Grenville-Jones' view was that by mid-2007 Mr Van Geens' ability to manage his share portfolio was "borderline in having or not having the required experience and expertise": para 36 **[3/25/1010]**. Mr Egerton's view was that by 2007 "the claimants had already had some five years of investment experience in equities, funds (and some bonds), and it may therefore be

reasonably assumed that they were considerably more experienced than they were towards the start of the period": para 33 **[3/26/1056]**.

68. Mr Grenville-Jones' view **[3/25/1010]** was that Mr Van Geens had purchased a portfolio of shares, which allowed him to spread his risk to some extent, but that he had no "coherent strategy for the selection of types of investment product or of individual holdings nor for the active management of the portfolio – it was all rather 'hit or miss'." He considered that his ability to manage his share portfolio with reasonable competence was "borderline". Under cross-examination he said: "I've heard [Mr Van Geens'] evidence. He doesn't have the expertise of a day trader. He doesn't have an attitude of skill to know when to take a loss."

69. Mr Egerton's view was that by 2007 Mr Van Geens had been investing for five years and that the bank were entitled to treat him as "considerably more experienced": **[3/26/1056]**. I agree that, insofar as Mr Van Geens had more experience of share selection, the bank could take the view *in relation to shares* that he had more experience. However, the bank would equally have been aware that there was no real strategy behind Mr Van Geens' stock selection. So far as his wider ability to manage an investment strategy, in particular in relation to bonds, there was no evidence available to the bank that he had any real experience at all. The only other investments he had had with the bank were the three bonds and some mutual funds.

70. Mr Egerton also considered that Mr Van Geens would have known what gearing entailed, even though he had never previously taken out a loan to make an investment: see para 75 of his report **[3/26/1064]**. In my judgment, here, as in para 46 **[3/26/1058]**, he was straying into giving his opinion on facts which are for the Court.

71. I prefer the view of Mr Grenville-Jones as to Mr Van Geens' investment competence to that of Mr Egerton.

72. Mr Samuel has very extensive experience in compliance work. He was called to the English bar in 1983 and to the New York bar in 1991. He has numerous financial qualifications and numerous publications to his name. He worked in senior ombudsman rôles for the Insurance Ombudsman's Bureau in 1991-1995 and the Personal Investment Authority in 1996. Since then he has consulted extensively on compliance and related matters.

73. His very full report in addition to Gibraltarian matters dealt with United Kingdom and Hong Kong financial compliance law and practice and their developments over time. Since the number of enforcement cases by the FSC is much smaller than in those other two jurisdictions, this was a potentially important exercise and has illuminated my understanding of the background to the Gibraltarian compliance regime. Since, however, I have found the current case to be comparatively straightforward, I have not had to have regard to these other jurisdictions, but if the matter had been more finely balanced, I would have found his researches of value.

74. Mr Egerton makes a number of criticisms of the bank's presentation of the Invest Loan Product to Mr Van Geens. I consider these below. However, his conclusion was that the Invest Loan Product was *a* suitable product for someone of Mr Van Geens' risk profile, even if it was not the *most* suitable product. I shall consider this point below.

The meeting on 10th May 2007

75. It was common ground that the meeting on 10th May 2007 was quite a long meeting, but no contemporaneous document was put

in evidence to show its precise length. This was surprising, since the meta-data on the fact find would show when the document was first created, presumably near the start of the meeting, and the meta-data on the guarantee would be near the finish.

76. The fact find shows obvious deficiencies. There is a serious inconsistency between the answers to the four questions on attitude to risk. Someone willing to accept a minus 50% loss in a single year hardly has a "moderate" attitude to risk. On her own evidence Ms Groes never, either at this meeting or subsequently, clarified the discrepancy with Mr Van Geens. She concluded that "he was comfortable with risk as he was an aggressive investor exposed to the markets in equities." This was her own opinion, not something which she discussed and agreed with Mr Van Geens. If she had discussed and agreed that he had a high risk profile, that should have been put in the fact find. Mr Van Geens' belief (erroneous though it was in the view of the experts) was that equities were fairly safe over the medium to long term.

77. The fact find produced by Ms Groes was in my judgment a box ticking exercise. The computer's template gave no scope to distinguish between different parts of Mr Van Geens' portfolio. Thus, the ten year horizon might have been appropriate for parts of the share portfolio, but was obviously wrong if he needed money for Panama. The discrepancies are sometimes so gross that I accept Mr Van Geens' evidence that some of the answers were not his, but were inserted by Ms Groes. For example, Ms Groes in oral evidence explained that "trading strategy" was the entry to show that the bank was not managing a discretionary portfolio.

78. I find as a fact that Mr Van Geens' attitude to risk was moderate. He is a sensible man. In 2007 he was 61 years old. He was winding down. Like everyone he liked to have a higher income, but, having seen him and making due allowance for the fact that

he is a man scarred by the loss of his life savings, I do not consider that he had a high risk threshold.

79. The fact find contains a space at its bottom for the customer to sign in order to show his approval. It is common ground that that was not done in this case, although the FSC newsletter **[5/85/2120]** makes this an express requirement. If it were necessary, I would draw inferences against the bank from its failure to ensure that Mr Van Geens' agreed with the fact find. The facts which I have found are, however, again sufficiently clear that I do not need to rely on inference.

80. There is no contemporaneous record of the discussions regarding the Invest Loan Product. The list of recommended bonds **[1/15/210]** and "worked example" **[1/15/219]**, however, have some markings by Ms Groes on them. Her custom, she said in evidence, was to circle important matters on documents.

81. On the bond list one can take the Ineos Group Holdings as an example. There are a number of columns. The first is the name of the company; the second a description, "chemicals-diversified"; the third the currency, here the euro; the fourth the coupon, here 7.875; the fifth the frequency of coupon payments a year, here twice; the sixth the maturity date, here 15th February 2016; the seventh whether the bond was "grandfathered" or not; the eighth and ninth the Moody's and Standard & Poor's rating of the bond, here B2 and B- respectively; the tenth and eleventh identification numbers; the twelfth the place of incorporation, here Great Britain; the thirteenth, the price, here 96.38; the fourteenth, the effective yield, here 8.47%; the fifteenth, the duration of the bond, here 5.98 years; the sixteenth the spread, here 445; the seventeenth the change in base points, here zero; and lastly whether the bond was callable or not.

82. Only the effective yield of 8.47% is circled by Ms Groes and I draw the conclusion that it is that on which Ms Groes concentrated. Yet, there are significant features of this bond which require explanation. One of the most important is the grading given by the rating agencies. The Standard & Poor's rating of B- is at the very bottom of its "highly speculative" category, just one rung above bonds rated CCC+, which have a "high default risk". The Moody's rating of B2 is one rung higher than that of Standard & Poor's. Now, for obvious reasons purveyors of this sort of bond dislike the expression "junk bond" and prefer euphemisms like "speculative grade" or "sub-investment grade", but "junk bond" is not an unreasonable description. The bank says that with these "highly speculative" bonds "[t]he chance of repayments of nominal and interest can be seen as uncertain": **[1/15/217]**.

83. In her oral evidence, when taken to the Ineos bond details, Ms Groes accepted that she would not have gone through all the columns as I have set them out above. She said that she would definitively mention the ratings agencies, but what precisely she would have said was unclear. Her explanation of B- in the witness box was that "it was speculative". Firstly, this in fact is wrong. B- means that it was "highly speculative": see **[1/15/217]**. Secondly she did not suggest that the B- rating was expressly drawn to Mr Van Geens' attention. Her evidence about what was said about the risk of default was unsatisfactory. Under cross-examination she first said that she did not know if she mentioned the risk of default, but then firmed this answer up to say that it was not mentioned. She then changed again this to say that she discussed it "like with equities", but said that "you had a better chance of repayment if the company went bust."

84. I find as a fact that Ms Groes did not explain the risk of default on individual bonds save in a wholly generalised manner which

would not have conveyed the real risk of default. I find that she did not tell Mr Van Geens that repayment was uncertain. The reason, I suspect, is that she treated the fact that the bank was recommending these bonds as conclusive in favour of the individual bonds. Yet all a "buy" recommendation from the bank means is that compared to similar bonds the bond under discussion was underpriced. It does not necessarily mean the risk of default is smaller and it certainly does not mean that the risk of default is smaller than on investment-grade bonds. None of this was explained.

85. Continuing with the list of bonds: "spread", she said, would have been against Treasury Bonds. However, this seems unlikely for bonds issued in euros. I conclude that she did not know what "spread" meant in the bond list. Further, regardless of the precise meaning of "spread" on the list of bonds, she certainly did not explain that bonds of this type were fairly illiquid and that the spread between the buy and sell price might be wide. Nor did she point out that liquidity might dry up completely in conditions of market stress, so that bonds (if they could be sold at all) might have to be sold at significant capital loss.

86. A serious deficiency in her explanation of the bonds and their yields can be seen in the "worked example" **[1/15/219]**. This document shows the yield on the Ineos bond as being 8.50%. This is slightly different to the 8.47% yield to maturity in the bond list **[1/15/212]**. Mr Grenville-Jones suggested it may be the internal rate of return or explained by a different treatment of partially accrued interest between coupon payments. What is important is, however, that Ms Groes was unable in the witness box to explain how the bank treated the capital gains or losses on the bonds in its presentation of the yields.

87. The problem can be seen most clearly in relation to the Brazilian bond **[1/15/215]**. This was bond maturing in 2016 with a coupon of 12.5%. The bond was denominated in Brazilian reals. The purchase price was 122.45. The running yield was 9.7% (12.5/122.45). However, if the bond was kept to maturity, there was a *guaranteed* capital loss *in reals* of 22.45 (in other words even ignoring the risk of the real devaluing against the euro). The effective yield in the bond list was given as 8.74%, but in the worked example as 8.32%.

88. There is another problem with the worked example in that the three bond funds into each of which Mr Van Geens invested €25,680 were "rolled up" funds, which paid no coupon. Rather interest payments were reinvested within the fund. The worked example shows the funds paying between 6.90% and 7.29%, yet in truth there would be no monies paid out unless Mr Van Geens sold some of the fund. Ms Groes gave no evidence about this problem and it may well be that she simply did not know that this was the case.

89. Given her inability to explain in the witness box these the treatment of capital gains and losses and of running yields against yields to maturity in respect of the bonds and the bond funds, I find as a fact that she did not explain these issues to Mr Van Geens. Yet the treatment of capital gains and losses and the running versus redemption yields are critical to an understanding of the bonds being purchased.

90. Mr Egerton agreed in his amended report at paras 57 to 61 **[3/26/1060-1061]** that the presentation in not distinguishing between the running yield and the redemption yield was misleading. Further the actual "headline" return of 19.34%, he said in his oral evidence, was also misleading. The running yield was in fact 17.6%, but the capital loss at maturity of the bonds

(assuming no adverse currency changes) was €24,000. With about 7½ years to maturity, that was €3,200 per annum, which reduced the 17.6% return to about 15%. Moreover, he said, this depended on including the income from the three bonds, which Mr Van Geens already owned. If the €23,000 income from those bonds is taken out, the return on the bonds being acquired dropped to 11%. (It is not clear how Mr Egerton accounted for the three bond funds in these figures.)

91. Mr Greenwood did not re-examine Mr Egerton on this evidence, but Mr Greenwood suggested in his oral closing and at para 17.6 of his written closing that I should treat these figures given in the witness box (by his own witness!) with circumspection. It is true that they were given "on the hoof", however, they seem broadly right on the assumptions made. I find as a fact that the presentation of the return given by Ms Groes to Mr Van Geens was made on assumptions polished to present a misleading return on his investment.

92. I should add at this point that Mr Salter sought when examining the experts to suggest that the return would be further reduced by various charges which the bank would raise. This was not a point which he had put to Ms Groes. Given that she was being accused in effect of professional negligence it seemed to me that it was only fair that she should be able to answer any criticisms made of her. He asked that Ms Groes be recalled so that he could put this point to her. Given that she had already completed her evidence and been released, I saw no special reason to recall her. Accordingly, I ignore the question of charges in assessing whether there was misspelling. It will, however, be open to Mr Van Geens at the trial of quantum, if it becomes relevant, to revisit the issue of charges.

93. Ms Groes accepted that she did not discuss whether bonds could be called or not. Some, like the Ineos bond, were callable. She said that she would only have discussed calls that if a date on which the borrower could call the bond in was imminent.

94. There is very little evidence that Ms Groes gave any advice about the currency risks attaching to the bonds dominated in non-euro currencies. Now Mr Van Geens had experience of movements in the sterling-euro rate and would probably have had a reasonable understanding of the risk of the euro-dollar rate changing, but he had no experience of the Brazilian real. I find as a fact that Ms Groes did not advise him on the greater risks associated with the currencies of emerging economies, such as Brazil. In particular, she did not advise him of the risk of such a currency depreciating very substantially. Again, in relation to all three of these bonds, she was guided by the bank's positive position on these bonds and I find that she did not explain the currency risks in anything other than the broadest way.

95. As regards the loans, the bank was at the time recommending the Swiss franc and Czech Koruna as good currencies in which to borrow. No criticism is made of that view, if it was appropriate for Mr Van Geens to be borrowing foreign currencies at all. The criticism is that there are matters which were not explained to Mr Van Geens by Ms Groes. Firstly, Mr Van Geens was aware that currencies fluctuate. However, Ms Groes did not explain how this might impact on the advertised rate of return on the Invest Loan Product. The key to the attractiveness of the product was borrowing in a low interest currency and investing in a high interest currency. The risk of this sort of "carry trade" is that the interest rate in the borrowed currency goes up or that currency strengthens. Because currencies often strengthen in consequence of rises in interest rates, the two are often correlated. I find as a

fact that the risks of a carry trade were not adequately explained to Mr Van Geens.

96. Secondly, with a carry trade it is essential that the investor switches the currency in which the loans are taken if a rise in interest rates or a strengthening of the currency is in prospect. This can involve taking a capital loss on the currency borrowed and incurs bank charges. Ms Groes did not discuss this with Mr Van Geens and did not consider with him his particular reluctance to cut his losses on investments or to pay bank charges.

97. Thirdly, the need for constant monitoring of the currencies was not mentioned. Nor was the potential need to make quick changes.

98. The bank required security over the whole of Mr Van Geens' portfolio, including his share portfolio. Ms Groes did not suggest that the implications of this were discussed with Mr Van Geens. In particular, given that he was, as Ms Groes knew, potentially going to need money for his property investments in Panama, the effect of the margin requirements were potentially important, but were not discussed.

99. It is common ground that no "Reason Why" letter was sent to Mr Van Geens after the meeting on 10th May 2007. In consequence the only time he was able to evaluate the merits or otherwise of the Invest Loan Product was at that meeting. If he had had a "Reasons Why" letter, he would have had until about 7th June 2007 to have second thoughts about the product. He would have been able to see the basis on which Ms Groes recommended it and reflect on its appropriateness.

Findings on liability

100. Mr Greenwood in his oral closing accepted that the bank had two duties:

     (i) the advice it gave had to be suitable; and

     (ii) proper disclosure of the risks and rewards had to be made to the investor.

101. As to (i), I have already found that the bank failed to carry out an adequate fact find. I have also found that if the bank had carried out a proper fact find, they would have concluded that Mr Van Geens did indeed have a moderate risk profile. It was common ground that the Invest Loan Product was high risk (Mr Samuel says even higher). It follows that it was an unsuitable investment for Mr Van Geens. The bank is therefore in breach of (i).

102. For completeness I should add that, even if the bank were entitled to find that he had a higher risk profile in respect of his share portfolio, that would not *of itself* have permitted the bank to recommend the (on any view) high risk Invest Loan Product. As Mr Samuel and Mr Grenville-Jones said, the fact that an investor has a high risk approach in one area of his life or in one part of his investment portfolio does not mean that he wants a high risk product when making other investments. Here he told Ms Groes that he considered that he had a "moderate" attitude to risk **[2/20/366]**, so it was in my judgment incumbent on her to recommend only a moderately risky investment: see *Rubenstein v HSBC Bank plc* [2012] EWCA Civ 1184.

103. As to (ii), there were a large number of features and risks associated with the Invest Loan Product:

     (a) The bonds were largely speculative or highly speculative with a significant risk of default.

(b) The bonds denominated in United States dollars, sterling and Brazilian reals had the risk of adverse currency movements as against the euro.

(c) Some of the bonds could be called by the borrower earlier than the final maturity date, thereby creating a risk as regards how the proceeds could be reinvested.

(d) The bonds, if held to maturity, would (leaving currency changes aside) make in some cases a capital gain, but mostly and overall would make a capital loss.

(e) The bonds were illiquid, so the spread between buying and selling prices was liable to be large. In circumstances of market stress, liquidity might largely dry up, so that very large capital losses might eventuate if the bonds had to be sold.

(f) The loans taken out in currencies other than the euro could become more onerous if the currency of the loan strengthened or the interest rate increased.

(g) Such loans require constant monitoring and a willingness to take a capital loss and incur bank charges if a change in the currency were required.

(h) The loan fell due before the bonds matured, so Mr Van Geens would need to refinance if he were not to have to sell the bonds before maturity.

(i) The bank required a charge over the whole of Mr Van Geens' portfolio to support the loan.

(j) The bank also required a margin of 130% security against the loan.

(k) If Mr Van Geens was unable to meet a margin call, the bank would be entitled to sell the bonds. If this occurred under conditions of market stress, a disproportionately heavy capital loss might be incurred. If the bank sold shares instead, it might be at a time when the market had declined.

104. Going through these, I have already held that (a) was not adequately explained. As to (b), Mr Van Geens had some

knowledge of currency risk, but not as regards Brazilian reals, and the overall currency risk of investing in these three bonds was not discussed or explained. (c), (d) and (e) were not discussed at all.

105. As to (f), again Mr Van Geens had some knowledge of currency risk, but he was given no worked examples of what the effect of, say, the Swiss franc strengthening might be. There was no discussion of the way in which this might affect the overall risk of the product or the headline rate of return.

106. As to (g), as I have found Mr Van Geens was temperamentally unsuited for a product where it was necessary to take capital losses at short notice and incur bank charges. Further the need for monitoring or what this might entail was not discussed. Mr Van Geens had no prior experience in carrying out such monitoring.

107. (h) was not discussed.

108. As to (i), Mr Van Geens gave the personal guarantee at the meeting on 10th May 2007. As I have found he never saw the charge over his whole portfolio. Ms Groes says in her witness statement **[2/17/334]**:

> "13. I clearly explained to him that his entire portfolio would be used as security if he decided to invest with the Invest Loan. He was made aware that his portfolio would be pledged against the loan, that there was obviously a risk of losing capital and that the bank could call in the equities as well as the bonds at any time to cover collateral, as that is how the Invest Loan works."

I do not accept that evidence. I prefer the evidence of Mr Van Geens that he thought only the bonds portfolio was being charged. Further it is consistent with Ms Groes' contemporary instruction of 19th June 2007 that the share and the bonds were to be considered as separate portfolios: **[4/36/1370]**.

109. It follows that I am not satisfied (j) was explained to him either.

110. Further, it was a requirement of the FSC that an investor be given a "Reasons Why" letter. In some cases such a letter has a solely evidential purpose: it provides contemporaneous evidence of what advice was given and why. The argument is that, if the client did not object to what was said in the letter, then he can be assumed to have agreed with the truth of the matters stated. As Mr Egerton said in a note handed to Mr Greenwood in the course of his closing submissions, "Reasons Why" letters are sometimes sent after the investment has been made for just this reason.

111. In other cases, it has a much more central rôle in ensuring that the client has a proper understanding of the product being sold him. This is particularly so, where the investment is a complicated one. I have no hesitation in saying that the Invest Loan Product was such an investment. It was in my judgment wholly unrealistic for a man such as Mr Van Geens to be able to take in all the different details of this product in one meeting.

112. I have identified ten factors which should have been presented to him. Even if (contrary to what I have found) Ms Groes gave a thorough and wholly satisfactory explanation of each of those matters to Mr Van Gees, there is no way in which he could have mastered the numerous risk factors, even after a long meeting with her. In my judgment a "Reasons Why" letter was essential to give Mr Van Geens a proper understanding of the product which was being recommended to him. If such a letter had been given to him, he would have had over three weeks before he was committed to the product and would have had time to reflect. The failure to give a "Reasons Why" letter is a further breach of the bank's duties.

113. The other matter which was not explained to him was the interaction of the various risks. All three experts were agreed that "high", "medium" and "low" risks are not mathematical concepts. Deciding into which category an investment product falls is more art than science. Mr Egerton accepted that the Invest Loan Product was "high risk", but that appeared to be the highest category of risk he was prepared to acknowledge existed. His opinion was that Mr Van Geens had a high risk profile, so this high risk product was a suitable product. Now I have already rejected the first part of this syllogism by finding that Mr Van Geens in fact had a moderate risk profile, but I also reject the underlying assumption of the second part of this argument that all high risks are equal.

114. The experts took the view that Mr Van Geens' share portfolio was "high risk". However, it is obvious that that portfolio of shares could be made still more risky by, for example, buying penny-stocks or by gearing up. It follows that not all high risks are equal. I accept Mr Samuel's evidence that under the Invest Loan Product the gearing in Swiss francs and Czech koruna turned what was already a high risk investment in speculative bonds into "spectacularly high risk one": 1st report para 10.1.3 **[3/23/805]**.

115. Accordingly I find that no proper disclosure of the risks and rewards was made to Mr Van Geens.

116. I accept fully Mr Greenwood's submission that one cannot look at the Invest Loan Product by reference to the disastrous consequences which in fact ensued. The Invest Loan Product was, however, in my judgment and ignoring hindsight a wholly unsuitable product for a man who was approaching retirement and who identified himself as having only a moderate appetite for risk.

Conclusion

117. It follows that there must be judgment on liability against the bank. This was in my judgment a bad case of misselling. There were as I have outlined breaches of regulations 20 and 27 of the 1991 Regulations. The bank is also in breach of its contractual and tortious duty of care to Mr Van Geens. Mr Van Geens' alternative claim based on the bank guaranteeing the return of 19.34% fails.

Adrian Jack
Puisne Judge

4th December 2014