Neutral Citation 2011 [IEHC] 546

THE HIGH COURT

[2009 No. 9042P]

[2009 No 347COM]

BETWEEN

GERARD McCAUGHEY

PLAINTIFF

AND

ANGLO IRISH BANK CORPORATION LIMITED

AND

MAINLAND VENTURES CORP

DEFENDANTS

Judgment of Mr. Justice Birmingham delivered the 27th day of July 2011

Introduction
The plaintiff is a successful and prominent Irish businessman, perhaps best known as the co founder of Century Homes Limited, which he sold to Kingspan plc in 2005.

The first named defendant is a bank and a limited liability company, formally known as Anglo Irish Bank Corporation plc. At all material times it was licensed under the Central Bank Act and was required to be regulated by the Financial Regulator. As part of the services it provided, the first named defendant (hereinafter referred to as "the bank" or "Anglo") offered private banking facilities to its clients. The second named defendant is a limited liability company incorporated in Delaware, USA. It was incorporated by the first named defendant for the purpose of facilitating participation in a property fund known as the "Anglo Irish New York Hotel Fund" (hereinafter referred to as "the Fund" or "the Hotel Fund").

The plaintiff, in September 2006, accepted an invitation to participate in the Fund and invested the sum of $1M of which $620,000 was provided by way of a loan advanced by the first named defendant and the balance came from personal funds that were available to him. The plaintiff was one of approximately 49 people who made similar investments. Issues similar to those that arise for consideration in the present case have been raised by a number of other investors and the present case has been identified as a "pathfinder" case for 22 other sets of similar proceedings.

An Overview
The investment project into which the plaintiff and others entered involved the acquisition and planned renovation of two hotels in Manhattan, New York City, being the Beekman Tower Hotel (the "Beekman") and the Eastgate Tower Hotel (the "Eastgate") collectively referred to as "the hotels" or "the two hotels".

The project has not proceeded as intended, principally because the cost of the planned renovation was far greater than had been contemplated originally. The plaintiff is deeply aggrieved by what has transpired, as are a number of other investors, and is firmly of the belief that he has been seriously ill served by the bank. In these circumstances, the plaintiff on the 7th October, 2009 issued the present proceedings in which he seeks a number of reliefs, the principal of which is rescission of a number of agreements and contracts entered into by him to facilitate his participation in the investment and there is also a claim for damages under several heads of claim. The proceedings involve allegations of fraudulent misrepresentation/fraudulent concealment and in addition claims in respect of misrepresentation, negligent misstatement, breach of fiduciary duty, intentional interference with the plaintiff's economic interest, unjust enrichment and conspiracy. The claim for damages includes claims for aggravated and exemplary damages.

There are essentially four legs to the plaintiff's claim as formulated in the pleadings which can be summarised as:-

(i) The Zoning or Certificate of Occupancy issue.

(ii) The Cost of Renovation issue.

(iii) The Presence of Sitting Tenants issue.

(iv) The Interest Rate Strategy issue.

Of these four issues, most attention has focused on (i) and (ii) and indeed the arguments relating to (iv) have not been pushed to a conclusion but I will be discussing each of these later in the judgment. However, before that, it is necessary to set out in some detail the factual background to the current dispute. In the first instance, and in order to offer context, I will do so without any detailed references to the matters most heavily in dispute and I will discuss these areas of greatest controversy in greater detail later.

The genesis of the idea for the project may be attributed to one Timothy Haskin, a New York hotel executive. Mr. Haskin had joined Tishmans Hotel Corporation ("Tishman") in 1993 and had an involvement thereafter with that organisation in various capacities, including Vice President, Partner, Executive Vice President and Managing Director. Tishman has been described as a vertically integrated hotel and real estate company providing services – from a single source in all major disciplines of the hotel, construction and real estate business. Tishman is a very significant force indeed in the New York hotel sector. The role of Mr. Haskin at Tishman was not an ever constant one but rather one that evolved over time. While that is so, in his various capacities he was directly involved in a number of mega hotel transactions, where his role was to arrange finance, introduce joint venture equity partners and to

participate with and frequently lead acquisition teams. In the context of the present set of proceedings it should be noted that Mr. Haskin was not a construction or renovation executive but it is the case that he was at the heart of a number of major construction and renovation projects. I think it would be fair to comment that he had a stellar C.V. as a hotel industry executive. One of his colleagues at Tishman was John Livingston, who was President of Tishman Construction Corporation. He and Mr. Haskin shared an ambition to go out on their own and set up their own business. Their ambition was to establish a real estate platform with an institutional sponsor focused in particular on what has been described as "value added" hotel projects, by which they meant hotels with potential, hotels that were well located but which required and would benefit from renovation and repositioning in the market-place. Mr. Haskin and Mr. Livingston saw their backgrounds and skill sets as complimentary for what they had in mind.

Mr. Haskin and Mr. Livingston were well known to the bank. Anglo had been involved in a number of transactions with Tishman. Moreover, at one stage Mr. Garrett Thelander, who was at this stage Senior Vice President at Anglo Irish New York, had previously worked with and for Mr. Livingston at New York City Public Development Corporation.

In September 2005, Mr. Haskin raised with Mr. Thelander the possibility of Anglo becoming involved as a sponsor of the new business entity that he and Mr. Livingston were considering. It appears that Mr. Thelander was receptive to the idea and agreed to bring the suggestion to his colleagues for consideration. He did so and arising from this Mr. Haskin was requested to make a formal presentation which he duly did in October 2005.

On the 11th February, 2006 on the occasion of a Six Nations rugby match in Paris to which they had been invited by Anglo, Mr. Haskin and Mr. Livingston were informed that the bank was proceeding with the Fund that they had proposed.

Back in New York, Mr. Haskin met with Mr. Mark Gordon, the managing director of Sonnenblick-Goldman, a leading New York real estate firm. Over lunch Mr. Gordon informed him that he was acting for the Denihan family, leading New York hoteliers and their company Affinia Hospitality who were in the process of selling three large New York hotels, the Beekman, the Eastgate and also the Surrey Hotel. For reasons unconnected with the present case the sale of the Surrey Hotel did not proceed. Mr. Gordon furnished an offering memorandum for all three properties and access to a website providing further information was made available. In the context of the issues that were to emerge subsequently it is worth drawing attention to the fact that the offering document, in the case of the Eastgate, refers to the option of converting the property to a luxury residential building, discussing this option in a section headed "Value Enhancement Opportunity – Residential". Again, the Beekman document raises the possibility of that property becoming a landmark luxury residential property and once more this option is discussed under a section headed "Value Enhancement Opportunities – Residential". Also in the context of the controversy that subsequently developed, it is proper to record that the Eastgate document, though not the Beekman, raises the possibility of increasing the number of bedrooms. In the case of addressing various scenarios that might be attractive to a prospective purchaser, the Eastgate document refers to a $40,000 per key capital expenditure to improve and upgrade the existing hotel while on the basis of adding 44 additional guest rooms the capital expenditure was estimated at $10.12M (averaging $43,800 per key) allocating $40,000 per key for the existing 187 guest rooms and $60,000 per key for the 44 new guest rooms. It may be noted that it is apparently the practice to deal with hotel renovations on the basis of dollars per key or room, but the aggregate involved is not the sum of what it is intended to spend on the individual bedrooms but rather that this is the amount estimated as needed to bring the whole hotel, including the public areas, to the standard required. To an outsider it might seem a somewhat strange method of calculating, but there doesn't seem to be any doubt but that that is the norm in the New York hotel industry.

It appears that at the time of the discussions between Mr. Gordon and Mr. Haskin that the sale campaign in respect of the hotels was already at an advanced stage and what has been described as "first round bids" were required to be submitted by March 9th, or within approximately two weeks of the lunch. On the 6th and 7th March, 2006, Mr. Haskin, along with Anglo personnel based in New York toured the three hotels that were then on the market as well as a number of other hotels for comparative purposes. It was clear to all that the hotels that were under consideration required renovation. It follows from this that if one were to form a view as to whether the hotels would be a good buy and what would be an appropriate price to pay that it would be necessary to identify what the likely cost of renovation was going to be. The view was formed that for the Eastgate and Beekman it was appropriate to budget on the basis of $60,000 per key while it was recognised that the renovation of the Surrey was likely to be much more expensive. The possibility of adding additional guest rooms in the Beekman, which was not an option that had been referred to in the Sonnenblick-Goldman document, was also identified as an option at this stage. I am using that rather vague phrase "the view was formed that… that it was appropriate to budget on the basis of $60,000" in a situation where there is sharp disagreement between Mr. Haskin and Anglo personnel as to how the view was arrived at. Mr. Haskin, in essence, says that the figure was the product of collaboration between himself and his team on the one hand and Anglo on the other. However, Anglo, and in particular Mr. Thelander who toured the hotels with Mr. Haskin, rejects any suggestion of a combined or co-operative approach, saying that Mr. Haskin was the hotel expert and that Anglo was relying on him and on his expertise as their putative partner and that there was no element of co-decision making. Mr. Thelander does say that he engaged in a desk valuation which involved benchmarking the figures that Mr. Haskin had come up with against renovation figures for other hotels to which Anglo, as an active player in the New York property market, had access. This exercise served to confirm Mr. Haskin's figures. It is certainly the case that Anglo was as of this date an experienced and sophisticated lender having been party to a number of hotel transactions, and certainly could not be regarded as novices in the area. However, on this disputed issue, I prefer the position contended for by Anglo as being more likely to reflect the state of the relationship between Anglo and their prospective partner and as being more in accordance with their respective experiences of the hotel industry.

On the 9th March, 2006 Anglo placed a formal bid, $80M for the Beekman and $70M for the Eastgate. The offer was, at this stage, non-binding. It was really in the nature of an expression of interest designed to get Anglo through to the next round of the process. It appears to have been submitted without prior clearance from Anglo headquarters in Dublin but in so far as the offer was non-binding, the view seems to have been taken that obtaining such clearance was unnecessary. In the event the exercise was successful in the sense that Anglo learned about a week later that it had made it through to the next stage, "the best and final round".

At about this time letters from a lawyer, Mr. Howard Goldman to Mr. Donald Denihan were placed on the Sonnenblick-Goldman due diligence websites. These letters, while not particularly detailed, raised the prospect that there were potential building code compliance and zoning conformance issues which could arise in relation to the hotels.

On seeing these letters Mr. Haskin sought advice from his counsel Mr. Harvey Yaverbaum of the firm Katten Muchen Rosenman LLP, ("Katten Muchen"). Mr. Yaverbaum's response was to recommend that the views of Mr. Michael Sillerman of Kramer Levin Nastalis and Frankel ("Kramer Levin"), a leading land use/zoning law firm in New York, should be obtained. The information obtained in relation to the code compliance/zoning issue and the appropriateness and adequacy of the response is a matter that is of central significance in relation to the first leg of the plaintiff's challenge and it is a subject to which I will return in much greater detail.

At this stage Mr. Haskin arranged for two construction professionals, who were well known to him and who would have roles allocated to them if the project proceeded, to tour the hotels. These were Mr. Ali Mohamedi, an architect and construction engineer, and Mr. Ted Brumleve, an architect. Mr. Brumleve was subsequently appointed to the position as project manager and Mr. Mohamedi was subsequently appointed as owners' representative on the project team. Mr. Haskin has indicated that the object of this exercise was so that Mr. Mohamedi could confirm that there was nothing apparent or evident that had not been dealt with in a report from Merritt and Harris Construction Consultants on the condition of the buildings which had been downloaded from the sellers' due diligence website and for Mr. Brumleve to express a view as to whether he was in agreement with the assessment that it would be possible to provide additional guest rooms or keys at both the Beekman and Eastgate. Following their tours both professional gentlemen reported verbally in positive terms.

There is a very sharp disagreement between Mr. Haskin on the one hand and Anglo personnel on the other as to how they reacted to the emergence of the zoning issue. It should be explained that the zoning issue, at its simplest, arose from the fact that both the Beekman and the Eastgate were operating as transient hotels, i.e. traditional hotels welcoming guests for an overnight stay, for a weekend, for a few days or longer period, but the Eastgate Certificate of Occupancy was for a transient hotel up to floor 7 and for a residential hotel for floors 8 to 25, while the Certificate of Occupancy for the Beekman was for a residential hotel throughout. A residential hotel is one that caters for guests staying in excess of thirty days and has sometimes been described as an apartment hotel.

Mr. Haskin indicates that, having taken advice, he felt that the issue was very real and very troubling, to the extent that consideration was given to withdrawing altogether from the bid process but that in the end it was decided to, as he puts it, put their hopes ahead of their assessments, and with their eyes open decide to take a risk and press ahead. He says that there was a common understanding of the extent of the problem, and of the scale of the risk that they were considering taking. He says that Anglo could have been in no doubt about this whatsoever. He himself made the position abundantly clear and he also had Mr. Sillerman and his colleagues at Kramer Levin explain the circumstances to them. The Anglo representatives are adamant that no such discussion took place, that they were never led to believe that the issue was a major one and that if they had ever been that they would never have proceeded with the project. In that context it should be noted that the legal system in New York, and in particular the zoning code, offers relief in certain circumstances to property owners where it is possible to establish long and continuing use, so the question was really one of how confident one could be of securing relief. The Anglo witnesses say that Anglo had a great deal to lose and that it would have been unthinkable to have proceeded were there any real and substantial risk.

There is no contemporaneous documentation to support the suggestion that the putative partners saw this zoning issue as alarming. On the contrary documentation generated by Mr. Haskin and his associates seems to be much more consistent with the view having been formed that this was an eminently manageable issue, in the nature of a minor problem or a routine issue that required sorting out. So, on 30th April, 2006, an investment summary in relation to the Beekman prepared by Jennifer Williams, a senior associate of Mr. Haskin contained the following reference:-

> "There is a risk with the transient hotel use of the property. The current operation is a non-conforming use. The Certificate of Occupancy is apartment/hotel. If there are any code compliance costs related to this issue, as per the latest discussion with Sonnenblick-Goldman, the costs will be paid by the seller out of a hold back from the purchase."

The issue is referred to again in the "pro's and cons" section where in the "cons" column there appears "have to work on non-complying use post closing". This language, which does not suggest that there was any threat to the capacity to operate the hotels as intended, was reproduced in internal Anglo documentation and indeed continued to appear there after that ceased to be appropriate because of an understanding subsequently reached with the vendor, as a result of which the risk in relation to code compliance cost passed from the vendor to the purchaser.

In so far as there is this conflict, I prefer, on this aspect, the evidence of the Anglo witnesses and in particular Mr. Thelander and Mr. Paul Brophy, Anglo New York Senior Vice President. Given the early stage at which the fact that there was a zoning issue emerged, before the formal partnership between Mr. Haskin and Anglo came into existence, it makes no sense to think that this issue was identified as a real major issue but ignored. In late March 2006, which would seem to be, as best one can determine, when the issue first surfaced, neither Anglo, nor Mr. Haskin nor anyone else had any contractual commitment to the Denihan family and there would have been nothing to stop them from withdrawing from the bid process and looking elsewhere for a suitable investment if necessary. That wasn't done. Instead, according to Anglo, it was agreed to use the issue as a device or stratagem to secure a price reduction. Mr. Haskin seems to have been particularly interested in seeking a price reduction, and using this issue for that purpose. In evidence he has said that his ambition had been to achieve a price reduction of $4M for each property.

On 25th March, 2006, Ms. Williams provided a deal summary and projections for both the Beekman and Eastgate, along with what has been described as pro-forma assumptions. These assumptions in the first instance contemplated a renovation of each hotel at a cost of $40,000 per key but also dealt with a recommended scenario. In the case of the Beekman this would see the addition of 20 rooms so that the envisaged renovation budget for the Beekman was $11.52M (plus an interest reserve in recognition of the likelihood of a shortfall in revenue while renovations were taking place). In the case of the Eastgate, the recommended approach envisaged a renovation budget of $12.24M, along with an interest reserve for the same reasons. The relevance of this is that at this stage, all concerned were continuing to operate on the basis of a renovation budget of $60,000 per key in the case of both hotels. Further documents were sent by Mr. Haskin and his team reflecting the same position. So, Mr. Haskin on the 27th April, 2006 sent Mr. Thelander, and other Anglo personnel a "current analysis". In a number of respects the original analysis had moved on but the analysis of the renovation issue remained unaltered. Over the following three days Mr. Haskin sent to Anglo a number of summary documents and each continued to deal with the renovation issue in the same fashion.

On 29th March, 2006, a revised offer, the best and final offer, was submitted, which was one of $74M for the Eastgate and $79M for the Beekman. This offer was on Anglo Irish Bank notepaper but the offering document made clear that post-closing ownership would be comprised of Anglo Irish Bank and an entity to be formed.

Within days Mr. Mark Gordon advised the would be purchasers that subject to tidying up what might be described as loose ends that their bid had been successful. A number of meetings were convened to address outstanding issues.

Around this time on 3rd April, 2006, what has been described as the fund term sheet setting out the basis of the relationship between Anglo and its partners was finalised and signed on behalf of the bank and also by Mr. Haskin and Mr. Livingston. At this stage the documentation envisaged a $100M property fund with the possibility of the commitment of a second tranche of $100M at the option of Anglo.

At one of the meetings held subsequent to the acceptance of the best and final offer, the Denihan's made it clear that no further due

diligence in relation to the condition of the properties would be permitted and they also set their face against any contact by the would be purchasers with the New York City Building Department enquiring about zoning code compliance issues. These restrictions imposed on the purchasers, in particular the restrictions on contact with the Building Department, constitute a matter on which the plaintiff now places considerable reliance and he contends that this was indicative of the fact that there was a serious issue here that all involved should have recognised and indeed must in fact have recognised.

On or about the 11th May, 2006, the final issues between purchaser and vendor were resolved. Mr. Haskin has said that he had hoped to secure a reduction of $4M per property but in the event the agreement reached saw a reduction of only $1M in total. This figure was arrived at following a face to face meeting on or about the 11th May between Mr. Lawrence Denihan and Mr. Paul Brophy. At this stage the Anglo Irish Credit Committee approved a request for funds in respect of the deposit on the hotels. On 19th May, 2006, two purchase agreements, one for the Beekman and one for the Eastgate were signed. The documents were signed by Mr. Paul Brophy on behalf of the purchasers doing so on behalf of "Mainland", Anglo's newly formed, wholly owned subsidiary. The contracts provided for a financial due diligence period and for a closing date of 28th September 2006 or the 3rd October, 2006 depending on the date on which the financial due diligence was completed. Of note is that from the 19th May, 2006 on, subject only to financial due diligence, the contracts were "hard"; that is to say the deposits totalling $11.15M had become non-refundable. Again, this is a matter on which the plaintiff places considerable emphasis and says that from that moment on there was an imperative for the purchasers to proceed and that there was thereafter an incentive to cut corners and, as it were, turn a blind eye to any difficulty that would emerge.

Matters had reached this stage without the proposed partnership involving Mr. Haskin, Mr. Livingston and Anglo formally coming into existence. However, there were developments on that front also around this time. Up to now as appears from the term sheet of the 3rd April, 2006, to which I have referred, it had been envisaged, that there would be a fund initially of $100M perhaps leading to the purchase of four to six properties. However at this stage an area of disagreement between Anglo and its would-be partners began to emerge. Anglo pressed that a system which has been described as one of "cross promotes" would apply. A "Promote" is a fee that is paid to the sponsor and the issue was whether the entire fund of $100M would be treated as a single investment or whether each of the properties, be that four or six or whatever, which were to be purchased would be regarded as separate investments. This change of approach saw Mr. Livingston, who, it will be recalled, was the former President of Tishman Construction, deciding to withdraw from the project and informing Mr. Haskin of his decision by email of 7th June, 2006. Accordingly there was no longer a construction executive participating in the proposed partnership.

Anglo's response to the withdrawal of Mr. Livingston was to propose that the project be scaled down to a $50M fund. Mr. Haskin has said that he was very unhappy about what was happening but, notwithstanding any unhappiness on his part, he did not withdraw but continued to negotiate the terms of the intended partnership. On the 24th July, 2006 the formal documentation to give effect to the partnership, including a limited partnership agreement, an investment management agreement and a venture agreement was executed. The effect of this was to bring into existence Peninsula Real Estate Fund I, LP (hereinafter referred to as "the partnership") as a limited partnership in accordance with the laws of the state of Delaware. In summary the documentation saw a limited partnership agreement entered into. This involved a general partner, namely Peninsula Real Estate Fund IGP, LLC, a Delaware Limited Liability Company controlled by Mr. Haskin; a Class A limited partner which was to be held by the second named defendant; and an initial Class B limited partner also to be held by the second named defendant. Significantly, the limited partnership agreement made provision for the transfer by the initial Class B partner of the Class B limited partnership interest to subsequent investors, as Class B limited partners. Those so admitted would succeed to the interest of the initial Class B partner to the extent of the transfer as if each newly admitted Class B limited partner had been admitted as a partner on the commencement date.

Also to be noted at this stage is that the limited partnership agreement created an Investment Committee which was required to agree on certain matters which included the sale or re-financing of properties owned by the Fund. The general partner Peninsula Real Estate Fund IGP, LLC i.e. Mr. Timothy Haskin, had a vote and Mainland had a vote with two nominees, Mr. Paul Brophy and Mr. Edmund Byrne, Head of Lending for Anglo in North America, sitting on the committee. In effect either side were in a position to veto any major decision.

With the contracts for the purchase of the hotels in place and the partnership structures in place, Anglo's focus turned to securing the participation of some of their clients, and in particular clients of the private bank division as investors in the project. Anglo's target group were clients with a net worth of over €5M or an annual income in excess of €500,000. Central to the task of interesting private clients of the bank was the role of the bank's relationship managers. These were the officials and officers of the bank who were in direct contact with the clients of the bank and they would be promoting the merits of proposed investment to their clients. Mr. Haskin was asked to come to Dublin to make a presentation to the relationship managers and did so on 28th August, 2006. For that purpose he received a power point presentation from Jason Drennan, the Dublin based Anglo executive who was taking charge of the approach to the private clients. Mr. Haskin reviewed the power point presentation as requested and suggested some changes. This presentation, it should be noted, contained and indeed was based on the $60,000 per key renovation budget and it was not suggested that there was any difficulty with that or any change was needed.

The central element of the strategy to interest private clients was the production and publication of a brochure (hereafter "the black brochure" or "the brochure"), an offering or information or promotional brochure which would be presented to them for their consideration.

In relation to the timing of publication, the contract to acquire the hotels provided for a closing date of the 28th September, 2006, or the 3rd October, 2006, with provision in some circumstances for extensions, and indeed the closing dates were in fact eventually extended by agreement until 25th October, 2006. That the closing dates had been identified was of some significance in that it meant that Anglo needed to move with considerable expedition because if there were any delay in recruiting equity investors there would be a risk that the Fund could find itself exposed to New York asset transfer tax at 3% of the asset value on the double with taxation arising on the transfer from the Denihan family and again on the onward transfer by the purchasers to the equity investors. The plaintiff attaches considerable significance to the fact that Anglo was in that sense operating against a deadline and certainly it is the case that Anglo personnel were very conscious of the potential downside if there was any delay.

The brochure which was eventually produced and furnished to the individuals selected is the document which is right at the heart of this case. Each of the four legs of the plaintiff's claim is based firmly on what is contained in the brochure and what is omitted therefrom.

The production of the brochure was a collective exercise involving Anglo personnel based in USA and in Dublin. Those involved on the US side were Garrett Thelander and Jeff Dybas, his subordinate based in New York, along with Mr. Paul Brophy and Mr. Edmund Byrne based in Boston, while in Dublin those involved were Mr. Jason Drennan, who had a particular co-ordinating responsibility, Mr. Paul Corry, who was his immediate superior, there was input from others, including Gerard Davis, Chief Executive of Anglo Irish Assurance

Company Limited, which was the main investment syndication vehicle that Anglo used to offer investment opportunities to its private clients in Anglo, Anglo's head of taxation, and others. Mr. Haskin and associates of his, including Jennifer Williams and Meredith Negrin were also involved and had a significant input into its contents.

In the course of the preparation of the brochure the code compliance/zoning issue emerged once more. In particular the question arose for consideration and decision whether the brochure should include material referring to the code compliance/zoning issue.

The days prior to the finalisation of the text of the brochure saw a flurry of emails exchanged involving Jeff Dybas, Garrett Thelander, Jason Drennan, Paul Corry and others on this topic and those involved were also in direct and telephone contact. In the event the brochure went to print without any reference to zoning issues. Of particular note is that on 31st August, 2006 at 2.38, Timothy Haskin sent an email to Garrett Thelander which he copied to Jeff Dybas, Jennifer Williams and Harvey Yaverbaum which stated, "I think you should disclose the zoning issue, thanks". Also on 31st August, Harvey Yaverbaum emailed Garrett Thelander, copying the email to Timothy Haskin. The email is headed "Zoning Disclosure etc" and so far as relevant stated, "attached, after consultation with Kramer Levin is our suggested language". The attachment was in these terms:-

> "Zoning
>
> The company intends to continue operating the Eastgate and the Beekman as transient hotels. It should be noted that the certificates of occupancy for the hotels permit only partial transient hotel use for the Eastgate and only residential hotel use for the Beekman. Both hotels are in an area of Manhattan in which the construction of a new building for use as a transient hotel (as opposed to use as a residential hotel) is not permitted on as [sic] as-of right basis. However, the zoning regulations permit the continuation of a use where a prior non-conforming use is demonstrated.
>
> Zoning counsel has advised the Fund that other hotels in circumstances similar to those of the Eastgate and the Beekman have been traditionally granted changes to their certificates of occupancy to permit transient use. However, zoning counsel has also advised the Fund that it cannot be completely assured of that outcome. If the use of the hotels for transient purposes were to be challenged, the Fund would either apply to obtain the changes, which could take time, or operate both hotels as residential to the extent required."

On or about the 11th September, 2006, the brochure was published. The brochure is question is a well presented, glossy publication. As it is the single document which is of the greatest significance in the context of this case, I will be dealing with its contents in detail. However, at this stage it may be noted that in the brochure, the core idea behind the proposal is set out in an executive summary, before being elaborated upon in the text of the brochure itself. It indicates that Anglo was seeking a limited number of investors to participate in the Anglo Irish New York Hotel Fund. It is explained that the Fund would acquire the freehold interest in the Beekman and the Eastgate hotel and that the hotels were being purchased for $151.2M with acquisition costs amounting to circa $10.5M. In addition, it was stated that a further c. $24.8M was being provided to facilitate the planned renovation of the hotel. The executive summary and the brochure as a whole contain a number of references to the fact that the investment is high risk. In addition the executive summary and the brochure as a whole contain non-reliance statements or cautions. So, the executive summary contains the statement:-

> "NB: All figures and statistics in this brochure are reproduced from external reports addressed to Anglo. Reasonable efforts have been taken to ensure that all such information has been accurately reproduced. However, Anglo cannot accept responsibility for any errors in the reports themselves or the information on which they were based."

On the 11th September, 2006, the black brochure was distributed to a number of people identified as possible investors. Also, in early September, 2006 there was telephone contact and face to face contact between the plaintiff and Mr. Jason Drennan. The plaintiff was informed that Anglo was putting together a fund for the purpose of acquiring, renovating and managing hotels in New York and was also told of the involvement of Mr. Tim Haskin and something of his background in the hotel industry. Subsequently, the plaintiff was given a copy of the black brochure by Mr. Jason Drennan and he has said that he read this brochure carefully. Having done so, on or about the 22nd September, 2006 he made the decision to invest in the Fund. The amount invested was, as we have seen, $1M, and part of this was sourced through a loan of €620,000 provided by Anglo on the 10th October, 2006. It may be observed that the contact in relation to the New York Hotel Fund took place against the backdrop of earlier approaches to Mr. McCaughey by Anglo in which they had outlined what a private banking relationship involved and all the advantages that they said it offered to him.

On the 27th September, 2006, the plaintiff went to the offices of Anglo at Connaught House in Burlington Road with a view to executing the relevant documentation. The plaintiff signed a Commitment Agreement with Mainland by virtue of which the plaintiff agreed to subscribe for and purchase an interest in the limited partnership known as Peninsula Real Estate Fund I, LP, being a "Class B" limited partnership interest. The plaintiff also executed a "Limited Durable Power of Attorney" which appointed the "Limited Partnership" manager of the partnership and each other person designated by the partnership or the manager thereof to act as his attorney in fact for the purposes there set out which included the powers of the limited partnership to acquire and develop the hotels, and completed a professional investor declaration. The documentation completed by the plaintiff included elaborate exemption or exclusion clauses. The significance of these provisions is a matter of dispute between the parties and it is a subject to which I will be returning.

Mr. McCaughey has made the point that when he called to the offices of Anglo the documentation signed by him was already prepared for signature in the sense that it was opened at the correct page with the places requiring his signature indicated by yellow post-it stickers. The point is made to the effect of this was that the scope for reading the documentation was limited.

Once the plaintiff had made his investment he was not directly involved in the events that occurred over the following months and his next significant involvement was when he visited the hotels while on a visit to New York shortly before Christmas 2008. In the interim investment updates had been issued in March and June 2008. These were received by the plaintiff but there may have been some delay in his receiving these, attributable to the fact that at this stage he was spending much of his time in California. The June 2008 update included the following:

> "To date achievements are as follows:
>
> • Completed restaurant and residential buy outs that will significantly facilitate any proposed renovation plans.
>
> • Zoning change approval, to enable the upgrade works at both hotels.
>
> • Approval for exterior renovation works at the Beekman.

- Renovation plans for both hotels filed with the New York Building Department and Building Permits obtained.

- New management team installed at the Beekman to replace interim management.

In order to carry the refurbishment programme, a facility of c. US$24.8million was originally approved by the bank with US$7.9milllion for the provision of interest costs and management fees for the term.

Given the significant increases in construction costs within the New York Borough, together with the fact the hotels are currently trading well (US$10.8million of combined net operating income) we are considering a variety of renovation options ."

September and October 2006 saw an amount of work taking place relating to the preparation and execution of a building loan agreement which was eventually signed on the 25th October, 2006. The plaintiff has focused particularly on a letter written on the 6th September, 2006, from Katten Muchen to Loeb and Loeb LLP, who were the lawyers acting for Anglo in relation to the transaction. That letter draws attention to the fact that while the provisions of the draft building loan agreement which was then under review contemplated that the budget would be finalised by closing that there would not in fact be a finalised budget in place at that time. Another paragraph of the letter dealt with the zoning issue. It did so in these terms:-

"Zoning

As Anglo Irish Bank is aware, certain of the representations, warranties and covenants relating to our clients compliance with applicable law and possession of all necessary licences and permits (including ss 4.04, 4.13, 4.16, 5.01 and 5.22) will need to be revised to take account of zoning issues. While our client intends to continue operating the Eastgate and the Beekman as transient hotels, it should be noted that the Certificates of Occupancy for the hotels permit only partial transient hotel use for the Eastgate and only residential hotel use for the Beekman. Both hotels are in an area of Manhattan in which the construction of a new building for use as a transient hotel (as opposed to use as a residential hotel) is not permitted on as [**sic**] as – of – right base. However, zoning regulations permit the continuation of a use where a prior non-conforming use is demonstrated. Our client has retained zoning counsel to address these issues".

The issue of zoning was also addressed in letters dated 25th October, 2006 from Beekman Tower Hotel Associates LP and Eastgate Tower Hotel Associates LP to Anglo. These letters essentially cover the same ground. The letters were signed by way of acknowledgement and agreement by two directors of Anglo Irish Bank Plc. and the plaintiff and Mr. Haskin point to this as an indication of the importance and significance of these documents.

The plaintiff contends that there is a very sharp divergence between the care and precision with which both the renovation budget and zoning issues were being approached in the context of the draft building loan agreement in September and October 2006, where Anglo Irish was directly involved and its interests directly at stake, and how these same issues were dealt with in the black brochure.

The defendants respond by saying that the context is an entirely different one and that the links that the plaintiff seeks to draw are utterly and entirely misconceived.

On the 20th November, 2006, Lehr Construction Corporation, the construction company which had been chosen to carry out the renovations, produced its first budget analysis for the Eastgate. The amount that they came up, with some $29.5M, was dramatically at variance with earlier expectations and was quite inconsistent with the underlying assumptions on which the black brochure was based. Then, very shortly after, Leher Construction produced their estimate for the Beekman and it came in at $33,681,000, again, completely out of line with earlier expectations and the black book summary.

In order to get a sense of the scale of the departure from the original assumptions it is necessary to recall that the black brochure had referred to c. $24.8M being provided to facilitate the planned renovation for the two hotels but now the figures that were emerging for each of the individual hotel were greater than that. A further measure of the divergence can be found in the fact that the $31.2M, inclusive of interest provision which appeared in the black brochure, had risen to $68.2M when the estimates were formally presented to Anglo on the 6th April, 2007 and by November, 2007 that figure had risen to $90M and by May 2009 stood at $102M before falling back somewhat. While the escalation in cost is certainly dramatic, it is useful to bear in mind, as Mr. Haskin pointed out when giving evidence, that the property market in New York in 2006 and 2007 was rising and that the value of the assets which had been acquired were rising rapidly at the same time.

There is disagreement between Mr. Haskin and Anglo witnesses as to how Mr. Haskin reacted to the information that was reaching him about the increase in the cost of renovations. Mr. Haskin says that he informed Paul Brophy, Garrett Thelander and Jeff Dybas and that their response was that he keep quiet about this for the moment and not tell Jason Drennan or anyone else in Anglo Dublin as they needed to "manage expectations". Mr. Brophy and Mr. Thelander denied this and say that they were first informed of the increase in costs only much later. Mr. Dybas did not give evidence during the course of the hearing on this topic or indeed at all and this was the subject of frequent comment by counsel on behalf of the plaintiff, and in closing submissions the plaintiff has urged the Court to draw inferences adverse to the defendant by reason of this failure to call a potentially significant witness.

If Mr. Haskin did inform Anglo of the situation as soon as he had any indication of what was happening there does not appear to be any surviving contemporaneous record of that. Nor is there any indication that Anglo were engaged in managing expectations or taking any other action on foot of this dramatic news.

Thereafter, in 2007, once the actual costs of renovating the hotels in the way that had been intended became clear, a number of possibilities were considered with varying degrees of enthusiasm and in some cases with no enthusiasm at all on the part of some participants. Mr. Haskin raised the possibility of seeking further equity from the Class B investors and also sought agreement to a refinancing of the deal and the involvement of a completely different bank, UBS. These were not suggestions that held any appeal for Anglo. Amongst other options considered was the sale of the hotels on the open market. While Anglo saw merits in this, in that they saw the prospect of the hotels being sold for a significant profit over the acquisition price, thus providing the investors with a profit, this was not attractive to Mr. Haskin, who countered by expressing an interest in buying the hotels himself. In turn Anglo were unenthusiastic about that suggestion, as they had concerns about the implications of a sale other than to an unconnected person at arms length. However, while at one stage that route appeared as if it might offer the prospect of success notwithstanding those concerns, in the end nothing came of it. All efforts to secure a resolution proved unsuccessful and ultimately, after an unsuccessful mediation attempt, the bank set about the task of removing its general partner. This gave rise to arbitration proceedings in New York, with hearings taking place in September 2010, the outcome of which has still not been finalised.

In terms of the sequence of events the next occurrence of significance is that the plaintiff, and other members of his family including his brother Gary, who was also an investor and has also issued proceedings, found themselves in New York in December 2008. They made arrangements to tour the hotels in which they had invested on the 21st December. On this tour they met Mr. Haskin for the first time. The plaintiff has said that he was shocked to learn that the project had come to a halt because of a disagreement between Mr. Haskin and Anglo. The plaintiff has described that Mr. Haskin explained to them that he had told Anglo not to raise equity for the Fund until all the costs of the renovation budget were in and until it was more fully vetted by a team of consultants but that Anglo had refused his request to wait and closed the purchase because they had a binding non-refundable deposit which would otherwise be lost. In evidence Mr. Haskin has denied that he said this. Whether or not it was specifically said, it is certainly the case that following this visit that Mr. McCaughey was motivated to take up the cudgels and thereafter did so with some vigour. This involved him sending numerous emails, many quite trenchant, to the bank, and also saw him playing a prominent role at a meeting of the investors which was held on 27th February, 2009. His efforts in that regard were the source of considerable annoyance to Anglo. The extent of that irritation is reflected in the fact that the defence and counterclaim filed in these proceedings includes a plea – that by reason of his behaviour and conduct in relation to the matters in issue that the plaintiff was disentitled to any equitable relief. During the course of this hearing, this plea was, very properly in my view, withdrawn.

To complete this overview of events there is one other issue to which reference should be made which relates to the zoning/Certificate of Occupancy Issue. On 1st March, 2007, Mr. Sillerman of Kramer Levin wrote two letters to Commissioner Christopher Santulli on behalf of the Eastgate Tower Hotel Associates LP and the Beekman Tower Hotel Associates LP requesting permission for an amendment of the Certificate of Occupancy. In the case of the Eastgate the letter requested permission for an amendment of the Certificate of Occupancy for the hotel to reflect transient hotel use on its 8th to 25th floor and in the case of the Beekman requested permission for an amendment of the Certificate of Occupancy to reflect transient hotel use. On the 2nd March, 2007, in the case of the Beekman and the 12th April, 2007 in the case of the Eastgate, Commissioner Christopher Santulli recorded his decision in handwriting on the letters that had been submitted. In each case he recorded that it was "o.k." to accept supporting documentation of continued transient hotel use and that it was "o.k." to file an application to amend the Certificate of Occupancy to reflect lawful continuance of existing non-conforming use. There has been some debate between the parties during the proceedings as to the effect of the decision of Commissioner Santulli and the extent to which it is definitive, authoritative or binding and I will address these arguments when considering the zoning issue but at this stage it is interesting to note how this development was dealt with and responded to at the time. Mr. Haskin sent an email to Paul Brophy and Garrett Thelander copying to Jeff Dybas and others which simply stated "subject FW: Eastgate, we got the approval!!!!!!!!!!!!!!!!!!!!!!!!!!!!" On the same day Paul Brophy responded to Mr. Haskin as follows:-

> "Subject: Re Eastgate
>
> Tim and Co.,
>
> This is fabulous news!!! and congratulations to you and the team for navigating very complicated and tricky waters. We will get back to you on the funding side of things at the end of next week.
>
> Regards
>
> Paul Brophy"

The Statutory and Regulatory Framework

Before proceeding to consider the arguments addressed to the various legs of the plaintiff's claim, it is appropriate to refer briefly to the statutory and regulatory framework that applies to the relationship between the parties.

At the hearing, the plaintiff applied to amend his Statement of Claim in order to plead that he was a "consumer" with a view to contending that he was entitled to the benefit of the European Community (Unfair Terms in Consumer Contracts) Regulations. I permitted this amendment to be made. However, when it emerged that the amendment would require the plaintiff to furnish details by way of discovery of his investment history so that the parties could address arguments as to the issue of whether the plaintiff was as a matter of fact a consumer, or a professional investor or what his precise status was, the application to amend, which had been successful, was withdrawn.

Furthermore, I also permitted the plaintiff to amend his proceedings so as to clarify he was alleging breach of statutory duty, and subsequently the plaintiff particularised this aspect of his claim by confirming that he was relying:-

> (i) On the Code of Conduct for the Investment Business Services of Credit Institutions 2001, as issued by the Central Bank pursuant to s.117(1) of the Central Bank Act, 1989 and
>
> (ii) On the Consumer Protection Code as issued by the Financial Regulator in August 2006 in accordance with the provisions of the Central Bank Acts 1942-1998.

The plaintiff's interest in the Code of Conduct is undimmed despite the fact that the introduction to the Code of Conduct for Investment Business states expressly:-

> "A failure by a Credit Institution to comply with a general principal of this Code shall not of itself give rise to any right of action by persons affected thereby, nor shall such a breach affect the validity of any transaction".

In so far as the plaintiff has an interest in the Code of Conduct for Investment Business it should be noted that the general principles require that a "*credit institution shall ensure in the conduct of its investment business services with clients* that it carries out its responsibilities in a particular way." [Emphasis and italics as in original. Readers of the Code are there referred to the definition section for terms shown in bold and italics.] At its most basic, the general principles are concerned with credit institutions conducting investment business services with clients. It is clear and indeed is common case that Anglo falls within the definition of a credit institution. However, the situation is more problematic when it comes to the question of investment business services. An investment business service must relate to an "investment instrument" which definition in turn is to be found in the Investment Intermediaries Act. It does not appear that an interest in a Delaware partnership was a transferable security and accordingly the plaintiff's investment would appear to fall outside the terms of the Code of Conduct. Mr. Robert Moynihan, an expert in regulatory matters called on behalf of the plaintiff, appeared to accept that from a legal point of view that was so, but felt that the regulatory environment was broader and softer than the legal regime. He indicated that he was assisted in reaching that view because the black

brochure had contained a statement to the effect that Anglo Irish Bank was regulated by the Financial Regulator, and he attached significance to this. Notwithstanding Mr. Moynihan's views about the nature of the regulatory environment being broader and softer than the legal regime, I am of the view, that having regard to the definition document which accompanies the Code of Conduct that the Code simply has no application.

There is a further point. The documentation completed by the plaintiff when he called to the offices of Anglo on Burlington Road, included a Professional Investor Declaration. This involved the plaintiff accepting that by signing the document he acknowledged that he would lose the protection of the Code of Conduct for investment business services and his right to investor compensation pursuant to the Investor Compensation Act 1998 and that he had been given sufficient time to consider the implications of changing status. It is in this context that the plaintiff and his advisers have pointed to the fact that when he called to the office all the documentation for signature was already laid out and that as a result Anglo was aware that as a matter of reality that on the occasion in question there was little opportunity to read the documentation and give it consideration. I am unimpressed by this argument. The plaintiff was a sophisticated and experienced businessman. When going to Connaught House he was fully aware that the purpose in going there was to execute legal documents. It was up to him to decide how much time he needed for his purposes and if he did not seek further time then really he has no one to blame but himself. My views in that regard are reinforced by the fact that the black brochure, which the plaintiff has said that he read carefully on more than one occasion, contains a specific reference to the requirement to complete a Professional Investor Declaration at section 11 headed "Investment Steps". If he had any uncertainty about the significance of the fact that he was going to be asked to sign a professional investor declaration, it is inconceivable that a business man of the plaintiff's experience would not have made enquires. Accordingly, it is my view that the declaration signed by the plaintiff was a valid and effective one.

Likewise, the general principles of the Consumer Protection Code published in August 2006 do not apply as an investment in a Delaware Partnership was not a service in respect of which Anglo was required to be authorised by the Financial Regulator. Quite simply the service that was being provided was not one for which the bank was required to be registered or authorised and accordingly the Code was of no application. In any event in the case of *Zurich Bank v. McConnon* [2011] I.E.H.C. 75, I expressed the view that I could see no basis for suggesting that any alleged breach of the Code exempted the borrower from repaying his loan and rejected the argument that a breach of the Code rendered a contract null and void. I see no reason to change my mind in that regard.

In any event whether the Consumer Protection Code applies may not in truth be of enormous significance, because it has been accepted on behalf of the bank that best practice in the industry is that a financial institution would act honestly, fairly and professionally in the best interest of customers and would act with skill, care and diligence and they say that this is just the way that the bank conducted its business.

The Threshold to be Overcome

The plaintiff has laid his claim in terms of fraudulent misrepresentation and fraudulent concealment and has also formulated claims in terms of misrepresentation, negligent misstatement, breach of fiduciary duty, intentional interference with the plaintiff's economic interest, unjust enrichment and conspiracy. The defendant takes objection to the plaintiff's claim as formulated and says that the only possible claim that the plaintiff can hope to make is one based on fraud, leading, if successful to an order for rescission. The starting point for the defendant's arguments that the plaintiff is confined to making a claim only in fraud is the Commitment Agreement signed by the plaintiff on the 27th September, 2006. This is one of the agreements, indeed, the principal agreement, of which the plaintiff seeks rescission. Clause 3 of the document begins:-

> "*Representations and Warranties of the Investor.* "To induce Mainland to accept this subscription, the investor represents and warrants as follows:-
>
> …
>
> (e) "To the full satisfaction of the Investor, the Investor has been furnished any materials the Investor has requested relating to the Partnership and the offering of the Interests and the Investor has been afforded the opportunity to ask questions of representatives of the Partnership and Mainland concerning the terms and conditions of the offering of Interests and to obtain any additional information necessary to verify the accuracy of any information provided to such Investor and to make an informed investment decision with respect to an investment in the Partnership,
>
> (f) other than as set forth herein, the Partnership Agreement and any separate agreement in writing with the Partnership executed in conjunction with the Investor's subscription for Interests, the Investor is not relying, and will not rely, with respect to its Interests, upon any other information (including, without limitation, any advertisement, article, notice or other communication published in any newspaper, magazine or similar media or broadcast over television or radio, and any seminars or meetings whose attendees have been invited by any general solicitation or advertising), any representation or warranty by the Partnership, the General Partner, Mainland, any Affiliate of any of the foregoing or any of their respective directors, officers, employees, partners, shareholders, advisers, attorneys in fact, representatives or agents, written or otherwise in determining to invest in the Partnership, and indirectly the real property located at 3 Mitchell Place, New York, New York USA and 222 East 29th Street, New York, New York USA (the "Properties") and expressly acknowledges that none of the Partnership, the General Partner, Mainland, their respective Affiliates, nor any of their respective directors, officers, employees, partners, shareholders, advisors, attorneys-in-fact, representatives or agents makes any representations or warranties to it in connection therewith. The Investor has consulted to the extent deemed appropriate by the Investor with the Investor's own advisers as to the financial, tax, legal and related matters concerning an investment in interest and on that basis believes that an investment in the Partnership, and indirectly the Properties is suitable and appropriate for the Investor."

It is true that the clause in question refers to the Partnership, the general partner or Mainland and there is no specific reference to the first named defendant. However, it seems to me given the nature of the relationship between Anglo and Mainland and the circumstances in which Mainland came into existence that it is impossible to argue that Anglo and Mainland are not affiliates of each other. Clause 3 also states as follows:-

> "(j) The Investor has, independently and without reliance upon the Partnership, Mainland, their respective Affiliates, nor any of their respective directors, officers, employees, partners, shareholders, advisors, attorneys in fact, representatives or agents, and based on such documents and information as it had deemed appropriate, made his or her own appraisal of and investigation into the business, operations, property, financial and other condition, credit worthiness and merits and consequences of investing in the Partnership and, indirectly the Property, and has made his or her own investment decision with respect to the investment represented by his or her Interests and his or her participation in the Partnership

and, indirectly, the Properties,

(k) The Investor has, based on his or her own investigation of the interests, the Properties and the Partnership, made his or her own independent analysis of the likelihood of its success and such investor acknowledges and agrees that the information regarding the Interests, the Partnership and the Properties (including financial, operational and performance data and projections) and the economic and market information contained in any materials provided (whether by Mainland or others) to such Investors in connection therewith would have been obtained or derived from sources prepared by other parties and that none of the Partnership, Mainland, their respective Affiliates, nor any of their respective directors, officers, employees, partners, shareholders, advisors, attorneys-in-fact, representatives or agents, assumes any responsibility for the adequacy, accuracy, completeness or reliability of such material or such information, the Investor acknowledges that past performance is no indication of future results, and that actual results may differ materially from projected, estimated or targeted results.

(i) The Investor acknowledges and agrees that (i) any materials provided (whether by Mainland or others) in connection with such Investors' investment in the Partnership and indirectly, the Properties, do not purport to be comprehensive or complete or to contain all information or to describe the risks and potential conflicts of interest that such Investor may consider material in making a decision to invest in the Partnership and, indirectly, the Properties. (ii) such Investor must perform his or her own independent due diligence and independent analysis of the merits and the legal, tax, regulatory, financial and other risks of an investment in the Partnership (and any series of Interest therein) and, indirectly, the Properties prior to subscribing for Interest, and (iii) none of Mainland, its respective Affiliates, nor any of their respective directors, officers, employees, partners, shareholders, advisors, attorneys in fact, representatives or agents assume any responsibility for, and shall have no liability in respect of the materials referred to in Clause (i) above,

(m) The Investor acknowledges and agrees that the Partnership, the general partner, Mainland, the respective Affiliates, and their respective directors, officers, employees, partners, shareholders, advisors, attorneys in fact, representatives or agents may have confidential information relating to the Partnership, the General Partner, the interests and the Properties that has not been disclosed to such Investor, and that notwithstanding such non-disclosure, such Investor has received information deemed by him or her to be sufficient to allow him or her to make an independent and informed decision with respect to his or her investment in the Partnership, and, indirectly, the Properties."

On their face, these representation and warranties by the plaintiff are couched in very broad terms. They involve him stating that he has all the material that he wants, that he is not relying on any representations, that he has made his decision on the basis of his own appraisal, and that he recognises that he may not have been given complete information but wishes to make the investment. Taken at their face, these representations and warranties present a substantial obstacle to any plaintiff seeking to present a claim on the basis that he has been misled or misinformed.

It is of some significance that the Commitment Agreement does not stand in isolation but followed on from the distribution of the black brochure which itself contained language of a broadly similar nature in both the executive summary and the full brochure and in addition contained warnings addressed to the reader. It is appropriate in particular to draw attention to a statement in the risk factors section of the brochure where under the heading Development Risk it is stated:-

"(e) A key part of this investment is the successful completion of the renovations to the Hotels while maintaining income. While these should be complete by 2008, there is a risk that despite the best efforts of Anglo and the Promoter, the works may not be completed on time or on budget"

Section 12 of the brochure headed "Valuations" includes the statement:-

"(f) Full valuations of the Hotels will be carried out at least every three years. There is no guarantee that the investment will ultimately be realisable at that or any other value".

While the final section of the brochure headed "Important Notice" states:-

"(g) This investment could be subject to sudden and large falls in value and an investor could lose the entire value of their investment".

The plaintiff says that the attempt to confine the case to one of fraud and to prevent the plaintiff advancing various elements of the claim that he wishes to, ignores the nature of the relationship that existed between the plaintiff and the first named defendant and says that the effectiveness or otherwise of the exemption clauses in particular those in the Commitment Agreement cannot be divorced from the nature of that relationship.

It is true, as Kelly J. pointed out in *Director of Corporate Enforcement v. D'Arcy* [2006] 2 I.R. 163, that banks occupy a special position in society, however, the days when a bank manager was seen as occupying a highly respected position in the local community, a pillar of the local establishment seen as an independent and disinterested advisor, or a confessor type figure are long gone, if indeed that ever represented the reality. Much of the activity of a bank involves selling products or services and those to whom products or services are offered will be wise to realise that few salesmen undersell their wares. While that observation is of general application, clearly the background and character of the target audience is a highly relevant consideration. If the target market comprises people who are unlikely to be accustomed to making financial decisions for themselves and who are not part of the investing class, without ready access to independent advice, it will be easier to conclude that reliance was placed on the expertise and indeed objectivity of the staff of a bank. See by way of example *Investors' Compensation Scheme Limited v. West Bromwich Building Society* [1999] Lloyds Reports 496.

In seeking to exempt himself from the effects of the limitations imposed by the terms of the Commitment Agreement, the plaintiff has relied heavily on the case of *Inter-photo Picture Library Limited v. Stiletto Visual Programme Limited* [1989] 1 Q.B. 433. That was a case where the plaintiffs ran a photographic transparency lending library. Following a telephone enquiry by the defendants, the plaintiff delivered to them a number of transparencies accompanied by a delivery note that contained nine printed conditions, one of which stipulated that all transparencies had to be returned within fourteen days and that otherwise a holding fee of £5 a day would be charged in respect of each transparency that was retained. The defendants, who had not used the service ever before, did not read the conditions and returned the transparencies four weeks later, as a result of which they received a bill of £3,783.50. The Court of Appeal concluded that where clauses incorporated in a contract contained particularly onerous or unusual conditions that the party seeking to enforce the condition had to establish that it had been brought fairly and reasonably to the attention of the other party. The plaintiff draws attention in particular to comments of Bingham L.J. at 445 where he stated:-

> "(e) The defendants are not to be relieved of their liability because they did not read the condition, although doubtless they did not; but in my judgment they are to be relieved because the plaintiffs did not do what was necessary to draw this "unreasonable and extortionate" clause fairly to their attention."

For my part I find the facts at issue in the *Inter-photo* case so far removed from the facts of the present case that it is of little assistance. There, a delivery note contained a highly unusual provision stipulating a time for return of transparencies and providing for the consequences if that was not achieved, consequences described as "unreasonable and extortionate". Here, in contrast, the plaintiff called to the defendant's premises specifically for the purpose of executing documentation. The documentation was obviously of a legal character and the plaintiff accepts that he was aware that the document contained legal terms. That a contract would seek to regulate the relationship between plaintiff and defendant is not at all unusual, on the contrary, it is entirely to be expected. Neither is there anything unusual in a pre- printed contract containing provisions designed to safeguard and strengthen the position of the party that prepared it, indeed quite the contrary. How broad the terms of any exclusions or how specific any representations will be can be expected to vary considerably but that very fact means that it is incumbent on a party who is signing a document that he knows contains contractual terms to satisfy himself that these are appropriate to his situation. The plaintiff has relied heavily on the case of *Walsh v. Jones Lang LaSalle Limited* [2009] 4 I.R. 401, producing supplemental written submissions dealing specifically with the decision. In that case the plaintiff had relied on the brochure of the defendant in purchasing a commercial property. In particular, the plaintiff relied upon the defendant's calculation of the floor area when deciding to purchase the property. The plaintiff claimed that, in miscalculating the floor area of the property by 20% and publishing the incorrect calculation in the sales brochure, the defendant had acted in breach of a duty of care which it owed to the plaintiff and that the defendant was guilty of gross negligence and negligent misstatement, which resulted in the plaintiff sustaining loss and damage. The brochure contained a disclaimer which stated as follows:–

> "Whilst every care has been taken in the preparation of these particulars, and they are believed to be correct, they are not warranted and intending purchasers/lessees should satisfy themselves as to the correctness of the information given."
>
> Quirke J. held as follows:–
>
> "It was to be expected that the potential purchasers would rely upon the information contained in the brochure when deciding whether or not to offer to purchase. Prima facie therefore, the relationship between the plaintiff and the defendant was sufficiently proximate to give rise to a 'special relationship' of the kind identified by the Supreme Court in *Wildgust v. Bank of Ireland*."

Quirke J. went on to state that the presence of a waiver within the brochure and its specific terms were insufficient to exclude the defendant from liability. Quirke J. held that, if the defendant wished to reserve to itself the right to publish precise measurements which were, in fact, grossly inaccurate, then there was an obligation upon the defendant to draw to the attention of the plaintiff and other prospective purchasers the fact that the seemingly precise measurements were likely to be wholly unreliable. Quirke J. stated as follows:–

> "The information within the brochure was published by the defendant for the express purpose of influencing a limited number of identifiable persons. The publication of the "disclaimer" was immaterial to that fact. The plaintiff was a person to whom the brochure was expressly directed and he was influenced by the information published within the brochure. I am satisfied on the evidence that he relied upon the measurements within the brochure when calculating his precise bid or "tender" for the purchase of the property.
>
> It seems to me that the question for determination in relation to the "waiver" is, whether its presence within the brochure and its precise terms, are together sufficient to exclude the defendant from liability to the plaintiff in respect of negligence by the defendant in the incorrect measurement of the floor area of the property and negligent misstatement on the part of the defendant in publishing the incorrect measurements of the floor area. On the evidence I do not believe that they are sufficient.
>
> …
>
> The duty of care for which the plaintiff contends was to ensure that the calculation of the floor area of the property which the defendant published in its sales brochure was correct. It is the existence of that duty which is in dispute in these proceedings. If the duty existed then it was a duty to have *reasonable* care for the interests of the plaintiff in the circumstances. It is not suggested that there was a duty upon the defendant to protect the interests of the plaintiff. It is not suggested that the defendant was not entitled to prefer its own interests or the interests of another party to the interests of the plaintiff. What is contended is that, in the circumstances of this case, there was a duty upon the defendant to ensure that the information which it provided for the alleged benefit of a limited category of persons (including the plaintiff) was reasonably accurate in the circumstances.
>
> If the defendant wished to reserve to itself the right (a) to publish within its sales brochure, precise measurements which were in fact grossly inaccurate and (b) to relieve itself of liability to the category of persons to whom the brochure and its contents were directed, then there was an obligation upon the defendant to draw to the attention of the plaintiff and other prospective purchasers the fact that the seemingly precise measurements published were likely to be wholly unreliable and should not be relied upon in any circumstances."

It may be noted that there are some significant distinctions between the *Jones Lang* case and the present one. There, the defendants had stated that every care had been taken by them in the preparation of the particulars and they believed them to be correct, whereas here, the defendant merely states that it has sought to reproduce accurately inforamtion obtained from third parties but are aceepting no responsibility for it.

Moreover, the commitment agreement in the present case contains elaborate, precise and comprehensive representations and warranties by the plaintiff to the effect that he is not relying upon anything the defendants may have said or on the absence of information in the brochure.

A further point of distinction between the two cases is that the Jones Lang case does not deal with the question of contractual estoppel, whereby the parties have expressly and specifically agreed that irrespective of whether a representation was made or not, or whether there has been any non disclosure that the plaintiff would not rely on that.

The validity and effectiveness of provisions similar to those contained in the Commitment Agreement have been considered in a number of recent decisions, and in particular were the subject of detailed consideration by the Court of Appeal in the case of *Springwell Navigation Corporation v. J. P. Morgan Chase Bank* [2010] EWCA CIV 1221, a case where an investor in derivatives of Russian Federation Bonds known as GKO's (an acronym for their full Russian name) had made representations to the effect that he had not relied on any representations and also accepted that other parties to the transactions had not made any representations or warranties with respect of the advisability of investing.

At para. 165 the Court of Appeal approved the following extract from an earlier Court of Appeal case involving GKO's in the case of *Peekay Intermark Limited v. Australia and New Zealand Banking Group Limited* [2006] 2 Lloyds REP 511 from the leading judgment by Moore – L.J.:-

> "It is common to include in certain kinds of contracts an expressed acknowledgement by each of the parties that they have not been induced to enter the contract by any representations other than those contained in the contract itself. The effectiveness of a clause of that kind may be challenged on the grounds that the contract as a whole, including the clause in question, can be avoided if in fact one or other party was induced to enter into it by misrepresentation. However, I can see no reason in principal why it should not be possible for parties to an agreement to give up any right to assert that they were induced to enter into by misrepresentation, provided that they make their intention clear, or why a clause of that kind, if properly drafted, should not give rise to a contractual estoppel of the kind recognised in *Colchester Borough Council v. Smith*, however, that particular question does not arise in this case. A clause of that kind may (depending on its terms) also be capable of giving rise to an estoppel by representation if the necessary elements can be established; see *E.A. Grimstead and Son Limited v. McGarragan* (CA) (Unreported, 27th October, 1999)."

I have concluded that the effect of the provisions of the Commitment Agreement is that the plaintiff is precluded from pursuing claims other than those based on fraud. In so far as the plaintiff has formulated a claim in tort, under various heads of claim, it must be recognised that this is a case where the parties have ordered their relationship on the basis of detailed, precise and elaborate contractual provisions. The effect of this is that the defendant's obligations in tort cannot be more extensive than what the parties have by contract determined should be the position. This much is clear from the judgment of the Supreme Court in *Kennedy v. A.I.B.* [1998] 2 I.R.

There, Hamilton C.J. referred with approval to the Court of Appeal decision in the case of *National Bank of Greece SA v. Pinios Shipping Company,* (No. 3) [1998] 2 Lloyds REP 126. In the case of his judgment Lloyd L.J. at p. 139 had commented:

> "But so far as I know it has never been the law that a plaintiff who has the choice of suing in contract or tort can fail in contract yet nevertheless succeed in tort".

With reference to that case Hamilton C.J. observed that it clearly established that when parties are in a contractual relationship, their mutual obligations arise from their contract and are to be found expressly or by necessary implication in the terms thereof and that obligations in tort which may arise from such contractual relationships cannot be greater than those to be found expressly or by necessary implication in their contract.

While the exemption clauses are very comprehensive indeed it is, nonetheless, not in dispute that the plaintiff is not in any way prohibited from pursuing the claim that he wishes to in fraud, resulting if successful in an order for rescission. The law does not permit a contracting party to exclude liability for his own fraud in inducing the making of the contract, a long established principal that was restated relatively recently by the House of Lords in *H.H. Casualty and. General Insurances Limited v. Chase Manhattan Bank* [2003] 1 CLC 358.

If the plaintiff is to succeed therefore, he must establish fraud. What that demands of a plaintiff was considered by Shanley J. in *Forshall v. Walsh and Bank of Ireland* (Unreported, High Court, Shanley J., 18th June, 1997). At p. 64 he commented that a plaintiff seeking to establish the tort of fraud or deceit must prove:-

> "(i) the making of a representation as to a past or existing fact by the Defendant
>
> (ii) that the representation was made knowingly, or without belief in its truth, or recklessly, careless whether it is true or false
>
> (iii) that it was intended by the defendant that the representation should be acted upon by the Plaintiff
>
> (iv) that the Plaintiff did act on foot of the representation and
>
> (v) suffered damage as a result.
>
> Where fraudulent misrepresentation is alleged it must be established that the representation (as defined above) was intended to and did induce the agreement in respect of which the claim for damages arises."

The meaning of fraud was settled by the House of Lords as long ago as 1889 in the case of *Derry v. Peek*. The elements of the tort of deceit were stated as follows by Lord Herschel:-

> "First, in order to sustain an action in deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made:-
>
> (1) Knowingly, or
>
> (2) Without belief in its truth or
>
> (3) Recklessly, careless whether it is true or false.
>
> Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states, to prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure

> the person to whom the statement was made."

So, simple lack of care will not of itself suffice. The threshold that the plaintiff has to cross is knowledge of or belief in the falsity of the representation or recklessness as to its truth, that is to say not caring whether the representation is true or false. This aspect is summarized as follows in Cartwright on *Misrepresentation, Mistake and Non-disclosure*, 2nd Ed. as follows:-

> "The representor will be fraudulent if he made the statement "recklessly, careless whether it be true or false". It is important to note that Lord Herschel does not say that a representor is fraudulent if he fails to take care – is negligent – whether his statement is true. Negligence is not dishonesty; and the House of Lords in Derry v. Peek was at pains to emphasise that negligence is not sufficient for deceit. Recklessness involves not caring whether the statement is true; an indifference to the truth."

However, in some circumstances evidence of a lack of care may go some distance to providing evidence that a defendant in truth, lacked belief in the truth of what he was saying or did not care whether what he was saying was true.

Misrepresentation can take the form of either a positive statement, or it can be through omission as it was made clear by the Lord Chancellor, Lord Chelmsford in the case of *Oaks v. Turquand and Harding* [1867] LR 2HL 325 where at p. 342 he commented:-

"It is said that everything which is stated in the prospectus is literally true, and so it is, but the objection to it is not that it does not state the truth as far as it goes, but that it conceals most material facts with which the public ought to have been made acquainted. The very concealment of which gives to the truth of which is told the character of falsehood."

In the present case the plaintiff complains of actual misrepresentations and of failure to disclose. So, the plaintiff complains that the renovation budgets presented by defendants were false and untrue in that they did not represent a true and realistic cost of the renovations and complaint is made that there was a failure to disclose the issue in relation to zoning or the position in relation to the sitting tenants.

While the statement of claim as amended was quite specific in relation to the allegations of fraud, as indeed was only right and proper, at the hearing much time was devoted to topics that had not been dealt with in the pleadings. When the intention to raise these topics was first flagged in the course of the opening of the case by counsel for the plaintiff, objection was taken on behalf of the defendants on the basis that these topics had not been pleaded nor had they been dealt with in any of the witness statements. I took the view that the plaintiff was entitled to pursue these aspects, that they had the potential to assist him in proving the allegations that had been pleaded and I felt that exploring these topics might assist me in identifying what was the attitude or state of mind of the defendant at various stages and that might in turn assist in determining whether any representation that might be established to be wrong or incorrect was the result of fraud. I felt that these topics, which in broad terms involved suggestions that there had been, in the course of the internal processing and consideration of the proposal, a consistent pattern of increasing the attractiveness of the project, had the potential to assist in determining what the motivation of the defendant was when decisions came to be taken as to whether to include or exclude material from the brochure. While there is no obligation on a plaintiff to prove a motivation as such, establishing a motive for the making of a false statement can offer evidence that it was in fact fraudulent. See *Barings Plc (In Liquidation) v. Coopers and Lybrynth* (No. 2) [2002] B.C.L.C., 410, para. 62.

I have referred to the fact that the defendant protested at the hearing that these topics which the plaintiff had indicated that he wished to pursue were not dealt with in the course of the various witness statements that were submitted. But what is perhaps somewhat more unusual is that neither was evidence led on these topics from any of the witnesses called by the plaintiff, instead the issues were dealt with by questions being put to the defendant's witnesses in the course of cross examination.

While the diligence of the plaintiff and his legal team in locating the entries in the documentation which have been relied upon to advance these topics is to be commended, it must be said that some of the issues which appeared to have the potential to be of the greatest significance in fact turned out to be balls of smoke.

So, in the course of the opening statement, reference was made to an email of the 27th April, 2006 from Ms. Williams which, it was suggested while considering the downsides for the Project had contemplated renovations of $88,000 per key for the Beekman and $90,000 per key for the Eastgate. Not surprisingly, this was described as a fundamental matter. However, in the course of the cross examination of Mr. Haskin, he accepted that Ms. Williams had said in the course of the New York arbitration that the downside scenario she had been considering was not in fact based on a change in the cost of renovations, but rather on a change in the average daily rate, the rate charged per day by the hotel per room occupied.

Again, in the course of the opening, considerable emphasis was placed on the fact that in the section of the brochure dealing with Transactional Evidence at pg. 17, a list of hotel transactions set out in chart form had omitted reference to the Crown Plaza at 304 East 42nd Street. It was contended that this was highly significant given that it was geographically proximate and had been sold at a price of $113,000 per key as against $445,000 per key for the Beekman and $400,000 for the Eastgate with other comparators referred to ranging from $426,000 to $727,000. However, when Mr. Haskin came to give evidence he accepted that the hotel in question was not comparable and did not offer a fair comparison as unlike the others it was held on a lease. Following that concession, thereafter, the issue was not pursued with the witnesses called by the defendant and seemed to have dropped out of the case. However, the hotel featured again in the closing submissions on behalf of the plaintiff when it was stated that it offered an opportunity for investors to see what they were buying into. In a situation where the only witness who had anything to say on the topic during the case and, it must be remembered that we are talking about the plaintiff's principal witness, had conceded that it was not a valid comparison, its re-emergence might seem slightly surprising.

I have indicated that notwithstanding the objection taken to these issues being pursued that I permitted this to happen believing that the plaintiff was entitled to look to these areas for evidence in support of the allegations actually alleged in the pleadings and in the belief that probing the issues had the potential to offer assistance. However, the manner in which the issues were dealt with meant that the assistance obtained was very much less than might have been hoped. While counsel in the course of cross examination was prepared to trace the evolution of certain figures and statistics, no evidence was ever adduced to call into question the validity or legitimacy of figures that eventually appeared in various documents.

So, the position is that while the plaintiff's advisors conducted an intense and detailed study of the documentation that the case has generated in order to identify figures or statistics which had changed or had been altered as the process has developed it has not called any evidence to explain the significance of the changes or to offer support to the suggestion inherent in the exercise engaged in that the changes were unjustified and made for an improper purpose.

So, much attention has focused on a memorandum sent to the Investment Product Committee on the 11th May, 2006, which referred to investment rates of return of 16.4% in the case of the Beekman and 17.2% in the case of the Eastgate. The point is made that a document created by Ms. Jennifer Williams on the 30th April, 2006, had mentioned returns of 10.2% to 11.1% in the case of the Beekman and 11.4% to 12.4% in the case of the Eastgate – the difference between the two documents is explained by the fact that different exit caps rates or terminal cap rates were used in the two documents, exit or terminal cap rates referring to the capitalisation rate used to calculate the resale value of a property by capitalising the expected net operating income of the property at the end of the planned holding period. Selecting an exit cap rate involves an exercise in forecasting and an element of subjective judgment. Both the documents of the 11th May, 2006, and that of the 30th May, 2006, were of course created at a time when the relationship between Mr. Haskin and Anglo was solid. In the circumstances if the figures that appeared in the 11th May, 2006, document fell outside a permissible range or were the product of excessive or unjustifiable optimism, one would have expected that Mr. Haskin would have been in a position to deal with this in evidence. It was, after all his associate who produced figures just eleven days before the Anglo document went to the Investment Product Committee. If her figures were, as it were, set in stone and ought not to have been departed from, he was singularly well positioned to condemn the changes but did not deal with the issue. It is noteworthy that while it is the case that there was movement on the figures between the Williams document and the Investment Product Committee document that it is also the case that figures quoted in respect of investment return rates by Mr. Haskin and his associates moved around sharply from time to time and in these circumstances, in the absence of specific evidence whether from Mr. Haskin or some other source to condemn the 11th May, figures, I believe it would amount to a jump in the dark to conclude that the figures were deliberately inflated to make the proposal look more attractive or were the product of an excess of enthusiasm.

Another issue on which much time was spent was the appraisal report prepared by C.B. Richard Ellis, ("CBRE"). Three editions of the report on the Beekman have been produced. What appears to be the final or definitive text accompanies a letter signed by Senior Real Estate Analyst Mark Vollmer, and by Managing Director Helene Jacobson. Three market values are presented, a "prospective value" based on value as of the 1st October, 2006, of $81.5M, an "as complete" value of 1st October, 2008, of $106M, and an "as stabilized value" of 1st October, 2010, of $116.5M. Two other reports accompanied by unsigned letters have been produced. The first of these offers a "prospective value" of $81.5M, an "as completed value" of $103M and an "as stabilized" of $112.7M. In the second unsigned texts, the values are $81.5M, $104.2M, and $114M. The plaintiff focuses on the improvement in the "as stabilized" figures from $112.7M to $116.5M and suggests that, just as the cap rate changes had the effect of and indeed were designed to make the proposal more attractive, so too were these valuations changes, which he points out are unexplained and have just the same effect. He invites the Court to conclude that the changes were procured by or at the behest of Anglo and that this was done for an improper purpose. Again he invites the Court to conclude that this was what happened on the basis of questions put in cross-examination of Anglo witnesses, but in the absence of evidence from Mr. Haskin, a valuer, an appraiser or anyone else. The differences between the texts is attributable to the fact that the first unsigned report used a discount rate of 10%, while the second unsigned report referred to an "as is discount" rate of 12% and an "at completion and as stabilized" rate of 9.5% but failed to apply these figures fully, while in the signed report, the discount rates referred to in the second unsigned text are actually fully applied.

I believe that the evidence is just not there that would justify drawing an inference that mischief was afoot. To so conclude, would require an assumption, not just that Anglo personnel were acting improperly but that CBRE would go along with that and lend their names to it.

It must also be borne in mind that what we are talking about is the difference between attributing a value of $112.7M and a value of $116M to the property in October 2010, more than four years on from the date of the report. Forecasting property values four years into the future is not an exact science. Property prices can fluctuate and move sharply up or down. The movement from $112.7M to $116M is not a very large one, and while no doubt welcome from Anglo's perspective as a move in the right direction, could not be seen as dramatic. In assessing the significance of the issue, it seems to me that the movement falls well within a margin of error. In any event it should be noted that the CBRE valuations do not appear in the black brochure and this reduces the significance that this issue might otherwise have. This is a point that applies also to the investment rate of return that appeared in the memorandum sent to the Investment Product Committee which has become the subject of controversy. Again, there is no reference to such an investment rate of return in the black brochure.

There is one further point of this variety, to which I will refer and it is an area where the plaintiff has been able to establish an error in the black brochure. The brochure states that CBRE is the source of the transactional evidence chart at pg. 17 to which reference has already been made in a slightly different context. That is not so. While the bulk of the figures that appear in the chart do seem to have been sourced from the CBRE reports, that is not so in the case of entry cap rates which appear in the last column and which appear to have come from Mr. Haskin and his team. However, it is of note that in so far as there is a divergence between the cap rates offered for the comparators between the CBRE figures and the Haskin/General Partner figures for those which can be compared directly, the movement is in both directions. One of the properties for which both sources quote cap rates has the effect of making the Eastgate and Beekman deals look better but the other makes the Fund hotels look poorer. The fact that the divergences go in both directions does not support the suggestion that there was anything untoward happening.

The net effect of all of this is that despite the amount of time devoted to these issues that have not been pleaded, I have in fact not received any really significant assistance in determining what was the attitude and approach of Anglo. It is therefore necessary to consider in turn the four legs of the plaintiff's claim without significant assistance from that source. I will do this in reverse order.

The Interest Rate Strategy Issue

This issue has not been pressed to a conclusion and instead the plaintiff agreed to admit in evidence the statement of Mr. Frank Anderson, the defendant's expert, without cross examination. This development occurred after counsel for the plaintiff had earlier indicated that instructions were being taken on this issue and that consultations with interested parties were taking place.

To put the issue as originally raised in context it is necessary to explain that the black brochure had on two occasions made reference to the issue of an interest rate strategy. On pg. 22 of the brochure under the heading "Financing" the following appears:-

> "The Fund is being financed by Anglo investor contributions of US$47.9million and Promoter contributions of US$718,000. The Partnership is acquiring two US limited partnerships, one for each hotel. These US Limited Partnerships are borrowing a total of US$145.3 million in non recourse debt from Anglo.
>
> The initial borrowings amount to 75% of the total cost of the transaction and are being provided to Eastgate Tower Hotel Associates, L.P. and Beekman Tower Hotel Associates, L.P. at costs of funds (currently 5.23%) plus a margin of 2.25% over cost of funds. The borrowings are recourse only to the Hotels and are therefore, non-recourse to the investors. **An interest rate capping strategy *may* be put in place to manage the risk of any increases in interest rates."**
> [Emphasis and italics added]

Then, at s. 9 of the brochure headed "Risk Factors" in a paragraph headed "Interest Rate Risk" the following appears:-

"As this is a leveraged investment, there is exposure to US interest rates.

The Fund has not fixed the cost of funds on the Bank borrowings but may *implement* an interest rate capping strategy. The Promoter believes that it is appropriate for the likely impact of changes in interest rates on income streams from hotel investments. A movement in interest rates can adversely impact returns." [Emphasis and italics added]

On a literal reading of the statements what is being said is that there is a possibility of the option of an interest rate capping strategy. There is no positive statement that any strategy will actually be put in place. At their height the two extracts merely indicate that a particular course of action may or might be put in place in the future. The language is suggestive of a decision yet to be made, and indeed Mr. Edmund Byrne has given evidence that the word "may" was used because a decision had not been finalised as to what instrument should be selected.

The plaintiff has complained that the brochure had indicated that Anglo contemplated an interest rate capping strategy that would cap the floating interest rate but instead it fixed on an interest rate swap strategy that resulted in a fixed interest rate set at a highpoint in the US interest rate cycle.

Mr. McCaughey has gone so far as to say that had he known that Anglo intended an interest swap facility, he would not have invested in the Fund. Had he known this, he says, and had he known that the Fund was not able to change lenders in order to negotiate lower interest rates and terms, he would not have invested as this would have contaminated the validity of the project.

I find the strength of these comments by Mr. McCaughey somewhat surprising and indeed feel that there is an element of hindsight always being wiser about these remarks. Mr. Moynihan, the expert witness dealing with this aspect of the case on behalf of the plaintiff, while critical in his witness statement of the language of the black brochure, commenting that it remained a mystery why the brochure used the language that it did, nonetheless accepted that the approach to interest rates actually adopted was an appropriate one. He referred to interest rate swaps as strongly preferable and interest rate caps as sub optimal, explaining that a swap is preferable to a cap because of the uncertainty which it removes, making the point that an interest rate cap delivering the same level of certainty would be prohibitively expensive. He repudiated the suggestion that it was well known at the time that that point in time represented the ceiling of the interest rate cycle.

While Mr. Moynihan was critical of the brochure language, he agreed with a question put by me to him, when I asked "That phrase 'an interest rate capping strategy' for someone who isn't versed in the world of finance, that might appear to be a generic term, wide enough to cover swaps, collars [typed as colours in the transcript] and God knows that else beside?" I remain of the view that the language is indicative of a general strategy, details of which were not available or at least were not being given rather than of a commitment to pursue any specific or precise strategy.

While as we have seen the interest rate issue was not pressed at the hearing; it was a significant issue in the campaign to encourage investors to oppose Anglo. Investors were led by Mr. Haskin to believe wrongly that the arrangement actually put in place was for the benefit of Anglo and was contrary to the interest of the investors and that this had seen Anglo benefit to the tune of $7M. Mr. Moynihan deals with the suggestion by Mr. Haskin that the outcome of an interest rate capping strategy had it been adopted would have been $7M better than the strategy actually implemented by saying that if that be so, it is due to chance rather than neglect and due to the completely unforeseen and unforeseeable credit crunch and consequent prolonged period of low interest rates.

Like the plaintiff's expert, I am of the view that the interest rate strategy selected which, it should be remembered was "in the money" for approximately twelve months i.e. interest rates had risen above the "strike rate" of the swap and the Fund was a net beneficiary, did not involve any element of neglect. Still less is there any indication whatsoever of fraud, nor did the black brochure misrepresent the position. It indicated that certain things may or might happen in the future and made no claim that a decision had been taken that a particular course of action would in fact be followed in the future. In the circumstances I am of the opinion that this element of the plaintiff's claim as originally formulated that relates to the interest rate strategy issue fails.

The Sitting Tenants Issue

This is an element of the case where the plaintiff alleges non-disclosure amounting to fraudulent concealment. A reply to a question posed in a notice for particulars makes clear that the plaintiff is contending that the black brochure constituted a "half truth" because of what it omitted in relation to sitting tenants. The factual background is that the ground floor restaurant space in the Eastgate was occupied by a restaurateur who held a lease and there were five long stay guests in the Beekman, mainly, if not entirely, in an annex of the hotel.

So far as the restaurant in the Eastgate is concerned, it appears from the evidence of Mr. Jesse Masyr, a New York lawyer, who furnished a witness statement and gave evidence on behalf of the defendant, that commercial tenants do not enjoy statutory rights. In any event the brochure contains a specific reference to the fact that the Eastgate includes a leased restaurant and bar. So on this aspect there was no question of any failure to disclose.

Mr. McCaughey, in his witness statement, has stated that had the existence of sitting tenants been disclosed, it would have caused him concern and prevented him from investing in the Fund. He states that at the very least he would have concluded that it represented a delay risk which would have made the enterprise less attractive to the extent that he would not have invested in the Fund. Given that the reference to the leased bar and restaurant did not have that effect, or as far as one knows, cause him to make any inquiries, it is difficult to take that statement fully at face value.

Of the five long term residents in the Beekman three were removed without cost and two were removed with the payment of compensation totalling $760,000 within approximately a year of the sale being concluded. It appears that it had always been envisaged that there would be some cost involved to be dealt with out of the renovation budget and no alarm or concern or disquiet was expressed by anyone at what was involved in securing vacant possession. The $760,000 cost of removing the residential tenants should be seen in the context of the cost of removing the restaurant tenant which was $650,000.

In contrast to the situation in relation to zoning to which I will be turning shortly and indeed the double taxation issue there does not appear to have been any issue raised at the time of the publication of the brochure about the desirability of making reference to the topic. Indeed, it is striking that there does not appear to have been any correspondence, documentation, or emails indicating that the sitting tenants issue was a significant one or a troubling one. On the contrary, it appears to have been dealt with by all concerned as a matter of no particular significance but which would be attended to as part of the renovations exercise. In that regard Mr. Masyr has said that the issue of residential tenants was not an uncommon one in New York, though that was not a proposition with which

Mr. Haskin was prepared to agree. However, whether or not the situation was a common one it is a measure of how little significance was attached by anyone involved that when in 4th December, 2007, Meredith Negin, a member of Mr. Haskin's team emailed a number of Anglo personnel in North America to tell them that an agreement had been reached with the remaining two permanent tenants which was described as removing the stigma of stabilized tenants, Mr. Eddie Byrne of Anglo on the same day emailed his colleagues who had been on the mailing list of Ms. Negin to say that he wasn't aware that there had been any tenants. The issue would seem to have slipped his mind as a matter of no importance. It is quite clear that this was never regarded as a significant issue at the time.

I am quite satisfied that no question of fraud arises in this instance. No one saw this as a concerning issue and the question of inclusion or exclusion or suppression of material on this topic just never arose. It is noteworthy that there is a reference to the commercial tenant in the Eastgate in the brochure, who, it may be noted, was removed on foot of a court order without controversy but following the payment of compensation. However, the reference did not provoke any controversy or give rise to any soul searching that we know of and certainly does not appear to have been of any interest to the plaintiff.

As to whether the approach to the issue was in any way negligent, very little information was put before the court to indicate whether it was in fact the case that all involved were unduly sanguine. From first principles the presence of sitting tenants in a location where development is to take place has the potential in some circumstances to cause delay or difficulty. Whether one would actually be worried about the presence of sitting tenants and about that happening would depend on whether sitting tenants have statutory rights; if so, what the extent of those rights are; whether, if there is a dispute between landlord and tenant, there is a court or arbitration process that can bring a speedy resolution to the dispute; whether there is provision for buying out statutory rights that may exist either on a compulsory or voluntary basis, and if so, what formula is applied to determining the amount of payment; whether there is a provision that any rights to remain in occupation or to renew a tenancy are trumped by the existence of a scheme of development and a number of similar issues. No information on any of these issues was forthcoming. In these circumstances one is left with the situation that those involved were confident that the issue would not be a problem and their confidence appears to have been fully justified. In these circumstances it cannot be established that those involved were negligent and still less can it be suggested that those involved were fraudulent.

The Cost of Renovation Issue
In practical terms, this was by far and away the most important issue of all. It was after all this issue which prevented the project being implemented as planned.

The basic facts relating to this issue have already been referred to in the course of the overview of this dispute set out earlier in the judgment. In summary, the hotels were purchased with a view to renovation on the basis that both hotels could be renovated with extra rooms provided at a cost of approximately $60,000 per key. That figure was not the result of any detailed structural survey, nor were detailed plans or specifications available but rather was the product of an assessment carried out by Mr. Haskin and Mr. Livingston, verified by a desktop exercise carried out by Mr. Thelander of Anglo with a very limited involvement thereafter by Mr. Mohamedi and Mr. Bromleve.

These figures, unaltered, appeared in the black brochure. They did so notwithstanding that Anglo received a contemporaneous reminder in the context of the discussions on the building loan agreement that the figures for renovation were not final. Then, on the 20th November, 2006, Lehr Construction Company produced its first budget analysis for the Eastgate. At $29.5M dollars it was more than twice the original estimate. When the estimate for the Beekman was presented on the 21st December, 2006, a similar situation emerged. Thereafter, the estimated cost of renovation continued to escalate until ultimately reaching $102M, as against a comparable figure, including interest reserve in the brochure of $31.2M.

There are some general observations that can be made. Right back to Mr. Haskin's time in Tishman, when he was considering a change of direction for his career, his interest and indeed that of Mr. Livingston was in "value-added" hotels: hotels that would show a return following renovation and repositioning. Mr. Haskin's initial interest in the Eastgate and the Beekman was because he believed that those hotels fell into that category and it was on that basis that he interested Anglo in these particular hotels.

The hotels were sold by vendors who are tough and experienced hoteliers and were purchased following a competitive bidding process. There was no reason, whatsoever, to believe that the hotels were sold at an under-value and that the purchasers had, as it were, gotten away with a bargain. Indeed, as much was acknowledged by Mr. Paul Brophy. This meant that the ability to renovate and the cost of renovation were always going to be central to the prospect of bringing the proposal to a successful conclusion. Indeed, the Development Risk section of the black brochure had referred to the successful completion of the renovations while maintaining income as a key part of the investment.

As we have already seen, there is disagreement between Mr. Haskin and Anglo about the origin of the $60,000 per key figure. Anglo contend that it was a figure provided to them by Mr. Haskin and Mr. Livingston and their team. While Mr. Haskin, in these proceedings, has contended that the figure was a joint figure produced as a result of collaboration between his team and Anglo personnel, a reading of the documentation generated during the spring of 2006 supports the view the figure of $60,000 was one that was put forward by Mr. Haskin and his team.

The alternative suggestion which I have rejected seems inherently unlikely. It seems implausible that a banker would, based on a walk through a large hotel have felt confident to or would have been willing to come up with a figure for the renovation and reconfiguration of the hotel. It seems to me that the most one would expect a banker to do would be to test the figures that were emerging against available information in relation to other projects to see if they were out of line and that, of course, is precisely what Mr. Thelander said he did. It also seems that had the figure of $60,000 been a joint production by Mr. Haskin and Anglo that one would have expected that once they found themselves in conflict in relation to the renovations Mr. Haskin would have said in trenchant terms "these are your figures, these are your figures as much as anyone else's". There is no such correspondence or such an email.

More critical than the source of the figure of $60,000 per key is the question of what Anglo's belief was in relation to the figure. The plaintiff in his witness statement and in evidence has said that when he met Mr. Haskin on 21st December, 2008, he was told by him that Anglo were asked not to raise equity for the Fund until all the renovation costs were in and until it was more fully vetted by a team of consultants. Mr. Haskin denies that he said this and indeed when pressed on this during cross-examination accepted that if he had said it that it was wrong. I have already indicated that, on this aspect, I prefer the evidence of Mr. McCaughey. Indeed, it seems clear that Mr. McCaughey entered into this controversy on the basis of a belief based on what he was told by Mr. Haskin that Anglo knew that the figures were not reliable and were likely to increase. There is no doubt that Mr. Haskin contributed to that belief and there is no doubt that that was the proposition for which Mr. Haskin, as a party to the dispute, was contending.

While in the course of these proceedings Mr. Haskin's position was that he regarded the original estimates as reasonable, though preliminary, that he had not expected them to increase significantly, and that he was surprised when Lehr Construction Corp. came

forward with their figures which were very much higher, it is clear that in the past that he has stated something quite different. So, in the course of his counterclaim delivered in the New York arbitration proceedings he had pleaded that when the building loan agreement was entered into on the 25th October, 2006, that Anglo, Mainland and the General Partner knew that the amount allocated to renovation would need to be increased.

At another paragraph in the counterclaim he had pleaded that Anglo did not disclose that the renovation budget was preliminary and would necessarily be increased and that the failure to disclose tainted everything that ensued. Asked about these pleas in the course of the present proceedings Mr. Haskin responded that the position was misstated by his lawyers and was not written down very clearly by them.

However, whatever about his criticisms of his lawyers' drafting skills it appears that Mr. Haskin himself had made a sworn statement to the same effect in the course of an application for an injunction restraining his removal as general partner which he made to the New York Supreme Court. His affidavit contained the statement "The acquisition was funded by loans from Anglo in the aggregate of $145M. Anglo knew additional lending for renovations would be necessary". Elsewhere in the document he swore that "Anglo were aware from the inception of the partnership that significant additional funding would be required". Mr. Haskin's position that Anglo knew the $60,000 budget was inadequate seems to have been key to the conclusions arrived at by the plaintiff. It also seems to have influenced the thinking of at least some of the other investors. The speaking notes for one of the investors for a meeting between the bank and investors in May 2009 contained a reference to the failure of Anglo to disclose that the renovation budget contained in the investment prospectus was very preliminary in nature and very likely to increase.

It must be said that, in so far as the plaintiff's case in fraud depends significantly on the allegations that were being made by Mr. Haskin, the concessions that he was forced to make in cross-examination served to significantly undermine the plaintiff's case.

So far as the renovation issue is concerned, Anglo relied on figures presented by a team of hotel professionals. Whether they were wise to do so or indeed whether they were negligent to do so is a subject to which we can return. In my view there is nothing in the evidence to suggest that they did not act honestly. On the contrary, there is a broad consensus that, while all involved knew that the figures were preliminary, all believed that they were reasonable and did not expect a significant departure from them. All involved were surprised when the figures produced by Lehr Construction did depart so radically. It was in these circumstances that I asked counsel for the plaintiff, in the course of his closing submissions, whether in a situation where recklessness means essentially indifference to the truth or not caring whether something is true or false, whether he contended that there was evidence of recklessness in relation to the renovation issue. Counsel replied that he thought so and referred to the exchange of emails that took place between Mr. Dybas and Mr. Haskin following the correspondence of 6th September, 2006. This exchange took place as a follow-up to the letter from Katten Muchen written in the context of the draft building loan agreement. On 13th September, 2006 Mr. Jeff Dybas emailed:

> "We'll certainly pick up the pace on documents. If you are certain budget wouldn't be ready by closing you should have told us a long time ago. We figured that since we went non-refundable back in May, we should be able to square the budget away by October".
>
> To this Mr. Haskin replied:
>
> "That is not true and we did tell you. Remember, a lot happened between May and July. Also, we did not even close the venture until the end of July. There is no way we could have had final budgets due by October. You have the approvals on the budget so I don't see why it is an issue. We are putting together a great team and all of the brands and management companies are interested. We need to think through this carefully and make the right decisions. The Mark [another New York hotel] did not have all of their budgets done when they closed. Anyway, let's move forward and deal with the issues. Thanks."

For my part, I cannot see that either the correspondence of 6th September or this exchange of emails has the significance suggested by the plaintiff. From the point of view of drafting a building loan agreement, it is obviously of significance whether one is dealing with a case where the price is fixed or remains to be determined. In offering its comments on the draft agreement that had been submitted, Katten Muchen was doing no more than drawing attention to this fact, with a view to having the reality of the situation reflected in the language of the agreement. The email of Mr. Dybas expresses impatience and disappointment that greater progress had not been made. Mr. Haskin's response was to offer a reminder that there was a shared state of knowledge. What is wholly lacking is any concern on either side that the figures, when finalised, would contain any nasty surprises. I am not persuaded that Anglo acted other than honestly and in good faith, and so the plaintiff's claim in fraud fails but, lest I am wrong about that, I want to address the question of whether Anglo's treatment of the renovation issue amounted to neglect or default. In the first instance it is helpful to consider in greater detail just what the brochure had to say about renovation costs and what would be learned by someone reading the document carefully.

The second paragraph of the brochure refers to the fact that the Fund will acquire the Beekman and Eastgate. This communicates to the reader that acquisition is in the future and that the hotels remain in third party ownership. It follows that anything that is said about future plans can only be the future plans of a would-be purchaser and that anything said about surveys or examinations can only be based on the extent of the surveys or examinations that are available to a party pre-purchase.

The fourth paragraph of the brochure states that the hotels are being purchased for $151.2M with acquisition costs amounting to c.$10.5M. In addition a further c.$24.8M is being provided to facilitate the planned renovations of the hotels and $7.9M is being provided for management fees and interest costs for years one and two.

The reference to c.$10.5M and c.$24.8M indicates that these figures are not finalised but it is the case that in particular the reference to $24.8M would, as distinct from, for example, a reference to c.$25M, suggest to a reader that the ultimate figure is likely to be close to that set out.

The section of the document dealing with the Beekman Hotel comments that some of the guest rooms will be reconfigured resulting in the addition of approximately 20 rooms while the section on the Eastgate observes that it is anticipated that the reconfiguration of some of the rooms will result in the addition of approximately 20 – 30 rooms. It seems to me that the reference to approximately 20 rooms and approximately 20 – 30 rooms does indicate that the plans have not been finalised. If there were detailed plans and specifications and the figures quoted in respect of renovation were based on this, then we would not be talking of the addition of approximately 20 – 30 rooms. One would know precisely how many rooms were going to be added.

Elsewhere in the brochure, in the course of the section dealing with "asset management initiatives", the statement appears "Each

hotel will undergo a comprehensive renovation of its public areas and guest rooms. The renovation for each hotel is estimated at $60,000 per room, will take place over an eighteen month period and will include all new soft goods and furniture in every room. Both hotels primarily offer suites and have large room sizes in comparison to their competitors. While suites are a very desirable room product it is planned to divide a number of the larger suites to add 20 to 30 new conventional rooms in each hotel. This should enhance the product mix offered to guests and generate greater revenue."

Again, it does seem to me that the reference to each hotel undergoing renovation at a cost estimated at $60,000 per room does indicate some degree of estimating and indeed some degree of a broad brush approach. The figure of $60,000 applies to both hotels, though they are quite different hotels. The Beekman was built in 1928 and underwent a renovation nine years before coming on the market while the Eastgate was built in 1971 and underwent a renovation twelve years before coming on the market. It seems almost unthinkable that the actual costs of renovation, or indeed a detailed line by line budget would be identical for two hotels that are so different.

The same section refers to the intention to brand/manage the Eastgate while keeping the Beekman independently managed. A long list of possible hotel brands is listed, providing a further indication that the plans are as yet not finalised. Different hotel brands will have their own requirements and will set their own standards. Which brand is chosen will influence the final renovation budget. Finally, as we have already seen, the Development Risk section refers specifically to the fact that the renovation works may not be completed on time or on budget. This warning, in conjunction with the reference to funds being provided to facilitate the planned renovation, seems to me to fall significantly short of a specific statement that the planned renovation will be completed for $24.8M.

Accordingly, I do not believe that the brochure misrepresented the situation as of the date of publication. Anglo has taken the position that it relied on its partners, initially Mr. Haskin and Mr. Livingston and subsequently on Mr. Haskin. Was more to be expected and could more have been achieved? The fact that so little information has been offered as to why the Lehr Construction figure was so much higher than the original estimate, and why the original figure was so inadequate, even as a ballpark figure, does not help in answering that question. It has not really emerged whether there was an initial failure to anticipate what contractors would want to charge or whether there were unexpected problems of a structural nature that emerged, whether it was a combination of those factors or whether some other factors came into play.

I questioned Mr. Haskin, while he was giving evidence, whether the procedure followed when deciding to purchase was an unusual one. His response was not completely unequivocal but he referred to the fact that at the time New York was a "very rising market" and that in order to do deals one had to move quickly, that people did not have time to do due diligence or to do complete budgets.

In a situation where Anglo was operating in partnership with professionals with the combined experience of Mr. Haskin and Mr. Livingston, it is quite understandable that Anglo would have relied on their assessment of the situation. Had Anglo been required to form a view of the adequacy of the renovation assumptions in some other context, such as in considering a loan application, it is hard to see where they could have hoped to find greater expertise and experience than that offered by Mr. Haskin and Mr. Livingston. No evidence has been put before me that any steps that Anglo could reasonably have been expected to take either pre-decision to purchase or prior to the publication of the brochure would have established that the figures presented by Mr. Haskin and Mr. Livingston were flawed.

In the course of his evidence, Mr. Haskin referred to the fact that the market in New York at this time was "on fire", whether this was a factor in the escalation of renovation costs, I do not know. However, that renovation budgets sometimes increase is simply a fact of life. In this case the black brochure contained a specific caution addressed to this possibility. However, I am not prepared to assume in the absence of evidence, that there were other steps that could readily have been taken and ought to have been taken in this case which would have identified what was likely to happen. There have been frequent references throughout the case to the Mark Hotel in New York, a member of the Mandarin Oriental Group, one of the world's foremost hotel groups mainly in the context of the consideration given to the zoning issue. However, of more immediate interest is the fact that Mr. Haskin referred to it experiencing a $750M renovation budget overrun, which, as I understand it, emerged subsequently to the budget difficulties of the Beekman and Eastgate. That a hotel as prestigious as that should encounter difficulties on that scale indicates that it may not be wise to attribute blame for failing to anticipate substantial cost overruns without specific evidence of how the default occurred and what could have prevented it. In that regard all of us have seen media reports from time to time of iconic hotels encountering problems with renovation budgets, the Savoy Hotel in London is one that comes to mind immediately. In this case Anglo was working alongside people with a lifetime of experience of the hotel industry, they were people who were showing their confidence in the project by a willingness to invest their own money in very significant sums. If it were desirable, necessary or opportune to involve other professionals, who better to recognise this and make the appropriate arrangements? In those circumstances, that Anglo would rely on partners of such experience and expertise seems to me understandable and I am not in a position to fault them.

Zoning or Certificate of Occupancy Issue
This aspect of the case differs significantly from those that have been discussed to date. In particular this is so because it is an area where specific and active consideration was given to whether material relating to the issue should be included in the black brochure, and a decision was taken that it should not.

On this aspect of the case two distinguished members of the New York land use bar, Mr. Michael Sillerman and Mr. Jesse Masyr, having prepared a joint report, have given evidence and I am now left with the unenviable task of choosing between the correctness of their views where they find themselves in disagreement.

At its most basic the issue which has arisen in the case arises from the fact that neither hotel was operating in accordance with its Certificate of Occupancy. The Beekman, when it came on the market was operating as a transient hotel i.e. as a traditional hotel. However, its zoning and Certificate of Occupancy provides for an apartment hotel. Accordingly, its use at that time and indeed its intended use into the future did not conform with its Certificate of Occupancy. The situation in relation to the Eastgate is similar though with the slight complication that its certificate was for a mixed use building in the sense that floors 2 to 7 were zoned for transient hotel use and floors 8 to 25 for residential use.

To put in context the various arguments that have been made on this issue I would offer the following thumbnail sketch of zoning law in New York, which is based heavily on the portion of the joint report where Mr. Sillerman and Mr. Masyr were in agreement. At the outset it was only right to say that the term "zoning" has a meaning in New York that is quite different to how it would be understood by an Irish lawyer or planner. The New York concept is a hybrid of planning as we know it and zoning as we know it. The primary mechanism for regulating land in New York City is the New York Zoning Resolution. Generally, zoning determines the size and shape of buildings, where they are located and the density of the city's neighbourhoods. The current New York City Zoning Resolution became effective in 1961. There was a prior resolution in 1916. In the current Zoning Resolution all land has been divided into three basic Districts: residential, commercial or manufacturing. Each land use is further divided into lower, medium and higher density Districts.

There are eighteen Districts, and they are numbered accordingly, for example residential Districts are numbered R1 to R10. Generally, the higher the number allocated to a District, the greater the intensity of use or greater density that is permitted. New York City and the Borough of Manhattan operate on the basis of a concept of "as of right" zoning. In essence this means that a builder does not require planning permission before embarking on the construction of a building provided that one has prepared plans that comply with the use and bulk regulations and also with the building code.

For each such District, the Zoning Resolution prescribes the specific uses that are allowed either residential, commercial or manufacturing, and the maximum amount of building floor area allowed for each permitted use which is referred to as a Floor Area Ratio ("FAR"), which is a multiple. For example, a high density residential District which has a FAR or 10 would mean that if there was a lot size of 5,000 ft, then you could develop ten times that area or 50,000 sq ft.

Under the Zoning Resolution a use of property that was previously in compliance with the applicable zoning regulations, but has been rendered non-conforming as a result of an amendment of the Zoning Resolution is classified as a non-conforming use. In general such a non-conforming use may continue to operate lawfully. However, that is conditional on the use being continuous in the sense of not being changed to another use and not being discontinued for a period of two years or more. This process of permitting an existing use to continue is commonly referred to as "grandfathering" and is based on a legal doctrine summarised in the maxim "use trumps paper". This "use trumps paper" doctrine was determined in a succession of cases beginning with *New York v. Victory Van Lines*, (1979) 69 A.D. 2d 605, and essentially states that if there was a prior legal conforming use and it had continued to the present, even if the applicable zoning regulations were changed to prohibit it, the property was entitled to non-conforming use status even though the Certificate of Occupancy did not reflect that.

Under the building code and the New York City Charter, most buildings in New York City are required to have a Certificate of Occupancy from the New York City Department of Buildings. The Certificate of Occupancy establishes the lawful use and occupancy of a building and certifies that such a building conforms to the requirements of all applicable laws and codes. Certificates of Occupancy generally deal with the block and lot, dimensions, the address, the zoning district, the permitted uses and the occupancy classification. Specialised fire safety provisions may also be dealt with. It should be noted that s.645 of the New York City Charter provides that a Certificate of Occupancy "shall be and remain binding and conclusive upon all agencies and officers of the city… unless and until vacated or modified by the New York City board of standards and appeals or a court of competent jurisdiction". Accordingly a Certificate of Occupancy is regarded as a very valuable document in the hands of property owner serving as a shield against interference by public agencies.

Occupying a building in a manner that is contrary to the requirements of the building code or contrary to its Certificate of Occupancy leaves the owner subject to a variety of sanctions, including civil penalties rendered by the New York City Environmental Control Board, criminal fines imposed by a court or court orders requiring the correction or cessation of the non-complying condition.

As we have seen, an issue relating to zoning/Certificates of Occupancy in relation to both hotels arose prior to purchase.

The relevant history of the hotels may be summarized as follows. The Beekman is located at 3 Mitchell Place, Manhattan within an R10-C1-5 zoning district. According to its original Certificate of Occupancy issued in 1928 the Beekman was constructed as a 26 storey building initially with stores on the first floor and a hotel on the upper floors. At the time it was located in a business and residence District. In 1929 the certificate was amended to provide for a hotel in the cellar and first floor and an "apartment hotel" on floors 2 to 25. The intention was that the hotel would serve as a residence and club house in New York City for sorority women. In 1951, 1955 and 1959 the Certificate of Occupancy was amended to provide for a mix of apartment and hotel use, along with a "Class B" hotel occupancy classification. Class B hotels are transient hotels. According to its most recent Certificate of Occupancy, issued in 1969 the Beekman contains a hotel and restaurant on the first floor and apartment on floors 2 to 25 and is classified as "Class A" apartment hotel located in an R10-C1 to 5 District which allows a maximum for 10 for residential uses and 2 for commercial uses, including a transient hotel. In so far as the Beekman is operating as a transient hotel it is operated other than in accordance with its Certificate of Occupancy, and has been so operated since 1969.

So far as the Eastgate is concerned, it was built in 1971. According to its Certificate of Occupancy the building was initially located in a C6-4 zoning district. It was built as a mixed use building with transient hotel use provided for on floors 2 to 7 and apartments on floors 8 to 25. However, in so far as it appears that the owners of the building began operating it as a transient hotel from the outset this would have been permitted under the then applicable C6-4 zoning district, though such use did not conform to its Certificate of Occupancy. In 1983 the location of the premises were rezoned to a C1-9 zoning district which had the effect of reducing the allowable commercial floor area ratio on the property from 10.0 to 2.0 for commercial uses. The effect of this is that since 1983 the Eastgate has been operating other than in accordance with its Certificate of Occupancy. The issue that arises here is primarily one of non-compliance, as distinct from non-conformance. Non-conformance arises where a building is used or operated other than in accordance with its zoning while non-compliance relates to departures from the permitted bulk or scale. It may be noted in passing that legal practitioners seeking to regularise the position of buildings have a preference for going down the non-complying route rather than the non-conforming route if that is an option. The reason for this is that the two years discontinuance provision to which I have made reference applies to non-conforming uses only and not non-complying. Accordingly if it is possible to present the issue as one of non-compliance there is one less issue about which to be concerned.

I have already referred to the fact that the issue in relation to zoning/Certificate of Occupancy first arose before the decision was made to purchase the hotels and the circumstances in which that occurred. In so far as there is a conflict between Mr. Haskin on the one hand and Anglo personnel on the other hand as to the nature of the reaction to the emergence of the issue, I have indicated that I find Mr. Haskin's account unconvincing and prefer to accept the account given by Anglo personnel.

Thereafter, the issue of zoning faded from prominence for a period but re-emerged as a significant issue in the days prior to the finalisation of the text of the black brochure.

At that stage the zoning/Certificate of Occupancy issue was the subject of an exchange of emails among bank personnel but also involving Mr. Haskin and his lawyer, Mr. Yaverbaum over the three day period from 30th August to 1st September. Of particular note is that Mr. Haskin emailed Garrett Thelander, copying Jeff Dybas and Harvey Yaverbaum stating "I think you should disclose the zoning issue. Thanks". This email is recorded as having been sent at 2:38:06, 31st August, 2006. However, following and making sense of the chain of emails is complicated by the fact that times referred to in some, though not all emails have converted automatically from New York time to Irish time. It appears the email in question was in fact sent at 9.38 p.m., local time on 30th August by Mr. Haskin who was in New York. This appears to be so because Mr. Thelander appears to have been replying to this email when at 9.51 p.m. on Wednesday, 30th August he emailed Mr. Haskin saying "let's discuss first thing tomorrow with Harvey [Yaverbaum], this is very imp."

Over the next hour Mr. Thelander and Mr. Dybas exchanged emails. This saw Mr. Thelander asking what do you think "re - C of O"

with Mr. Dybas replying immediately "I think we need to have a conversation with Harvey before releasing brochure. If it goes out and we find out there's a material risk factor with the C of O then that's not the right move by us".

The morning of the 31st August saw an exchange between Garrett Thelander and Tim Haskin. At 7.43 a.m. Mr. Thelander emailed Mr. Haskin copying it to Harvey Yaverbaum asking Harvey Yaverbaum to call him or Jeff Dybas as soon as possible. The email includes the comment "we were under the impression that this was a risk, but very manageable". Mr. Haskin responded, copying the email to Harvey Yaverbaum, Jeff Dybas and also Jennifer Williams. He wrote "yesterday was a fire drill with the brochure. I hope in the future we can do this over a reasonable period of time. The issue is disclosure, not the manageability of the issue." It is fair to say that this relationship between manageability and disclosure is at the heart of this element of the dispute between the parties. However, at this stage it may be noted that there is no dissent by Mr. Haskin from the observation that the issue is manageable and indeed implicitly, he seems to concur that that is the case.

Then, early afternoon saw contact by Jeff Dybas with Kramer Levin. He emailed Michael Korotkin of that firm and also spoke by phone to another lawyer there, Mr. Gary Tarnoff. Mr. Tarnoff gave evidence during the case and his recollection at this stage, of the phone conversation which he times as occurring between 12 p.m. and 2 p.m. was that Mr. Dybas was inquiring about whether it was possible to renovate the hotel so as to facilitate its continuing use as a transient hotel without seeking to amend its residential Certificate of Occupancy.

If Mr. Tarnoff's recollection of the conversation is correct, it seems surprising that Mr. Dybas would be making such an inquiry, but in the absence of testimony from Mr. Dybas, it is difficult to gainsay the account given, but in any event little seems to turn on the details of this conversation, as distinct from the fact that contact was taking place with Kramer Levin.

At 1.13 p.m. on 31st August, 2006, Harvey Yaverbaum emailed Garrett Thelander and Jeff Dybas, copying to Timothy Haskin, enclosing the suggested zoning language which we have already seen.

Friday the 1st September, 2006 saw further email traffic. Garrett Thelander sent an email recorded as sent at 1st September, 2006 at 13.27 but likely to in fact have been sent at 8.27 a.m., to Jeff Dybas and James Whelan, another Anglo official. The email is directed primarily to the possibility of making use of an article from the New York Sun for promotional purposes but it contained the following: "Also, can you confirm with me that there is and will not be any disclosure about the C of O issue in the brochure. Sounds like a bunch of lawyers being lawyers". This was replied to by Jeff Dybas at 8.55 a.m. who wrote "Brochure is very close to ready for press. We just spoke with Jason [Drennan] and final version PDF will be sent to us later this morning with no language about C of O issue but updated equity requirement table (which we confirmed with Eddie [Byrne])."

While there is no formally recorded minute of the decision anywhere, it appears that the decision not to include the suggested zoning language or indeed any alternative zoning language was the subject of discussions involving Mr. Paul Brophy, Mr. Dybas and Mr. Corry and Mr. Byrne. The sense I have is that the decision was one reached by consensus, though the views of Mr. Byrne as the most senior participant would obviously have carried particular weight.

The bank's position is that the view that they arrived at - that the issue that they faced was one that was that was very manageable - was one that was fully open to it. Those involved on the bank's side say that they were dealing with hotels which had long operated as transient hotels and had done so lawfully, notwithstanding the terms of the Certificate of Occupancy.

The bank points out it had a previous involvement with the Mark Hotel where issues of a similar nature had arisen and been resolved successfully and as a result there was a degree of familiarity with the issue and indeed they had drawn comfort from their prior experience.

The bank says that nobody was saying to them that this was a material issue or an issue which was not capable of being readily resolved.

From its perspective, the hotels were operating perfectly legally, albeit that they did not conform with the Certificate of Occupancy. To regularise the situation and bring the paperwork into line with what had long been the reality on the ground, all that was required was to engage with an administrative procedure. The bank says that the correctness of its view that the issue was readily manageable and therefore not material has been established by what happened subsequently with the successful application to amend the Certificate of Occupancy, which was achieved in March and April 2007, at the very modest cost of $50,000 which was expended on legal fees.

In contrast Mr. Haskin and Mr. Sillerman, who have given evidence on behalf of the plaintiff and had an involvement in this area at the time, say that the issue was a real one and a troubling one.

As Mr. Sillerman puts it, securing an amendment to the Certificate of Occupancy was "no slam dunk, no walk in the park". An application was not assured of success and in any event would certainly take time.

It is said that there were aspects of both applications which caused particular concern. In the case of the Beekman, the particular concern focused on the fact that the original Certificate of Occupancy was for a Class B hotel i.e. for commercial use as a transient hotel but this was altered following an application in 1966 to Class A residential. It is suggested that this was disquieting not just because it represented a very unusual twist in the paper trail, which might of itself give rise to problems, but also because it raised questions whether the existing use as a transient hotel had in fact been continuous or whether use had been discontinued for a period in excess of two years. If this were so, and there had been an interruption, then having regard to the provisions of the New York Zoning Resolution known as 52-61, the prospect of "grandfathering" a non-conforming use would be lost.

In the case of the Eastgate, the particular concern centred on the fact that it was constructed in 1972. While it is the case that a number of hotels that were operating as transient hotels, though with residential Certificates of Occupancy, had been able to regularise their position over the years, none of these were a hotel built post-1961. It was said that successfully amending the Eastgate Certificate would involve breaking new ground.

Over and above the factors that were specific to each of the hotels there were developments of a more general nature occurring in relation to zoning issues in New York at this time which gave rise to disquiet. So far as the Mark Hotel is concerned, while Anglo drew comfort from its knowledge based on an involvement as lender of what was happening to it's application to amend, Mr. Sillerman, who acted as counsel for the owner of that hotel took a quite different message. He said that consent to amend the Certificate of Occupancy was achieved only after a difficult and strenuous effort involving the making of a number of submissions. He said that during the course of the application in relation to the Mark Hotel he detected clear signs of a tendency on the part of the Department

of Buildings to row back from the key "use trumps paper" doctrine as determined in a succession of cases beginning with City of *New York v. Victory Van Lines* 69 Ad 2D605 and this tendency was a cause of concern to him.

Not surprisingly, the plaintiff endorses the view that the issues that had emerged in relation to zoning and the Certificate of Occupancy were real and troubling as of August 2006 and indeed asserts that the issues remain real and troubling to this day.

So far as the Beekman is concerned, the surprising submission was made on behalf of the plaintiff that the only objective evidence available is that transient use was discontinued for a significant period. This submission, which I have to say I found extremely surprising, is based on the fact there was the application to amend the Certificate of Occupancy in 1966, to which I have referred, and that an alteration, in effect a downgrade, also occurred in relation to the fire alarm system which it is said is suggestive of change of use on the ground. The submission which is now made on behalf of the plaintiff runs directly contrary to the specific statement of fact made by Mr. Sillerman in his letter to Commissioner Santulli of 1st March, 2007 which contained the following statements:-

> "However, since well before the current Zoning Resolution was enacted in 1961, the Hotel has been lawfully used primarily for transient occupancy, with a few of its units occupied by long term residents, and the hotel has never ceased to be operated primarily for transit occupancy".

Dealing specifically with the 1966 Certificate of Occupancy, Mr. Sillerman had this to say:-

> "The next available C of O for the hotel – No. 63235, dated June 23 1966 – for the first time indicates only apartments, with no hotel rooms, and describes the building as a "Class A Apartment Hotel". A "Class A Multiple Dwelling" is defined in the multiple dwelling law as a dwelling used for permanent residence purposes. A "hotel dining room" and an eating and drinking establishment are shown on the first floor, a "tenant's social hall" on the second and third floors, and a cocktail lounge and accessory promenade on the 26th floor. These same uses are indicated on the most recent C of O for the Hotel – No. 67768 dated July 23 1969. According to DOB records, as further described below, this 1966 change in the designation of the C of O resulted from alterations by the then-owners to add kitchenettes and bathrooms to the hotel's rooms. The LPC's [***Landmark Preservation Commission]*** designation report for the Hotel states that the owners at that time were attempting to reposition the Hotel to attract guests from the United Nations or large corporations "that needed rooms with kitchens for weeks at a time to house employees who were being trained or relocated". Despite these alterations and the business goal of attracting longer-term occupants, only a small number of units in the Hotel were ever actually occupied for long-term stays. The majority of the Hotel's units continued to be used for transient occupancy, as they have been to the present time".

These very specific statements were made by Mr. Sillerman in a situation where an architectrical archivist and historian had been engaged and had reported. The submissions on behalf of the plaintiff make the point that it is not at all unusual for a lawyer on the one hand to advocate a position to a third party, while warning a client of potential pitfalls. However, it must be said emphatically, that this was not the case of a lawyer merely putting forward his client's instructions. This was a specific and unequivocal statement of facts against a background of completed research. It is unthinkable that Mr. Sillerman would have made such a statement if it was untrue.

So far as the significance which it is said attaches to the fact that the Eastgate was a post-1961 hotel is concerned, it is certainly the case that none of the half dozen or so hotels that have been referred to during the course of the hearing as having had their Certificates of Occupancy amended were built post-1961. However, it must also be said, that the Zoning Resolution itself draws no distinction between hotels built pre-1961 and post-1961. Nor, indeed does it draw a distinction between hotels and other commercial uses. Rather, the Zoning Resolution speaks without qualification of lawful non-conforming and non-complying uses. The matter was put very succinctly by Mr. Sillerman in the course of a letter written on 7th September, 2010 by him on his own behalf and on behalf of other land use practitioners expressing concern over an apparent abandonment of longstanding practice by the Department of Buildings. In the course of a lengthy and closely reasoned letter he makes the following comments:-

> "(iii) ***DOB's refusal to grant legal non-conforming use status to a building solely on the basis of the applicable C of O is contrary to the express provisions of the Zoning Resolution. [Emphasis in original letter]*** The provisions of the Zoning Resolution that concern non-conforming uses make it clear that the legal protections accorded to lawfully establish non-conforming uses are available so long as specified criteria are satisfied. Nothing in these provisions states, or in any way suggests, that these protections are unavailable merely because the relevant use is not shown on a C of O.
>
> Section 12 – 10 of the Zoning Resolution defines "non-conforming use" as "any *lawful use*, whether of a building or other structure or of a tract of land, which does not conform to anyone or more of the applicable use regulations, of the District in which it was located, either on December 15th, ***or a result of any subsequent amendment thereto". [Words in italics emphasized in original letter, words in bold emphasis added]*** That definition makes no mention of a C of O and the above cited cases conclusively establish that with regard to the legal non-conforming status of property, the lawfulness of such use turns on whether the use conformed to the then applicable zoning scheme and not whether that use is shown on a C of O.
>
> Article VI, chapter 2, section 52-00, et seq., of the Zoning Resolution establishes the regulations applicable to non-conforming uses. Section 52-11 states that [a] non-conforming use may be continued, *except as otherwise provided in this chapter* [Emphasis in original letter]. Chapter 2 goes on to state that the right to continue a non-conforming use terminates only under two circumstances;
>
> (1) A 50% or more of the floor area of the building housing the non-conforming use is demolished, damaged or destroyed and requires reconstruction (section 52 – 531) or
>
> (2) If the active operation of substantially all of the non-conforming use is discontinued for a period of at least two years (section 52 – 61), once again, there is no mention of any C of O requirement in Article 5, chapter 2".

Mr. Sillerman's views were put clearly and firmly by him in the course of his letter to Commissioner Santulli. They lead to the conclusion that the fact that the Eastgate is a post-1961 hotel is of no inherent significance. The distinction between pre- and post-1961 hotels is a distinction without a difference.

A further argument in relation to the Eastgate was introduced on day 18 of the hearing, when for the first time, it was suggested that there was a question over the lawfulness of the use of the Eastgate prior to a change in the Zoning Resolution that occurred in 1983.

The issue raised related to the fact that the Eastgate was operating as a commercial transient hotel in a structure of over 100,000 sq ft but did not have a designated loading bay, which is a requirement for commercial buildings of that size and it was suggested that this raised doubts about the lawfulness of the use of floors 17 to 25 at all stages, floors 17 to 25 constituting the portion of the building in excess of 100,000 sq ft.

This argument was raised at that stage of the case, notwithstanding that Mr. Sillerman, the zoning expert who had given evidence on behalf of the plaintiff, had expressly stated while testifying that the use of the Eastgate as a transient hotel from 1972 to 1983 was a use which was permitted in the zoning for the District in which it was located.

Mr. Masyr, with whom this topic was raised for the first time during the course of cross-examination, did not regard the issue as one of any real concern. He made the point that if anyone had ever raised a concern on this issue, then, without any difficulty, an area of on site parking could be designated as a loading bay or loading berth. In the context of the issues with which the Court is concerned of greater practical significance is that in the forty-two years that the hotel has been in existence, nobody, so far as is known, as ever raised any concern about this topic whatever.

In so far as the plaintiff has indicated a wish to focus on the situation of the two individual hotels, it is of course the case that applications to amend a certificate based on pre-existing lawful non-conforming or non-complying use must be judged in their own factual context. It hardly needs to be said, but it is of course the situation that, simply because an application in respect of a particular hotel is successful, it does not follow that an application in respect of another hotel will achieve the same result, no more than the fact that a moving and storage business was successful in the *Victory Van Lines* case guarantees success to another moving and storage business or, of itself, is even an indication that application from them will be likely to be successful. Each application turns on its own facts. This is an area where applications are fact-driven. In that regard, the reference to Anglo drawing comfort from the Mark Hotel has to be treated with some caution. That Anglo personnel had acquired a knowledge of the procedures involved in "grandfathering" and were aware such procedures existed to the potential benefit of property owners, may have been a source of some comfort, but it certainly was not open to them to conclude that because the Mark appeared to them to be on the road towards a successful conclusion that this was a guarantee or even a strong indication that applications in respect of the Beekman and Eastgate were also likely to be successful. One might hope and expect that hotels or other commercial entities with a similar factual history would be treated in a similar fashion, but that was the extent of the comfort that could be drawn.

I do not believe that there was information available in either the Spring or Autumn of 2006 to indicate that there was cause for particular concern in relation to either hotel. I do accept that, to use the language of Mr. Sillerman, the issue was not a slam dunk or a walk in the park; the landowners had the obligation, and the onus was on them to present to the authorities cogent evidence in relation to the hotel's history. In this case, the Fund and, more particularly, Anglo, were concerned with two hotels that were located in C1 districts, the effect of which was to limit commercial use to a FAR of 2.0 or essentially two floors as of right. The situation required regularisation and the onus to do so was firmly on the property owners. However, just about everyone in New York must have known that the Beekman was built long prior to the enactment of the 1961 resolution and had long been operated as a hotel as it was, and is, it must be remembered quite literally a New York landmark, and had received formal recognition as such. The Eastgate's location at 222 East, 39th Street was previously zoned C4 and as such commercial use as a transient hotel was, subject to the issues raised belatedly in relation to the loading bay always permitted.

It seems to me that all involved with the two hotels in 2006 were entitled to be confident that the issues relating to zoning and Certificates of Occupancy could and would be regularised. Whether the Certificates of Occupancy would be permitted to be amended was primarily an issue of fact. Subsequently, Mr. Sillerman addressed these factual issues in his submissions to the Commissioner, by putting before him a considerable body of evidence including hotel advertisements, hotel association memberships, hotel rate sheets, hotel brochures, reports from an industry information service and phone records all designed to establish use going back very many years, to pre-1961 in the case of the Beekman and pre-1983, the date of the zoning change in the case of the Eastgate. The point is made that this evidence has to be assembled and that, back in 2006, the extent of the evidence which could actually be compiled was an unknown. While that is so, one cannot ignore the fact that we are dealing with very large prominent buildings of a public character, which had been frequented by many thousands of members of the public over the years and in which many hundreds of people must have worked. In truth I cannot believe, that if a building had in fact been used as a hotel that it would be difficult to establish that as a fact.

There must be few successful applications in any area of the law where it is not possible to consider in retrospect, and say "could it have gone wrong?" However, trying to view matters in the round and attempting to put myself in the position of someone giving consideration to the issue in August 2006, it seems to me that it would have been very reasonable to expect with real confidence that the Building Department would acknowledge the reality of the existence of lawful non-conforming uses. Both hotels gave a clear impression of having lawful uses that were deeply entrenched and this, more than anything else, is what would have occurred to anyone considering the situation.

There are two other areas of disagreement between the parties in relation to the zoning issue to which I should refer. Firstly, the parties are in disagreement about the significance of the fact that both hotels were operating contrary to their Certificates of Occupancy and about what the likely consequences of this were.

Mr. Sillerman has expressed the view that because the operation of the hotels as transient hotels was not authorised by the Certificates of Occupancy, and because it appeared that the hotels were not in full compliance with all applicable Building Code Provisions applicable to transient hotels, there was a significant risk that the Department of Buildings or some other city agency would take action against the buildings which could have resulted in a number of possible sanctions, including the possibility of judicial orders requiring the closure of the buildings, together with other civil or criminal sanctions. He points out that under the Building Code, transient hotels are required to contain a number of safety/lifesaving features that are not obligatory in residential buildings such as emergency lighting, exit signs and the like. Assuming that the Beekman and/or Eastgate were operating without these safety features, then this was a serious breach of the law, which could have resulted in significant civil and criminal sanctions. In addition if there was a fire or other accident, then the owners were exposed to the risk of a civil claim for damages.

Mr. Masyr, on the other hand, was of the opinion that zoning interventions by the authorities are complaint driven. He says that it is not at all uncommon for buildings in New York to be operated other than in accordance with Certificate of Occupancy. Such buildings are to be found in virtually every community. He regards the notion that such buildings would be subjected to criminal sanctions as far-fetched in the extreme. He describes talk of the possibility of the closure of the hotels as unthinkable. He says that there is just no precedent for the closure of a hotel, operating in a normal fashion in the heart of Manhattan. When hotels provoke intervention by the authorities, then this will almost always be as a result of complaints which have been triggered by activity such as the illegal use of drugs, prostitution and the like. However, absent something of that nature there is no reason to expect any serious consequences. He says that any suggestion of civil or criminal prosecution is theoretical, rather than real but that even there any enforcement

action that could even theoretically arise would be against the property owner and that as such the investors would not be exposed to any risk of civil and/or criminal prosecutions. In assessing to what extent these risks are real, I attach some significance to the fact that until these topics emerged as the subject of discussion in the context of the present dispute, the issue just never seemed to arise. It is not an issue that was referred to in the suggested zoning language for the black brochure nor was it mentioned when zoning/Certificates of Occupancy arose in the context of the building loan agreement. Again, it is of note that the issue was not one that was specifically referred to by Mr. Sillerman when in March 2009 he was first asked to write to Mr. Haskin setting out his thoughts on the situation facing the Beekman and the Eastgate. Only following requests from the investors, for greater elaboration of the issues, and a greater highlighting of the question of risk, was this area the subject of specific comment. However, while I do believe that this conflict between the parties has brought to centre stage risks that would otherwise be regarded as remote or theoretical I do not believe that operating important public buildings such as multi-storey buildings in an unauthorised manner can be regarded as trivial or of no consequence. In particular any failure to adhere to safety codes must, by any standards, be regarded as a matter of the utmost significance. In that regard I feel entitled to take judicial notice of the fact that tort lawyers in the United States have a reputation for seeking and pursuing deep pockets with both imagination and determination. That being so, it is obviously desirable that any irregularities identified should be brought into conformity without delay. That has not happened, and, notwithstanding the determinations of Commissioner Santulli, both hotels operate to this day other than in accordance with their Certificates of Occupancy. The reason that is so is because the requisite work to achieve code compliance has fallen victim to the dispute between Mr. Haskin and Anglo in relation to the cost of refurbishment. To the extent that this is so, it indicates that the issues in the case in relation to renovation budgets and zoning/Certificates of Occupancy are in fact linked. At its most basic, if it had proved possible to renovate the hotels at a cost of $60,000 per key as originally envisaged, it is highly unlikely that anyone would ever have heard of the zoning/Certificates of Occupancy issue. However, in a situation where more than four years has passed since Commissioner Santulli made his determination concerns undoubtedly heighten. It will be recalled that the Denihan family had set their face against contact with the Department of Buildings. While they did not, as far as I am aware, spell out their reasons, I think it reasonable to assume that they were operating on the basis that sleeping dogs should be let lie and not be disturbed. However, what has actually happened now is that the fact that there are issues, which require regularising, has been brought to the attention of the Department but, despite doing that and despite securing the desired outcome from the submissions, the issue has not been finalised and brought to a conclusion.

The other area where the parties are in disagreement is linked to the fact that the necessary works to take advantage of the rulings of the Commissioner have not taken place. Mr. Sillerman and Mr. Masyr are in disagreement about whether there was and is a risk that the favourable determinations that have been obtained could be rescinded. Mr. Sillerman is of the view that until all necessary code compliance work has actually been completed and the amendments to the Certificates of Occupancy obtained, there is a distinct possibility that the determinations obtained could be rescinded. He refers to the fact that the changing climate in the Department of Buildings, which he had first identified in the course of the Mark application, has continued and indeed intensified.

The changed approach now evident on the part of the Department of Buildings had caused Mr. Sillerman to write to Ms. Sehgal, General Counsel of the Department of Buildings on behalf of the land use bar, making the point that the Department seemed to be turning its back on long and consistently established practice. While the views of the bar were set out very clearly and very firmly in that letter, it had not resulted in the Department having a change of heart. He points out that no similar determination to those that were achieved in the case of the Mark, Beekman and Eastgate had issued to other hotels since then and that at least one hotel had been refused a determination. A further area of concern was that the New York State multiple dwelling law was amended by the legislature in 2010. This legislation makes provision for resolving difficulties with apartment hotels operating as transient hotels, but what is of concern is that while it might be that the Beekman could benefit from the terms of the amending Act, it is not available to the Eastgate. This is so because the "grandfathering" procedure there set out, includes a sunset clause which only applied to pre-1961 buildings, and as we know the Eastgate was built in 1972.

On the other side of the coin Mr. Masyr was of the view that once Commissioner Santulli had issued his determination it was not open to the Department of Buildings to refuse to issue building permits based on the issue of use. In that regard the factual position is that building permits did indeed issue but had not been acted upon. He says that the determinations of Commissioner Santulli, as a matter of reality, brought the issue to a conclusion.

Again, in so far as this has become an issue at all, that is a function of the fact that the works have not been carried out. When Commissioner Santulli made his determination he did so on foot of extensive and cogent evidence which I think can properly be described as compelling, of the factual background to the hotels and the underlying legal doctrine which he was applying i.e. that use trumps paper, was one that was long established and deeply entrenched. As I understand it, there is no question of decisions of a Commissioner being reopened or reversed on an arbitrary or random basis. Decisions can be reversed only if they were made in error, either legal or factual. When these determinations issued there was nothing whatsoever to indicate that Commissioner Santulli erred in law or fact. On the contrary the determinations were those that were to be expected and accorded in full with long established practice. That more than four years was allowed to pass since the determinations issued without the necessary work commencing was not something that anyone could have expected.

Further evidence that the issue was one that was regarded by all involved as having been resolved is to be found in the fact that the letter to Ms. Sehgal, which protested about what was regarded as a change in attitude on the part of the Department of Buildings, referred as evidence, in support of the proposition that there was in existence a long established practice, to the fact that in at least seven instances the legal non-conforming status of a transient hotel based on long standing occupation for transient purposes had been recognised. The hotels referred to include the Beekman and the Eastgate.

We had already seen the exchange of emails dated the 12th April, 2007, between Mr. Haskin and Mr. Paul Brophy which followed on the issue of the determination in respect of the Eastgate. This exchange is consistent only with a shared belief that the issue had been concluded satisfactorily. The update issued "to the investors" in June 2008 recorded as one of the achievements to date the fact that the Zoning Change Application Approval, to enable the upgrade work at both hotels had been obtained. It may be noted that there is no indication that the distribution of this "update" which contained specific reference to the zoning issue and indeed also to the existence of restaurant and residential tenants provoked any reaction from those to whom it was circulated. That these two issues were the subject of specific comment in the update might be seen as an indication that Anglo personnel were not of the belief that these were areas which had been suppressed previously and which accordingly ought not to be addressed in public.

My overall sense of the zoning issue is that this was just not seen as a major worry. It is understandable why that should have been the attitude. The owners were simply seeking to continue the status quo, and to maintain a use that had continued for many years. It is noteworthy that, while undoubtedly there was a difference of view as to whether the black brochure should contain a reference to this issue, nowhere among the vast volume of documentation that has been accessed has a single document been found which indicated any real doubt on the part of any participant in the project that the issue was capable of being resolved. Neither has any document been identified which indicated concern that there was any risk of catastrophic consequences in the form of closure orders

or civil or criminal penalties such as has been canvassed in the course of the current litigation. Neither indeed is there anything to indicate that the satisfaction that was experienced when Commissioner Santulli issued his determination was in any way tempered by a fear that the decisions that had issued would be reversed, overturned or quashed.

I am of the view that any risk facing the hotels in 2006 was very small. While a satisfactory resolution might not have been completely assured it was certainly to be expected and indeed confidently expected. There was, I am satisfied, a clear belief on the part of Anglo personnel that the issue was one that was capable of ready resolution and that belief was an honest one and a reasonable one and indeed one that was later proved to be correct and quickly proved to be correct.

The evidence of all the Anglo witnesses was that the question of whether to include a reference to the zoning/Certificate of Occupancy issue was one that was considered and debated and a decision was reached in good faith that this was not necessary.

The point has been made that in a situation where Anglo was, on its own account, placing great reliance on Mr. Haskin's expertise, there was an obligation to accept his views on disclosure and also an obligation to follow the advice of Mr. Sillerman. That is not a proposition with which I find myself in agreement. So far as Mr. Haskin is concerned, he himself specifically made clear that the views he was expressing on inclusion of material in the brochure related to disclosure rather than a view as to whether the issue was manageable or not.

So far as Mr. Sillerman is concerned his acknowledged expertise is of course in the area of zoning/land use. It does not appear that he has any direct expertise on disclosure issues as such. Of course, it is possible that in particular circumstances he would give advice or offer an opinion on zoning/Certificate of Occupancy issue which would then have to be disclosed. Manifestly, it is the case that had he opined that the zoning issue was unlikely to be satisfactorily resolved then this would have had to be disclosed. Failing to do this in such a situation would beyond any doubt have meant that the black brochure was seriously misleading. While it might be that, in that situation, what actually appeared on the pages between the covers was true as far as it went, the exclusion of information which put a major question over the ability to carry the project through to its intended conclusion would mean that the brochure as a whole was a falsehood. However, quite different considerations apply when he expresses a view on whether a particular issue should be disclosed in a brochure to be published in Ireland. On that specific issue, as distinct from assessing the extent of risk and the prospects of success which will determine how material an issue is, it does not seem to me that the views of a New York land use lawyer are determinative of the issue.

Accordingly, I do not believe that there is any substance in the suggestion that Anglo acted fraudulently in publishing and distributing a brochure that did not contain a reference to the zoning issue, nor am I of the view that the publication of the brochure was in this regard negligent.

I do not lose sight of the fact that the plaintiff has given very firm evidence that he would not have invested in the Fund had the brochure contained any reference to zoning. He has described his evidence in that regard as "categorical" and has referred to the fact that he has in the past declined to become involved in investment opportunities in Ipswich and Sheffield which appeared to raise zoning issues.

I do not, at all, believe that Mr. McCaughey has been intentionally untruthful in making the statement that he has, but I do believe that statement is the product of hindsight and indeed of wishful thinking. This statement is undermined by the fact that Mr. McCaughey has also said that had he known about the interest rate strategy and about the long term tenants and the status of the renovation budget that he would not have invested. Indeed, it must be said the phrase "I would not have invested" became something of a mantra. In my view no reasonable prudent investor who found the proposed investment otherwise attractive, is likely to have been dissuaded from investing by being told about the reality of the zoning issue. The language suggested for inclusion by Mr. Haskin which he had obtained from his lawyers was itself quite comforting. If it were felt that an Irish readership would benefit from greater elaboration of the situation relating to zoning/Certificates of Occupancy, then that could have been provided and would have offered additional comfort. In particular it would have been possible to clarify the distinction between the New York concept of zoning and the Irish concept of zoning. Anglo personnel expressed concern that the prominence of zoning in public discourse, having regard to the ongoing work of the Planning Tribunals in Ireland, might mislead potential investors as to what was in issue in New York. Appropriate language could certainly have removed that concern.

In summary then, the plaintiff has failed to establish the fraudulent misrepresentation or fraudulent concealment in relation to the contents of the brochure. Indeed quite simply there has been no evidence of fraud. Having regard to the view that I have formed about the effectiveness of the exemption clauses contained in the commitment agreement that would be sufficient to dispose of the case. However, I should add that the plaintiff has also failed to establish the evidence and entitlement to succeed on any one of the non-fraud elements of the claim. Clearly, the plaintiff now regrets his investment decision but investor remorse does not provide a basis for a successful legal action. Had the hotels been disposed of at a time when they had increased in value very substantially and had a profit been recorded his attitude might well have been different. Unfortunately that didn't happen and it appears that the plaintiff is now facing a loss on his investment. However, that is sometimes the lot of those who participate in high risk investments. It does not follow that because an investment failed to deliver the hoped for returns that there must have been any culpability on the part of a third party. Still less, does it provide a basis for concluding that there has been fraud on anyone's part. In the circumstances each aspect of the plaintiff's claim fails.