

**THE HIGH COURT**  
**COMMERCIAL**

**[2013/7194P]**

**BETWEEN**

**EOIN DOOHAN & ANNE DOOHAN**

**PLAINTIFFS**

**AND**

**IRISH LIFE ASSURANCE PLC AND IRISH LIFE INVESTMENT MANAGEMENT LIMITED**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Fullam delivered the first day of December 2015**

**Introduction**

1. In this case, the plaintiffs claim damages for losses suffered as a result of the alleged mis-selling by the first defendant to the plaintiffs and other pension/ life assurance investors in 2007, of an investment product known as the Austin Friars Geared Property Fund. The subject property is 23 Austin Friars, adjacent to the City of London, a corner office building, comprising 55,127 square feet.

The plaintiffs claim that the second named defendant was in breach of its contractual duty and/or duty of care by failing to structure the borrowings so as to give the defendants a real discretion to extend the loan at the end of term if necessary, and in negligently disposing of the property in July, 2013 in breach of its contractual duty and/or duty of care and/or fiduciary duty. Finally the plaintiffs claim that if they had known in 2007, that Irish Life did not have the discretion to extend the loan term, they would not have invested in Austin Friars. The first and second named defendants will collectively be referred to as 'Irish Life' throughout this judgment unless otherwise specified.

2. The plaintiffs Eoin and Anne Doohan, are representative of 214 investors in the Irish Life Geared Property Funds investment products, the subject matter of these proceedings. This judgment relates to the above entitled proceedings and also to *Grand Liquor Limited v. Irish Life Assurance Plc and Irish Life Investment Managers Ltd* record no. 2013/8344P and *Hubert O'Donoghue v. Irish Life Assurance Plc and Irish Life Investment Managers Ltd*. record no. 2013/8916P. By Order of the court of 3rd December, 2013, the cases of the other plaintiffs were stayed until the decision on liability has been delivered in the test cases.

3. The first defendant, Irish Life Assurance PLC was at all material times a major provider of life assurance, pension and investment products in the Irish financial services market. In 2007, Irish Life was part of the financial services group, Irish Life & Permanent TSB.

The second defendant was the investment management subsidiary of the first defendant and a major provider of the life and pensions products and services in the State which were sold through approximately one thousand seven hundred broker agencies.

**Factual Background**

4. Mr. Doohan is an investment advisor and a former account manager with Irish Life. The second named plaintiff is his wife. Both plaintiffs invested in the fund in August, 2007. It was agreed between the parties prior to the commencement of the trial that it was not necessary for Mrs. Doohan to give evidence in the circumstances of this case.

Geared property funds were specialist products and were introduced by Irish Life to a small number of brokers that Irish Life believed understood the concept and had the knowledge and client base of high net worth investors to get involved. This group included Mr. Doohan, Mr. John Hoey, Mr. Frank O'Mahony and Mr. Philip Delaney, another former Irish Life account manager.

4. In early 2007, Irish Life identified the Austin Friars property as being suitable for a geared property fund for high net worth investors and paid a deposit. The property was occupied by a single tenant Avanta Managed Offices Ltd, on a 15 year lease expiring in 2022. The initial rent was £1,916,360 with the rent 'stepped up' for the first 5 years and thereafter 5 yearly upward only rent reviews. Mr. Willie Holmes of Irish Life approached Mr. Doohan, to sound him out as to whether his clients would be interested in investing in such a fund. Mr. Holmes worked for Irish Life for 37 years and was an actuary by profession. He took over management of the brokerage division of Irish Life in 1999 which he held until his retirement. As part of this role Mr. Holmes was responsible for liaising with over 1700 brokers who were agents of Irish Life .

5. Mr. Doohan had previous experience in geared property funds. In 2004, he and his clients invested in a 4 year geared property fund at Thames Court in the City of London. That fund realised a 300 per cent profit in 2006. Also in 2006, he invested in the Princes Exchange geared property fund located in the city of Leeds; in early 2007 it was showing a substantial profit. In 2007, Mr. Doohan was also organising his own geared property fund on a property in Weinstrasse, Munich where an agreement had been reached to acquire a property for €20.573m partly financed by a €14m loan from Anglo Irish Bank plc for a term of 7 years with an investment term for investors of also 7 years.

6. On 14th March, 2007, Irish Life sent Mr. Doohan a cash flow statement, the sales brochure for the Austin Friars' property and information relating to the tenant covenant. Mr. Doohan visited London to inspect the property over the St. Patrick's weekend. On his return, in an email to Mr. Barry Skelton of Irish Life on 21st March, he expressed interest in the proposed fund and sought further information on nine specific issues. Mr. Skelton was a regional manager within the brokerage department of Irish Life and acted as a

'conduit' between Irish Life and the brokers. None of the information sought by Mr. Doohan at this point related to the term of the loan.

7. On 22nd April, Irish Life organised an introductory meeting with Mr. Doohan and two other leading brokers, Mr. John Hoey of BHP Insurance Ltd. and Mr. Frank O'Mahony and Mr. Gerry O'Mahony of O'Mahony Insurances Ltd. The brokers were enthusiastic about the Austin Friars product following the meeting. In subsequent dealings with Irish Life, Mr. Doohan was the spokesman for this group. Following the meeting, Mr. Doohan produced his own brochure which he circulated to his clients in May.

8. An internal Irish Life memo of 22nd May from Mr. Tadgh Clandillon to Mr. Kevin Murphy, Managing Director of Irish Life, setting out the proposed product structure included a pricing note which concluded that *'it barely made sense to gear the investment'. It was an 'upside play and creates significant downside risk if high returns are not met and/or if interest rates increase materially. This needs to be clearly explained to customers'*. In May/June, Irish Life produced a 27- page brochure for the sale of Austin Friars fund through five selected brokers namely CFS, Mr. Eoin Doohan, Mr. John Hoey, Mr. Gerry O'Mahony and Mr. Phil Delaney. Mr Doohan circulated Irish Life's brochure to selected high net worth clients at this point.

### **The Structure of the Fund**

9. The intended term of the fund was 5 years. The purchase of the property by Irish Life was to be funded, as to 68% by a non-recourse loan from Irish Life's sister company PTSB, and the balance, 32% to be provided by life assurance/pension investors.

Under the PTSB facility letter of 13th June, 2007, the loan obtained by Irish Life from PTSB was also for the term of 5 years. Initially, the Irish Life Board applied for, and approval had been granted, for a loan term of 7 years. However, following the review of the draft loan agreement by an Irish Life team which included Ms. Kate Nugent, a member of the High Net Worth Unit of Irish Life, it was considered that a loan term of 7 years "made no sense" as the cash flows and all the other documents were based on a term of 5 years. As a result the loan term was changed to 5 years. Irish Life borrowed the sum of £25.4 million from PTSB. €17.78 million was for a fixed 5 year period until July 2012 with the 30% balance of €7.62 million being at a variable interest rate.

10. The 'Repayment Date' of the loan from PTSB is defined in the First Schedule of the Facility Letter as: *'the anniversary of 5 years from the drawdown Date (which said period may be extended for up to a further 3 years at the request of the Borrower and at the sole discretion of the Lender)'*. It is clear from the First Schedule that Irish Life had an option to seek an extension of the loan for a further 3 years but the granting of such extension was at the sole discretion of the lender. Clause 7 of the facility letter further provided for repayment in the occurrence of an event which, in the lender's reasonable opinion, was likely to have a material adverse effect on the borrower's ability to comply with its obligations.

11. Irish Life completed the purchase of the property for £37,081,259 which together with costs involved a total outlay of £39,676,947. Irish Life also arranged finance for investors through PTSB up to a maximum of 75% of each investment. This facility was primarily targeted at high net worth clients of brokers who had maturing SSIA's. The Doohans borrowed €75,000 from PTSB on a loan term of 7 years for their investment in the fund.

12. Irish Life obtained a bank guarantee dated 19th December, 2007, in respect of the rent for Austin Friars from Lloyd's Bank which expired on 11th April, 2012. Investors received an investment pack comprising an Application Form, the Brochure, a Terms and Conditions booklet and a Customer Information Notice. The Terms and Conditions booklet and Application Form were stated to be contractual documents. The documents stated that the intended life of the fund was to be 5 years but Irish Life had discretion to change the term of the fund to an earlier or later date *'depending on market conditions'*. The Doohan plaintiffs entered into their agreement on 28th August, 2007, with the other plaintiffs investing at different times.

### **Post Inception**

13. Following inception of the fund, Irish Life provided property updates to brokers and their clients on a biannual basis. Mr. Doohan would raise queries on the updates on behalf of brokers either in correspondence or at meetings.

The global financial crisis hit the UK and Ireland in 2008. It resulted in a credit crunch which affected the availability of finance for property in both investment and rental sectors.

14. In the middle of 2010, the tenant, Avanta, experienced banking problems. Its major shareholder, Kenmore Ltd., had gone into administration in November, 2009. Avanta's business consisted of taking leases of commercial property and sub-letting space on short term premium rentals. It had also been acquiring freehold properties paying top prices. As a result of the credit crisis, it was no longer getting premium rents and was having difficulty meeting its borrowing requirements. The position of the tenant prompted Ms. Sarah Coyle of the Irish Life Asset Management Team to seek advice in anticipation of Avanta's insolvency. She had joined Irish Life in June 2008 and was the asset manager responsible for Austin Friars. The advice was that a new tenant was unlikely to match the existing rent and moreover it would be necessary to give a new tenant an inducement of a two year rent free period. Following the negative Performance Report of 30th June, 2010, Ms. Coyle met with Mr. Doohan and other brokers at the Stillorgan Park Hotel on 14th July. The sole topic of conversation was the rates on fixed interest loans obtained by Irish Life in the context of extensions of other maturing facilities.

On 16th September, Mr. Doohan sought information from Mr. Johnny Horgan of Irish Life under four headings: Banking, Yield, Rent and Disposal (likely date and reasons therefor). Mr. Horgan joined Irish Life in June 2009 to head up the Syndicated Properties Team within Irish Life Investment Managers.

15. Following a meeting with Mr. Doohan, Mr. Fox of PTSB responded by email of 14th October, 2010, stating in relation to the loan:-

"The loan which is with PTSB was drawn down in 2007. The amount of the loan drawn was £25.4m and the duration was expected to be 5 years with the ability to extend for a further 3 years."

In January 2011, Ms. Coyle met Mr. Alberto, Managing Director of Avanta, to consider 3 proposals, namely:-

- (1) cancellation of the lease,
- (2) calling in the guarantee, and
- (3) rent reduction to £1,400,000 per annum.

None of these proposals was acceptable to Irish Life, as they would have triggered a loan default under Clause 7 of its Facility Letter.

Thereafter Irish Life, advised by Jones Lang La Salle, agreed to postpone part of the rent until February/March of 2012 to assist Avanta with its cash flow. This deferral had the consent of PTSB and preserved Irish Life's position under the Lloyd's bank guarantee which was due to expire on 11th April, 2012.

In an email of 2nd March to Ms. Coyle, Mr. Doohan asked a number of questions relating to Avanta's difficulties which were flagged in the Property Update of 31st December, 2010, as well as a query regarding how much the decline in value of the units of the fund, since launch, was due to exchange rate movements.

16. In mid-July 2011, the Department of Finance took over control of PTSB. The relationship between the Irish Life and PTSB had changed at this point with PTSB now seeking to de-leverage its portfolio and reduce its debt-to-deposit ratio. Irish Life saw this as an opportunity of increasing equity for the investors if PTSB was willing to take a reduction in its portfolio of loans *'if some of the deals could be refinanced externally'*. Irish Life engaged Bircroft Private Ltd. as specialist investment advisors while PTSB were advised by KPMG.

17. Bircroft approached a number of lenders with regards refinancing the Austin Friars fund. Covenant strength was a key issue in respect of Austin Friars. Lloyds Bank was the only financial institution to make a refinancing offer. That was a loan of £14m (45 % LTV) for a period of 3 years and would have required a significant injection of funds, £10m, by the investors. Thus, the initial search for refinancing ('Project Victoria') proved unsuccessful; PTSB rejected the defendant's proposal for a debt reduction.

18. As the PTSB loan was due to mature at the beginning of July 2012, Irish Life again investigated the possibility of extending the loan with PTSB and refinancing with other lenders. Irish Life had a number of communications with PTSB during this period however PTSB were not disposed to the idea of extending the loan. In January/February 2012 the defendants decided to put Austin Friars on the market; the final decision was made following meeting with a number of Estate Agents in London on 1st February. The thrust of the defendants' evidence was that although the decision to put Austin Friars on the market had been taken, their strategy was to keep 3 options open:-

1. Extending the loan
2. Re-financing the loan, or
3. Selling the property.

#### **PTSB decision not to renew Irish Life Loan**

19. On 14th February, 2012, Mr. Graham Fox informed Mr. Doohan by email that PTSB financing was unlikely to be renewed. Mr. Fox stated '...there have been changes with regards PTSB's view on their loan book and the decisions which are now being driven by the Department of Finance'. On 29th February Irish Life had an 'emotive' meeting with the brokers. The brokers were told by Irish Life that PTSB was not willing to extend the loan and it was the right time to sell Austin Friars. On 2nd March, Mr. Doohan wrote to Mr. Tony Lawless Head of Brokerage at Irish Life requesting:-

- All communications regarding the loan the loan facility with PTSB over the last 12 months;
- Valuations of the property as prepared by Knight Frank and Jones Lang La Salle;
- A listing of the Bank/funders recently approached to re-finance the property together with their feedback /terms.
- The letter concluded-'You might advise me when you expect to furnish this information to me as I wish to manage communication to my clients in this matter.'

On 8th March, Irish Life provided Mr. Doohan with information sought in relation to banking, valuations and attempts to refinance. Mr. Doohan responded on 12th March complaining that the decision to sell was being taken without any regard to the investors who supported and promoted the fund on the basis they would have a direct involvement when major decisions were being taken. The letter called for the decision to sell to 'be rescinded immediately while (they) exhaust every possible avenue to secure the best possible result for all their clients'.

20. There was a further meeting with Mr. Gerry Hassett, Managing Director of Irish Life Retail, and brokers on 22nd March. The brokers challenged the decision to sell Austin Friars. This time also there was some unhappiness with the advance copy of the Property Update of 29th February. In the revised version of the Update, Irish Life notified brokers of their intention to dispose of the property giving the reason that 'now was an appropriate time to sell' given the combination of the length of the lease and the strength of the property market in the City of London

21. On 23rd March, Mr. Doohan wrote to Mr. Hassett expressing the brokers' unhappiness at the outcome of the meeting, and again requested that Austin Friars be taken off the market suggesting that otherwise the consequence would be an outflow of funds from Irish Life and PTSB. Mr. Doohan also indicated that the brokers were seeking meetings with Mr. Kevin Murphy, CEO of Irish Life, Mr. Jeremy Masding, CEO of PTSB and the Minister for Finance, Mr. Michael Noonan.

22. On 28th March the brokers wrote to Mr. Kevin Murphy setting out their objections to the sale and challenging Irish Life's justification as set out in the Property Update and asserted that the fact that 'the loan had a maturity date was news to (them)'.

On this date also, Mr. Tony Lawless of Irish Life responded to Mr. Doohan's letter of 8th March, setting out the rationale for the proposed sale, namely, that to hold the property for another two years would affect the yield and impact on the valuation; the forecast for the London market for 2012 was at best flat with a high likelihood of a drop in values; and while a cohort of investors was paying reasonably strong prices for assets in London City, Irish Life's advice was to sell in the near term and achieve a good market price. Mr. Lawless said Irish Life were formally made aware of Irish Life's decision not to renew in January and enclosed a copy of the PTSB loan facility.

On 30th March, Mr. Hassett responded to Mr. Doohan's two letters of 23rd and 28<sup>th</sup> March, explaining that Irish Life was in a very difficult position as not all elements were within its control, they were acting on the advice of professional advisers and 'would continue to keep all options open and choose the one that is in the best interests of the investors'.

23. On 2nd April, Mr. Doohan and other brokers met the Minister for Finance and sought to persuade him that a sale of Austin Friars was ill-advised.

24. On 25th May, Mr. Doohan and Mr Hoey met Mr Kevin Murphy and raised the issue of the PTSB loan. Part 9 of the attendance encapsulates the case made in these proceedings:-

"We also informed Mr Murphy that Irish Life had mislead us and our clients that an actual loan maturity date existed and using the opportune (time) to sell line was to deflect away from their incompetence. The actual fact was that the property was being sold because the loan had been called in by PTSB under pressure from Finance and, as a consequence, Irish Life were now unable to meet their commitment (made at meetings and in writing) that, if required, there was flexibility beyond 5 years in selling to allow for market conditions. We pointed out that had we known this flexibility did not exist we would not have promoted or sold the investment."

#### **Austin Friars on the Market**

25. According to Ms. Coyle, Austin Friars was put on the market on 28 11 May, at an asking price of £30.5m with CBRE as the appointed selling agent. At this time Irish Life also sought an extension of the loan. By supplementary Facility Letter dated 23rd July, 2012, PTSB agreed to a six month extension until the end of January 2013, subject to review if the property was not sold, at a fee of £300k. The Olympic Games in London in August meant little or no activity in the commercial property market in the city resulting in Austin Friars being temporarily taken off the market.

26. On August 12th after the sale of Princes Exchange earlier in the year at a loss of 85% for investors, solicitors representing Mr. Doohan wrote to Mr. Kevin O'Connor of Canada Life alleging that the Canada Life brochure, on which their clients had relied, 'seriously misrepresented' the position, in that 'no reference was made... to the risk that the borrowing was for a limited period of 7 years.' KBC bank had refused to extend the 7 year loan due to expire in January 2013 and neither Canada Life nor Mr. Doohan was able to obtain refinancing elsewhere.

This correspondence including the reply from the solicitors for Canada Life of 21st September, refuting the allegation of misrepresentation is relevant to the second issue fixed by Mr. Justice Kelly in this case.

27. On 21st September, Mr. Doohan met with Mr. Hassett requesting that Irish Life seek a write-off from PTSB of personal loans of 89 of Mr. Doohan's clients. This proposal amounted to a write off of circa €1.6 million. Following this Irish Life did seek a write-off from PTSB of 5% of the outstanding loan on Austin Friars which was the equivalent of €1.6 million, however PTSB would not engage with this proposal.

28. Apart from an informal indicative offer of £26.9m, which was withdrawn in September, no formal bids were received for the property. The Irish Life Retail Steering Committee Meeting of 11 11 October noted that there was *'no overseas interest and this was the only offer. Property decision now more challenging-would hold rather than sell if debt issue was not there'*. Irish Life through Mr. Johnny Horgan sought a two year extension in letter of 23rd October to Mr. Dermot Nutley of the Corporate Development Unit of PTSB. On 24th October, Irish Life's Geared Property Forum made an investment decision that the property would be held for a period of two years, and, on that basis to request an extension of the loan from PTSB at the Governance meeting on 26th October. It was accepted that this decision, stated to be *"part of the overall strategy"*, could not be implemented unless PTSB granted the loan extension.

29. PTSB refused this two year extension. In his letter of 7th November, Mr. Nutley pointed out that the existing six month extension was granted on the basis that the property would be sold and the loan repaid in January, 2013. The letter formally requested Irish Life to accept the "firm offer" of £27 million. In its response of 12th November, Irish Life said this "firm offer" was a verbal expression of interest at a level which might not result in a formal offer; as proved to be the case. Irish Life at this point again requested a two year extension which PTSB refused. Mr. Nutley requested, as a matter of urgency, an update of all viewings, offers and general interest to date from the selling agents CBRE. CBRE provided the details requested by email dated 11th December. Concerns about covenant strength featured in six of eight possible purchasers identified in CBRE's email.

#### **First formal offer for Austin Friars**

30. On 19th February, 2013, the defendants received a formal offer of £25.8m for Austin Friars. This offer was increased to £26m on 15th March. On 6th March, Irish Life received a separate bid of £27.2 from a Russian investor, Hdi London Property S.A. On 14th March, Hdi increased its offer to £27.45m and on the 19th Irish Life sought a further extension of the loan which PTSB again refused

31. In April, Irish Life sought a report from Deloitte on the offer of £27.475 million. The Deloitte report of 11th April concluded that with vacant possession the property would achieve £16.5 million whereas if there was a strong covenant it could achieve £35 million and recommended that sale was the prudent option.

32. In June, Irish Life received a request from Avanta Limited to move the guarantee from its parent company, Beadon Limited, to Avanta Managed Offices Limited (AMOL) which was being sold to Serviced Office Group PLC (SOG) who might be perceived as a stronger guarantor for the lease. Following receipt of this information, Irish Life requested a further short extension of the loan to consider whether the take-over of Avanta by SOG would improve the value of the asset. Again, this was refused by PTSB on 11th June, Mr. Nutley reminding Mr. Horgan that *'the Bank had extended the Austin Friars loan on two occasions totalling 10 months with the desire to achieve an asset disposal and loan repayment in full'*. A financial report on the tenant and guarantor from KPMG concluded that the covenant would be strengthened, and, although CBRE agreed with this view they advised that SOG had similar banking difficulties as Avanta and the market would not view the new arrangement as vastly different from before. CBRE were asked by Ms. Coyle at this stage to:

(1) investigate the possibility of negotiating an increase in the purchase price, and;

(2) approach lenders to see if finance would be available in the light of the likely strengthening of the covenant.

33. CBRE subsequently advised Irish Life that there was no finance available for the Austin Friars fund. Following this, CBRE negotiated an increase of £500,000 on the purchase price and recommended that the defendants sell at the increased price of £27.975m. On 2nd July, Ms. Coyle sent a letter of comfort to Mr. Proshin of Hdi accepting the offer, subject to Board approval.

#### **The decision to accept the Hdi offer**

34. Later, on 2nd July, the Geared Property Forum recommended sale of Austin Friars for £27.975m for the following reasons:-

- "The London property market is strong

- The property has been widely marketed and the offer represents the best offer currently achievable in the market.
- The funds matured in June 2012.
- The loan on the property has matured and the bank requires repayment of the loan facility.
- The sale at this level will generate a unit price of £0.25 i.e. c. 25% return of equity.
- While the covenant will strengthen due to the transaction between SOG and AMOL this increase is being reflected in the higher figure which is being offered by the purchaser.
- Policy holders and brokers have been informed that the sale is imminent.
- External advice has been received from CBRE and Deloitte on the property decision and from KPMG on the tenant risk."

35. At its meeting on 2nd July, the Board of Irish Life ratified the decision to sell Austin Friars for £27.975 million.

#### **The result of the sale**

36. PTSB had its loan repaid in full by Irish Life; Irish Life suffered no financial loss, and, on average, the investors lost 78% of their capital. Two weeks after the sale of Austin Friars Avanta was sold to Serviced Offices Group pic. The expert valuers engaged on behalf of the parties, Mr. John Bareham of DTZ, for the plaintiffs, and Mr. James Marland, of Savills, for the defendants, agree that the sale price achieved represented market value at July 2nd, 2013.

#### **The Issues**

37. On 10th March, 2014, Mr. Justice Kelly fixed the following Issues to be determined in the proceedings:-

*"1. Having regard to the words used in the Brochure, the Application Form, Terms and Conditions and the Customer Information Notice in their respective [actual matrices]:*

*(i) Did the defendants owe the plaintiffs a contractual duty and/or duty of care to have regard solely to the following criteria in deciding when to sell the Austin Friars property, namely:*

*the prevailing market conditions at any given time; and*

*the interests of investors generally and the plaintiffs in particular?*

*(ii) Did the defendants breach their contractual and/or tortious duties to the plaintiffs by financing the acquisition of the property using a .five year term loan facility (which did not give the defendants an express right to extend the said term), which was drawn down in or about June 2007?*

*(iii) Did the defendants breach their contractual and/or tortious duties to the plaintiffs by selling the property in or about July 2013?*

*(iv) If so, did the plaintiffs suffer the alleged or any loss as a result of any such breach of contract or breach of duty?*

*(v) If so, what is the measure of the plaintiffs' loss?*

*(vi) If the plaintiffs suffered a loss, is their loss recoverable at law?*

*2. Would the plaintiffs have invested in the Austin Friars fund if they knew that the acquisition of the property was financed by way of a .five year term loan facility (which did not give the defendants an express right to extend the said term), which had been drawn down in or about June 2007?"*

#### **The Documents**

38. The terms and conditions booklets for Geared Property Life Bond and Pension Plans state that the contract between Irish Life and the investor is made up of:-

- the schedule;
- the terms and conditions booklet;
- the application form;
- the fund rules; and
- any extra rules added by Irish Life staff.

The brochure is not a contractual document and is subject to a disclaimer. The defendants did not pursue any issue concerning the disclaimer during the trial or in their final submissions.

#### **Terms and Conditions Booklets**

39. In the definition section of the Geared Property Life Bond, "Fund Cease Date" is defined as:-

*"This is the date on which you have the option of withdrawing your full fund value or switching it into an alternative investment opportunity. The Austin Friars' life fund will not cease until the property in which it invests has been sold. This is expected to be five years after the start of the fund. However, depending on market conditions, the term of the fund may change."(Emphasis added)*

40. Under the heading "Unit Linking" and "Unit Pricing" at Section 2, the Terms and Conditions booklet states:-

*The value of a unit (known as the investment price) will rise or fall over time, depending on how the underlying assets perform. The Austin Friars' life fund is a geared fund. This means that the unit price also takes into account additional*

underlying assets, bought by money borrowed by the fund. Therefore the value of the units in this fund will also depend on how the return on the assets compares with the cost of the borrowing. All the money borrowed will be secured on assets bought by the fund. When the Austin Friars' life fund ceases, the value of the fund will be the amount received from the sale of the properties (less all sales costs e.g. legal and estate agent fees) less any outstanding balance on the loan of the fund. Your fund value at that time could be zero.'

41. (The Terms and Conditions booklets for the geared property pension funds- personal and company -state at section 4.2: 'Your accumulated fund at that time could be valued at zero').

'The Austin Friars' life fund will not cease until the property in which it invests has been sold. This is expected to be 5 years after the start of the fund. It is possible that market conditions may suggest changing the end date to an earlier or later time. In these circumstances, the term of the fund may be changed at the discretion of Irish Life. This fund invests in one specified property only and therefore is not well diversified. A single property may be difficult to sell'.

42. At section 7 under 'Cashing in your investment', the booklet states:

'It is expected that the fund will cease in 5 years time. However, it is possible that the term of the fund may be changed depending on market conditions. The Austin Friars Life Fund will not cease until the property in which it invests has been sold. This will be at the sole discretion of Irish Life'.

### **The Application Form**

43. In the Doohans' Application Form signed on the 28th August, 2007, the investor's declaration states:-

"I understand that the single' premium contribution will be invested into the Austin Friars' life fund initially and that the underlying investment is a geared property fund. I commit to the assets of this plan remaining in the Austin Friars' life fund until the property is sold. This is expected to be 5 years from the start of this plan. I understand I will not have access to the funds invested in the Austin Friars' life fund until the fund ceases. This does not apply if exit from the fund is as a result of death. I understand that the underlying investment is made up of one property only and as such cannot be considered a diversified or liquid portfolio. I confirm that I am at arms length from the property within the fund."

### **The Brochure**

44. The first reference to "*market conditions*" appears at Section 4 of the brochure entitled "Details of the Investment on page 9:-

"Irish Life has established a life fund for non-pension investors and a pension fund for pension investors (Including trustees) that offers the opportunity to invest in a prime commercial property located in Austin Friars. The property will be purchased using a combination of borrowings and investment and pension funding.

The borrowing will be on a non-recourse basis with approximately 68% borrowing for life and pension plans.

The objective is to hold property for five years. However, Irish Life will have the discretion to change the term to an earlier or later date, depending on market conditions at that date.(Emphasis added) This investment aims to benefit from rental growth over this term. If this anticipated rental growth does not materialise, the return on the fund will be adversely affected and the term may be changed.

The property purchased is funded by borrowings in addition to your payment, and this gives the fund the potential to benefit from enhanced returns. However if the total return from the property, after deducting charges and costs, is less than the cost of borrowing then the return on the fund will be adversely affected."

45. Underneath there is a warning:-

"Warning: The expected term on this investment is five years. As there are high acquisition costs associated with property transactions, there will need to be significant growth over this period to recoup these costs. Investors should consider this timeframe carefully in relation to their overall investment goal. The fund value could be less than the amount invested."

### **Financing**

"The fund has arranged the borrowings from permanent tsb on behalf of the Austin Friars property funds. These will be on a\* non-recourse basis with 70% on a fixed rate and 30% on a variable rate. The rate is set at a margin of 1.2% above the cost of funds. The rate is declared on the date the loan transaction is completed."

### **Potential Costs**

"The interest rate on 70% of the borrowings arranged by Irish Life is fixed for the term of the investment. The loan interest will be 1.2% above the cost of funds. Penalties may apply if the property is sold before the expected five year term. If the term is longer than five years, a different fixed rate may apply. This could be higher or lower than the current fixed rate."

46. Section 6 is entitled 'Exit Mechanism'. Under "Exit Proceeds" the Brochure states at page 16:-

"The return on this investment will be determined by the rental income received, the costs including loan interest incurred and the sale price achieved when the building is eventually sold. It is anticipated that the investors will exit this transaction at the end of the five year term when the building may be sold, subject to favourable market conditions. However, market conditions may mean having to change the expected term to an earlier or later date. Disposal of the property is the complete discretion of Irish Life. The proceeds from the sale of the building will be used to clear the remaining loan. The net proceeds remaining will determine the value of the units in the fund."

47. The Brochure outlines various Potential Risks at section 7:-

"1. Property Investment Risk

As with any property transaction, values are impacted by matters such as economic climate, fluctuation in property yields, tenant default and, of course, interest rate movements. There can be no guarantee that the policy holders will receive any money back on the realisation of the investment. Pension contributions that have been invested are also at risk given the fact that the investment is geared. Where any property is vacant for any period of time, it will impact on the cash flow generated.

The principal areas of risk for investors are as follows:

- Rents may not increase after rent reviews;
- The tenant defaults and the property remains vacant;
- The property market is cyclical and a loss could occur if the property has to be sold in a downturn."

48. The brochure explains other risks such as Fund Diversification Risk, Encashment Risk, Exchange Rate Risk, Liquidity Risk, Tax Risk as well as the following :-

#### **"Geared Property Risk:**

The borrowings obtained by the fund will increase the potential volatility of the return from the fund. Therefore the risks involved in this geared property are greater than those involved in more traditional unit linked property funds."

#### **Term Risk:**

"Property by its nature is usually a long term investment, as sufficient time is required to recoup high acquisition costs associated with property transactions. However, the expected term on this investment is 5 years. Investors should consider this timeframe carefully in relation to their overall investment goal. A shorter expected term increases the risk that the fund value could be less than the amount invested."

#### **Interest Rate Risk**

"Although the interest rate will be fixed on 70% of the borrowings for a 5 year period, there is a certain level of exposure to fluctuating interest rates on remaining borrowings. Interest rates may rise in the future and this would impact on the fund's returns."

#### **Disposal Risk**

"Disposal of the property is at the complete discretion of Irish Life and the expected term is 5 years. However market conditions may dictate that the property may be sold earlier or later than this date. If the property is not sold before 8 years, exit tax will be paid from the fund under any life assurances contracts, as outlined in the tax section." (Emphasis added)

#### **The Customer Information Notice**

49. Under the heading "How are the payments invested?" , the Notice states on page 8 as follows:-

'In addition to your payment, the fund will borrow money to invest in the properties. Whilst this borrowing feature gives the potential for enhanced returns it also increases the level of risk associated with your investment. The fund will benefit from enhanced returns when the return from the property exceeds the interest payments on the borrowing. However if the return from the properties is less than the cost of the borrowing then the return on the fund will be adversely affected. It is intended that the term of the Austin Friars' life fund will be 5 years. You should note that there will need to be significant growth to recoup the acquisition costs normally associated with property transactions over the short term. It is possible that market conditions may suggest changing the end date of the fund. In these circumstances, the term of the fund may be changed at the discretion of Irish Life.'

50. Pages 3 and 4 entitled - 'What are the projected benefits under the policy?' provide an illustration of projected benefits and charges on an investment of €100,000. Assuming a return of 5.8% (the maximum rate being 6%) the investment would have returned €112,582 at the end of the 5 year term.

#### **Submissions**

51. Although the plaintiffs in evidence at the trial said that they had relied on oral representations they allege were made to them by Irish Life personnel, such representations do not come within the issues fixed by the court to be tried in the action. Kelly J. fixed the issues *'having regard to the words used'* in the specified documents. In this regard the plaintiffs have not pleaded that they relied on any oral representations made by representatives of Irish Life. Nevertheless, two of these alleged representations concerning Irish Life's ability to extend the term of the investment beyond 5 years are referred to in the course of this judgment; Mr Holmes's response to a question from Mr. Hoey at the meeting of 22nd April. 2007, and Mr. Skelton's response to a question from Mr. Delaney relating to the Brochure during a telephone conversation. The first of these alleged representations is superseded by the issue of the brochure and the signing of the contractual documents. The Skelton representation is dealt with later in the judgment

For completeness, Mr. Horgan's email to Mr. Doohan of 14th October, 2010, is not relevant to the decision to invest as it post-dated the contract by three years.

#### **1 (i) Defendant's Contractual duty/duty of care**

52. The plaintiffs' case is essentially that they were encouraged to invest in the Austin Friars fund on foot of representations made in the brochure and other documentation (and statements made in the course of meetings) that the defendants had the discretion to extend the investment term beyond 5 years. Irish Life did not have such discretion; the sole discretion in that regard lay with PTSB. The plaintiffs submit that they relied on the representations made to them, and would not have invested but for the assertions that flexibility existed in respect of the date of disposal. The plaintiffs submit that the defendants were in breach of contract in that they did not enjoy any discretion to extend the term of the investment.

53. The defendants accept that they owed the plaintiffs a contractual duty, a duty of care and fiduciary duty in deciding when to sell the Austin Friars property and to have regard to the prevailing market conditions at any given time and the interests of the investors

generally and the plaintiffs in particular. The defendants submit that 'Market Conditions' included the availability of finance and the strength of the tenant. However, in addition they submit that they also had to have regard to the fact that the acquisition of the property had been financed by way of a loan, and their obligation to act in the best interests of the plaintiffs was in so far as the contractual scheme allowed.

## **(ii) Breach of duty- No right to extend loan term**

54. The plaintiffs submit that the defendants should not have structured the fund so that PTSB would make the decision as to when the property should be sold. The plaintiffs say that the loan structure was in breach of the defendants' representation to them that they had discretion to extend the term of the investment should the need arise. The plaintiffs argue that under the terms of the loan the defendants had no discretion to extend; and, the defendants' construction of "market conditions" in the documents is tainted with the benefit of hindsight.

55. The plaintiffs say that avoiding a forced sale was a '*straight forward matter*' for the defendants, that it would not have been '*terribly difficult*' for the defendants to negotiate a loan with an express right to extend the term and that the defendants were negligent in not doing so. In the circumstances the plaintiffs submit that the contractual risk is carried by the defendants and the plaintiffs should not be at a loss.

56. The defendants deny that such loan facilities were available in the Irish market and to the extent that such loans were available elsewhere, the normal loan-to-value condition attaching to them could not have been met in the case of Austin Friars. The defendants say that they had reasonably expected that the loan could be refinanced at maturity. Such an expectation was accepted by the plaintiffs expert Mr. Porter as "reasonable" while the defendant's banking expert Mr. Fennelly stated that the availability of refinancing was the sole basis upon which the market operated at the relevant time. The defendants say the loan was fit for purpose and was in essence no different from any other comparable loan adduced in evidence. In the case of the two funds in which Mr. O'Driscoll's firm was involved, City Park 1 and City Park 3, the extension clause (i.e. definition of Repayment Date) in the loan facility letters was identical to that in Austin Friars.

## **(iii) Breach of duty- Sale of Property July 2013**

57. The Plaintiffs submit that the defendants would not have had to sell in July, 2013, if they had negotiated a loan with an appropriate term. The sale in 2013 was a breach consequential on the initial breach in the structuring of the investment by means of a loan limited in time without the discretion to extend.

The plaintiffs further allege that Irish Life's decision to sell was not based on the reason given, i.e. that the timing of the sale was right, rather the decision to sell was forced upon them as their lenders PTSB, now under the control of the Minister for Finance, refused to extend the period of the loan and Irish Life were unable to obtain refinancing elsewhere

58. The defendants submit that they did not breach their duties by selling in July, 2013. They say that the property was sold following an open marketing process for its full market value in light of prevailing market conditions and based on independent expert advice. Furthermore, as against the investors and the plaintiffs, the defendants enjoyed a complete discretion as to when the property should be sold and provided the defendants acted bona fide in the decision to sell they cannot be liable for any breach of duty. The exercise by the defendants of their discretion must be assessed on the irrationality test per the decision in *The State (Keegan) v. The Stardust Victims Compensation Tribunal* [1986] I.R. 642. Can the plaintiffs show that there was no evidence on which the defendants could base a decision to sell Austin Friars in July, 2013? From the evidence adduced before the court it is clear that the defendants acted in good faith, on the basis of independent advice having regard to the strength of the tenant and the availability of refinancing. They attempted to keep their options open, there was ample evidence supporting the decision to sell.

## **(iv) Did the plaintiffs suffer loss caused by breach of contract or breach of duty?**

59. The plaintiffs say that the defendants put themselves in a position of having two conflicting contracts with regards the Austin Friars fund. One contract with the investors and the other with the lender. Consequently, the defendants bore the risk of being unable to meet their commitment due to their inability to extend the loan. The plaintiffs' loss arises from the sale in 2013. They say that the property could have been held until 2014 at which point the plaintiffs would have recovered or substantially recovered their investments.

60. The Defendants say the plaintiffs suffered no loss from a culpable act or omission on the part of the defendants. If the plaintiffs have suffered a loss in the financing or selling of the property, there is no evidential basis upon which the court could quantify the loss.

## **(v) Measure of the Plaintiffs Loss**

61. The plaintiffs say that their loss can be measured on two alternate bases:-

(a) A full refund on the basis that the plaintiffs would not have invested if they had known the defendants did not have discretion to extend (the "no transaction" measure).

(b) The contractual measure which would put the plaintiffs in the position as if the contract had been performed. The determination of quantum cannot be decided until the appropriate selling date and likely sale price are ascertained.

62. The defendants say that the plaintiffs have not discharged the onus of proof in that they have not established any legal or evidential basis upon which the court could determine the measure of the plaintiff's loss, if any. They submit:

1. The evidence shows that they would have invested if they had known the defendants had no discretion and;
2. There is no evidential basis for fixing November 2014 as the appropriate date for disposal of the property.

## **(vi) If the Plaintiffs suffered a loss, is it recoverable at law?**

63. The defendants admit that if the plaintiff suffered loss due to the defendant's breach of duty, such loss is recoverable at law.

## **2. Would plaintiffs have invested if they knew the loan term was limited to 5 years?**

64. The plaintiffs say they would not have invested if they had known that the five year loan did not carry an express right to extend. They say their position is supported by the evidence of defence witness, Mr. Kevin O'Connor, formerly of Canada Life, in which role he had dealings with Mr. Doohan in a single geared property fund in Leeds known as Princes Exchange. They submit that Mr. O'Connor was the defence witness with the most experience in geared property funds, and that he agreed in his evidence to the court that he wouldn't have been able to sell such a product without an express right to extend the loan. The plaintiffs agree they



wouldn't have invested in Austin Friars if they had known that Irish Life did not hold an express right to extend the term of the loan on the property.

65. The defendants say that aside from the fact that no such loan with an express right to extend on the part of the borrower was available on the Irish Market, the evidence clearly shows that the plaintiffs would have invested if in fact the terms of the loan were known to them. They submit that the plaintiffs would not have considered the loan facility letter if it had been presented to them before making the investment. The plaintiffs invested because they had an appetite for risk and because of their assessment of the London property market. They submit that the plaintiffs' evidence that they would not have invested was based on hindsight.

## Discussion

66. From the foregoing, the principal matters affecting liability which fall for consideration are the following:-

(a) The nature of the contract and the meaning of the terms 'discretion' and 'market conditions' in the expression 'sole or discrete discretion' to alter the expected term of the fund to an earlier or later date depending on market conditions'.

(b) Whether the financing of the investment by means of a loan without an express right to extend was a breach of contract and/or breach of duty of care on the part of the defendants.

(c) Whether the sale in July, 2013, was a breach of the defendants' contractual and/or tortious and/or fiduciary duties to the plaintiff?

(d) Whether the plaintiffs would have made the investment if they knew there was no express right to extend the term of the loan?

## The Nature of the Contract- Discretion/Market Conditions

### The Construction of Contractual Terms

67. In McDermott, *Contract Law*, (Dublin, 2001) the author summarises the elements of the factual matrix approach at [9.45] as follows:

"The factual matrix approach is an objective one. The actual intentions of the parties are irrelevant and direct evidence of these intentions is inadmissible. Warning has been given that '[t]he commercial or business objective of a provision, objectively ascertained, may be highly relevant...[b]ut the court must not try to divine the purpose of the contract by speculating about the real intention of the parties. It may only be inferred from the language used by the parties, judged against the objective contextual background.' While the reasonable expectations of the parties to a contract are entitled to protection, 'they are not derived from extrinsic evidence as to subjective intention, but from the contract itself'."

68. The importance of the "factual matrix" was considered by Lord Wilberforce in *Prenn v. Simmonds* [1971] 1 W.L.R. 1381 wherein it was stated that:

"The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations... We must... inquire beyond the language and see what the circumstances were with reference to which the words were used, and the object appearing from those circumstances, which the person using them had in view."

69. In *Raffaelsen Zentralbank Osterreich AG v RBS* [2010] EWHC 1392, which dealt with alleged misrepresentations inducing the plaintiff bank to participate in a loan syndication, Clarke said at para 82:

"In the case of an express statement, the court has to consider what a reasonable person would have understood from the words used in the context in which they were used. The answer to that question may depend on the nature and content of the statement, the context in which it was made, the characteristics of the maker, of the person to whom it was made, and the relationship between them'.

70. The Court must therefore consider the relevant representations in light of the full circumstances of the case and not merely in a literal linguistic manner. As Finlay C.J. in *O'Neill v Beaumont Hospital Board* [1990] I.L.R.M., 419 stated:

"The terms of this sub-clause must be construed in the light of the terms of the entire contract in which it is contained and in the light of the purpose for which the contract was entered into between the parties concerned."

71. The subject matter of the contract is an investment in a geared property fund in a single property provided (promoted and managed) by an insurance company with loan finance from a bank and equity from investors. Within that framework, the fund provider is engaged in two separate contracts; a loan agreement with its bank and a financial services agreement with the investor. The lender and the investor have different interests, the lender to secure the payment of the interest during the term of the loan and the repayment of principal at its conclusion whereas the investor, having weighed up the risks before investing, seeks to obtain a return on his capital on the realisation of the fund which event is stated in the Austin Friars documents to be at the sole or complete discretion of Irish Life. These contracts are linked in the sense that they provide the legal structure of a single financial product though they create separate and discrete legal rights and obligations. In simple terms, the Irish Life/PTSB contract relates to a loan secured on a property, while the Irish Life/Investor contract relates to an investment in a fund, measured in units of value, for an expected term of 5 years. The lender has ultimate control over the secured property and can protect his security by imposing performance conditions on the borrower, for example, requiring compliance with periodic LTV ratios. The investors have an interest in expectancy in respect of 32% of the underlying asset value which is contingent on the realisation of a surplus after the loan and costs of sale have been discharged

72. On each occasion discretion to alter the investment term is mentioned in the documents it is linked with the expression "depending on market conditions". Nowhere in the Irish Life documents is it stated that Irish Life has the discretion to vary the term of the loan. The loan arrangements are part of a separate contract. The key elements of the statement are 'discretion' and 'market conditions'. The interpretation is a matter of construction for the court.

73. At this point it is opportune to mention that at the close of the case the plaintiffs disputed that the terms should be treated as linked having regard to the insertion of the adjective 'favourable' before market conditions under the heading 'Exit proceeds' in the brochure. This argument will be considered later.

74. The ordinary meaning of discretion is *'freedom or authority to act in accordance with one's judgment'*. *'Discretion'* defines the role of Irish Life in terminating the fund. Irish Life alone has the discretion to decide when the property will be sold. The words *'depending on market conditions'* are used to qualify the discretion of Irish Life to change the expected investment term of five years.

*'Market conditions'* is not defined in any of the documents specified by Kelly J., and requires the assistance of expert evidence in identifying the constituent elements; in the first instance whether, in general, the availability of finance is a market condition and if so the particular conditions in the Irish market for geared property funds at the relevant dates.

#### **Expert evidence**

75. The plaintiffs called Mr. Seamus Porter, principal of Aspire Wealth Management in relation to the Irish market, and Ms Ann Le Monniere, a French citizen living in London who, up to 2009, was managing director of Real Estate Private Equity of Lehman Brothers. Her role involved organising and managing property investments across Europe

The defendants called Mr O'Driscoll, general manager of FDC, a financial services company, Mr. Vincent Fennelly, a Fellow of Institute of Chartered Accountants, banking consultant, former executive of Bank of Ireland and member of its Credit Committee for 4 years up to his retirement in 2009, and Mr. Pat McArdle, an economist.

Mr. Bareham of DTZ and Mr Marland of Savills were called in relation to the Central London property market.

#### **Market Conditions include the availability of credit**

76. Ms. Ann Le Monniere agreed that on each occasion the phrase *'discretion to dispose earlier or later'* is mentioned in the documents it is linked to *'market conditions'* and that every witness to date accepted that *'market conditions'* includes the availability of credit. Ms. Le Monniere added that *'market conditions'* were not limited to the availability of credit

77. Mr Seamus Porter, the plaintiffs' expert witness on the Irish market, accepted that the availability of finance was a *'very significant'* market condition and *'the credit crunch had a profound effect on property'*.

Mr. Doohan, experienced in geared property funds, agreed that the availability and terms of finance were *'crucial'* in relation to the property market.

Both Mr. Hoey and Mr. Walsh, Director of Grand Liqueur Limited, an experienced property investor, agreed that property market conditions were affected by the availability and the terms of credit and that they were aware of this in 2007.

Mr. O'Driscoll said the availability of credit was a fundamental part of market conditions and market liquidity and availability of finance is an inherent market condition.

#### **Market Conditions Overview**

78. Mr. McArdle's unchallenged evidence can be summarised as follows. The global financial crisis, which was triggered by the sub-prime mortgage crisis in the US and had spread to Europe, hit Ireland in 2008. Derivatives linked to US mortgages, which had been purchased by EU banks, became worthless. The interbank market, where banks borrowed and lent wholesale funds, dried up. The initial problem in Ireland was excessive private debt for property related borrowing but that became public debt when the State first guaranteed private sector debt in September. This had only a temporary impact as the scale of bank losses grew and in 2010 the State was required to bail out banks systemic to the domestic economy.

Irish banks lost access to market funding. They had to turn to the ECB and its agent, the Central Bank, for emergency funding. When the quantum of this funding got too large the ECB sought repayment forcing the banks to sell off non-core and foreign assets and in some cases core domestic assets as well. Significant downsizing targets were set for Irish banks as part of the PCAR exercise in early 2011. PTSB had estimated non-core assets of €10.4 billion as of December 2010 but was required to de-leverage by €15.7 billion. While failing to meet its target, PTSB reduced its loan to value ratio from 248% to 141%.

#### **Property Market Conditions**

79. Mr. Fennelly said that there was an aggressive appetite for property borrowing during Ireland's property boom which was described in Klaus Regling, Max Watson, *'A Preliminary Report on the Sources of Ireland's Banking Crisis'* (Dublin, 2010) p. 33-34 as *"an uncritical enthusiasm for property acquisition that became something of a national blind spot."*

80. In his witness statement, under the heading *'The Changes in Availability of Finance for Property Transactions between 2007 and 2013'*, Mr Fennelly said at para. 6.9:

"The global economic downturn commencing in 2008 had profound impacts on asset values, wealth, and the availability of credit. Thus property values fell sharply in many countries but especially in Ireland and the UK. The fall in economic performance had a knock-on impact on available property yields as businesses experienced poor trading and in many cases failure. The fall in yields impacted directly on the valuation of investment property as one is a function of the other. Allied to this, the shortage of capital, as a result of losses in very many banks, led to capital being rationed therein. Thus, all previous *'market norms'* were revised on the side of prudence and scarce lending capacity was reserved for the best deals and at terms much less favourable to the customer than in pre-crash times".

81. Mr O'Driscoll said :

"Property was the investment vehicle of choice for investors at the time. Investors' risk appetite, which changes depending on market conditions and economic cycles, was at a high level during this period. There was free flowing liquidity from banks in relation to this type of investment at the time of promotion, with the different banks competing for these investments."

#### **Geared Property Funds**

82. Mr Fennelly said:

"These kind of products were sold by pretty much every bank operating in the market. There was huge demand for risk from customers in the market at the time, such that there were property funds based in Ireland, in the UK, in Europe, there were property funds denominated in Euro, denominated in foreign currencies, which added to the risk...The market was very liquid and had been for his entire career, such that refinancing was effectively always available at whatever

level, such that there was never an issue as to what the term was in essence."

83. At para. 6.4 of his witness statement he said:

"Non-recourse lending for syndicated property products had two clear advantages in terms of security from a bank's point of view:

(i) the capital value of the property appreciates over the term of the loan; and,

(ii) the rental funds service some or all of the ongoing interest and capital repayment obligations of the borrower."

84. At para. 6.5 he continued to state that:

"The standard *modus operandi* in the market at that time was that the facilities were expected to be renewed, repaid or refinanced by the end of the agreed term."

In his evidence he said - "There was no other way."

85. Ms Le Monierre when asked if the expectation going back to 2007 of being able to refinance in 2012 was a reasonable one, she said: '[i]t is not 100% unreasonable.' This answer was in the context of her belief that, rather than have refinancing after 5 years coinciding with property related events, a longer loan term of 7 years would have been better.

Later, the brokers' statement in their joint letter of 28/11 March, 2012, to Irish Life CEO, Mr Kevin Murphy, that: 'the unprecedented impact of the Credit Crunch has ensured that market conditions have changed' was put to Ms Le Monierre as evidence of their understanding of market conditions in the context Irish Life's discretion. She said:

"It is not synonymous with a loan maturity forcing you to repay the property, That is my position and I would like to maintain it, even on the basis of his evidence"

### **Central London Property Market Conditions**

86. In brief, the London property market suffered significant impacts from the global downturn. The property experts, Mr. Bareham and Mr. Marland agree that first sign of recovery was seen in the third quarter of 2012. The market stabilised in 2013 and began to improve in 2014.

In summary, the unanimous evidence of the experts shows that "market conditions" included the availability of finance and the state of the London property market. The evidence also shows that the factual matrix in which the Irish Life/Investors agreed their contracts in 2007, insofar as the availability of finance was concerned, the market in geared property funds in Ireland operated on the basis that refinancing would be available at the end of the expected term of the fund.

### **Favourable market conditions**

87. In his closing speech, counsel for the plaintiffs Mr. O'Neill, S.C., argued that the defendants were incorrect in their contention that discretion to sell was linked to market conditions. He cited the reference in the commentary under Exit Proceeds at page 16 in the brochure to the building being sold at the end of the 5 year term '*subject to favourable market conditions*' and asked how in the context of this statement can non availability of credit come into play as it is not a favourable market condition?

88. The commentary states at page 16:-

"The return on this investment will be determined by the rental income received, the costs including loan interest incurred and the sale price achieved when the building is eventually sold. It is anticipated that the investors will exit this transaction at the end of the five year term when the building may be sold, subject to favourable market conditions. However, market conditions may mean having to change the expected term to an earlier or later date. Disposal of the property is the complete discretion of Irish Life. The proceeds from the sale of the building will be used to clear the remaining loan. The net proceeds remaining will determine the value of the units in the fund."

The paragraph must be read a whole. In the first sentence 'favourable market conditions' refers to an anticipated favourable outcome at the end of the 5 year term. Clearly the non-availability of credit is irrelevant as a market condition if the property is sold while the initial loan is in place. In the second sentence, the adjective '*favourable*' cannot be implied as qualifying 'market conditions'; it clearly refers to different circumstances as signalled by the adverb 'however' which qualifies the first sentence. In the event of a change to a later exit date, involving an extension of the term, the non availability of credit would become a relevant market condition.

To suggest as Mr. Gordon did in his cross examination of Mr. O'Driscoll, that 'favourable' in these circumstances leaves the client with a reassurance that Irish Life can continue to hold as long as was necessary until such time as there are favourable market conditions for the disposal of the asset, would negate the various risks and warnings in the Brochure and make Austin Friars a risk free investment. Such a construction is incorrect. The exercise of discretion must be considered in the context of market conditions

### **Duty of Care- Implied Terms**

89. The plaintiffs submit, at para. 31 of their outline submissions, that the position in the UK and Ireland is that the regulatory framework for financial services and in particular, the Consumer Protection Code 2006 (CPC), should inform the court's view of the standard to be applied to regulated bodies. At paragraph 47 of their closing submissions the plaintiffs argue that the court should have regard to the CPC in construing the contract and whether '*market conditions*' is actually '*a highly coded warning*' to investors that the risk was '*an upside play which barely made sense due to the gearing.*' At para. 74, in the context of the plaintiffs' assertion that they would not have invested if they had known there was no discretion to extend the loan, they suggest that a further consideration would be what would have happened if Irish Life had complied with the CPC and stated the precise extent of the risk for investors.

90. The law in relation to the legal effect of the CPC has been clarified by Baker J. in *Ryan v Danske Bank* [2014] IEHC 236. This judgment has been cited with approval in a number of decisions of this court. Her analysis concluded that there were two streams of cases, the first involving the repossession of a family home to which the provisions of the CPC applied and a second stream where the duty of care at common law prevailed. The learned judge's view, at para. 22 was that:-

"Breach of a provision of a code does not in my view offer a borrower a substantive basis on which relief may be sought. It may sound in equity or in defence but it does not offer a justiciable cause of action to a plaintiff at common law."

## Conclusion

91. In the circumstances, I am of the view that the statement in the documents, that Irish Life had a sole or complete discretion to vary the termination date of the fund depending on market conditions, would have been understood by a reasonable person to mean that investors had no say or role in the decision to terminate the fund but that, subject to market conditions, Irish Life would exercise their discretion bona fide in the interests of investors, in so far as the contractual scheme underpinning the fund allowed, in deciding when to sell Austin Friars. The obligations of the defendants, in contract and tort, (and their fiduciary duty in so far as the sale was concerned) must be considered in the light of this interpretation. The fiduciary duty is coextensive with, but not greater than, their contractual duty and duty of care

92. Irish Life had a contractual duty to take reasonable care in structuring, managing and terminating the fund. The appropriate test is what would have been required of a reasonable fund provider in the circumstances.

1(ii) Did the defendants breach their contractual and /or tortious duty to the Plaintiffs by financing the acquisition of the property using a 5 year term loan facility without having an express right to extend which was drawn down in or about June 2007?:

## Plaintiffs'expert evidence

93. The plaintiffs' experts, Mr. Seamus Porter and Ms. Anne Le Monierre had no experience of geared property funds in Ireland. Ms. Le Monierre had been involved in diverse funds but had no experience of a single property fund. Mr. Porter had never been involved in a geared property fund. In his report, he made a number of criticisms of the Irish Life brochure alleging non-compliance with certain provisions of the Consumer Protection Code. In particular, he said that the brochure did not reflect the downside risks namely the gearing risk, high interest rates and the reduced term of this deal (five years), which the 'Clandillon Memo' advised Mr Kevin Murphy, was required to be '*clearly explained to customers*'. He accepted, in cross examination, that the relevant risks, together with the identified costs and charges, were set out in the brochure and in the illustration at pages 4 and 5 of the Customer Information Notice. Mr Porter accepted that the illustration, based on an assumed rate of interest of 6%, showed a modest return at the end of five years and demonstrated to potential investors the high risk nature of the investment. I am satisfied that Mr Porter's criticism of the brochure, for non-compliance with the CPC, is not borne out. As indicated earlier the common law position of reasonable care applies.

94. In her report, Ms. Le Monierre stated that '*the structuring of the debt facility by the Fund Manager was not adequate.*' She criticised the Austin Friars fund on two main grounds namely Irish Life should have obtained either:

I. a seven year loan term for the five year investment term; or,

II. a five year loan with a real option to extend at maturity.

Ms Le Monierre also claimed that the gearing was excessive at 67% saying that 'typical' ratios were below 50%.

95. Taking the last point first, Mr. Cush S.C. suggested that Ms. Le Monierre was wrong in relation to the 50% LTV point as, of the twelve geared property funds put to her, only one, Tour Esplanade, Paris (65%) had an LTV lower than 67%, all others ranging up to 85% including three involving Mr Doohan: Weinstrasse, Munich (75%), Jaguar, London (80%), and Princes Exchange, Leeds (75%). Ms. Le Monierre acknowledged the position, and said, in effect that she meant to say that the 50% LTV ratio typically applied to funds sold to retail investors as distinct from high net worth investors. She said:

"I did not mean to say it was not possible to invest in such products and would agree that for a limited number of investors, you had very high gearing available as well."

96. She also agreed she had not carried out research to ascertain the level of gearing for comparable products on the Irish market at the time.

In relation to her first criticism, Irish Life's failure to obtain a seven year loan for a five year investment term, the furthest she put it in evidence was that it would have been 'preferable' or 'judicious' to have a loan of a longer term than the investment term. That view was based on avoiding a loan maturity coinciding with the rent review and the loss of collateral protection i.e. return of rent deposit. Mr. Fennelly's view was that this coincidence was precisely the reason why, as a banker, he would not be offering a seven year loan. It was contrary to the well accepted norm in banking that the term of the facility offered should match the nature of the underlying asset. He could not understand the logic as to why a bank would commit to such a loan, the extra cost of which would negatively impact on net cash flows.

97. It was put to Ms Le Monnier that in the two brochures (Weinstrasse, Munich and Ashton-under-Lyne, Lancashire) in which the loan term was mentioned, it matched the investment term. She would not comment other than to say:-

"[H]ad it been possible to have more flexibility in the loan maturity - for instance borrowing on a seven year term which was initially being considered - it would have been better."

98. In relation to her second criticism, no evidence was adduced by the plaintiffs that a five year loan facility with an express right to extend the term was available in the Irish market in 2007. Mr. Doohan said in cross-examination that he only knew that now (2015) but was not so aware in 2007. Ms. Le Monnier had experience of such facilities in the European market:

"Most of the loans I have raised for my own investments would have had such an extension option with objective tests... [t]ypically financial tests, like an LTV calculation or interest cover calculation with a minimum or a maximum. Plus of course a condition such as there will be no event of default at the time of the extension request or that would be provoked by such an extension."

99. A condition that the LTV ratio be lower at maturity than at commencement, or at specified dates in between, would, in the case of the Austin Friars loan, mean lower than 68%. If such loan had been available, Mr. Fennelly's evidence was that the LTV condition would not have been met in any of the relevant years, i.e. 2010, 2011, 2012 and 2013. Mr. Cush S.C. put it to Ms. Le Monierre that such a loan would have made no difference in this case.

"Ms Le Monniere: It would have, if you would assume that you could have found a source of finance to bridge the difference.

Mr Cush: So that's refinancing of a type isn't it?

Ms Le Monniere: Or adding another injection of funds."

Her '*preference*' was a seven year straight-on risk with no discussion around whether or not they would need an extension.

100. Ms. Le Monierre could not find agreement with Mr. Fennelly at their meeting. In her report she anticipated Mr. Fennelly's view on the operation of the Irish market:

"According to internal statements, Irish Life had the expectation that the loan would be extended, but does not explain the rationale for such expectation. An expectation not grounded on valid and realistic reasons is similar to 'hope' and cannot constitute a strategy for a professional fund manager. Given that almost since inception of the investment the property values started to decrease and the general market conditions deteriorated until reaching 'crisis' status later on, it is hard to understand how Irish Life maintained that expectation."

101. At the conclusion of his direct evidence Mr. Fennelly was asked if there was anything unusual about the extension term in the PTSB facility letter. He said:

"No, what it did was it reflected the expectation of those involved. I mean, the bank wanted to do this, the bank expected to be able to do it. But, I mean, there was always the case- so let's assume that the crash hadn't happened. I mean other things could have happened so that there was always the possibility that this wouldn't work out. So I could never imagine that it would be other than at the discretion of the lender. But I mean those kind of statements were made as an expression of a desire to do business with the customer, which was valid."

### **Conclusion I(ii)**

102. No evidence was adduced by the plaintiffs that the defendants could have obtained a loan with an express right to extend the repayment date or a seven year loan with a five year investment term.

The plaintiffs did not challenge Mr. Fennelly's evidence on refinancing. His view is supported by:

(i) The fact that the PTSB loan facility in 2007 made provision for Irish Life to seek an extension of the loan term for three years, without specific LTV conditions (a provision replicated in the both City Park loan facilities), is evidence that refinancing was expected and contemplated by both borrower and lender at the time;

(ii) Mr Delaney's agreement in evidence it was "everybody's expectation in 2007 that you could extend loans and refinance".

(iii) Mr O'Connor explained, in direct evidence, the reason for the absence of any reference to the term of the loan in the Princes Exchange brochure of 2006 as follows:

"We would always in our brochure state that we had the option to sell earlier or to delay the sale, but that would have been obviously on the assumption that we could, if need be, re finance the property at that point in time. So there was always an assumption there that that could happen - there was a general assumption that if you wanted to continue it on, you would have to agree alternative re-financing or get that particular lender to roll-over the financing. But I don't recall it being it specifically stated in any of our brochures or any other brochures that I saw at the time'

(iv) Mr. Doohan obtained refinancing in 2008 for his Munich fund in which he knew the initial loan from Anglo Irish Bank was for a limited term of seven years;

(v) Ms. Coyle's evidence that in the Summer of 2010, she successfully extended three loans on London properties with LTVs in excess of

80%; and when the extensions were requested from the banks involved, Ulster Bank and PTSB, 'there was no question that they would not be forthcoming.'

(vi) Mr. Doohan's engagement of consultants in 2012 to investigate refinancing options for the Prince's Exchange loan (from which no proposal materialised), when KBC declined to refinance and Canada Life's own consultant failed to get an offer of refinancing from any of the nine institutions approached. This was in the context that he knew from the outset that the loan was limited to seven years and any extension depended on refinancing, a fact not apparent in the initiating letter from his solicitors to Canada Life.

103. The court is satisfied that Mr. Fennelly's description of the Irish market in 2007 is correct. He had never heard of a seven year loan for a five year investment term. A loan product giving a borrower the option to extend the repayment date was not available and the market operated on the basis that refinancing would be available. In the circumstances, the structuring of the fund by Irish Life did not depart from the standard expected of a reasonable fund provider.

### **I(iii) Did the defendants breach their contractual and/or tortious duty to the plaintiffs by selling the property in or about July 2013?**

104. The Defendants' duty is to take reasonable care and perform termination of the fund in a bona fide manner in the interests of investors subject to market conditions. Market conditions include not only the availability of finance but also property market conditions in Central London and in particular the strength of the tenant covenant; in this case, Avanta.

### **The London Property Market: The experts' perspective**

105. There was considerable agreement between the two experts on the London property market, Mr. Bareham and Mr. Marland. In general, rents fell between 2007 and 2012; however, the rent payable for Austin Friars (£2.28m) due to the stepped up provisions meant that there was over-renting of 14% as of June, 2012. The investment market picked up from the third quarter of 2012, consolidated in 2013 and yields started to drop in 2014.

106. In their joint statement of 10111 December, 2014, they agreed that the market perception of the covenant at that time (2012) would be a key factor in determining the appropriate value. They also agree that the sale price achieved in July 2013, £27.975, represented market value as at that time. Mr. Marland dismissed the suggestion that it was the sale of an asset by a distressed Irish bank, saying, that such assets would have been sold at market value and in a proper manner to achieve the best price. They agreed, in the course of the trial, that the market value of Austin Friars on } 51 November, 2014, was £34.48m (reduced from £35.225m).

107. They differed in their valuations of the property as of June, 2012. Mr. Bareham's was £26.75 whereas Mr. Marland's was £28.73 (i.e. greater than the price achieved 13 months later). Mr. Bareham based his value more on the underlying movement in the market while Mr. Marland put more emphasis on covenant strength. In his direct evidence, Mr. Bareham said that "*on balance*" he would have held the property rather than attempt to sell it in 2012:

"The unexpired lease residue at around ten years would have been attractive; however, the covenant status would be poorly received."

108. Asked about the impact on the market surrounding the uncertainty of the tenant's survival, Mr. Bareham said:

"Well I think on the face of it - I guess at the time there was quite strong demand for London offices, but the demand was primarily from overseas investors and for what would be considered trophy assets, so generally, shiny buildings let to very strong internationally recognised brands. Here we didn't really meet that criteria because we had a poor tenant covenant, we weren't shiny, it was leasehold. There were a whole load of factors which weren't favourable. In terms of the covenant, I think it meant that it was really difficult to know who might buy this because if you're going to buy it because you think the tenant is going to go bust as a recovery play, you've got no guarantee of when they might go bust in terms of repositioning the asset."

109. Mr. Marland said that any decision to sell was a question of balancing risk and reward. The prime risk with Austin Friars was that the tenant might fail; the financial cost of which he calculated at £7m. The reward was that the income might improve as occupier and investment markets were beginning to gain momentum. He said that there was no one overall view in the market to hold property because rewards might get a bit better. His view was the risk of the poor covenant strength was so large that the decision to sell was justifiable at any time.

110. As for 2013, Mr. Bareham said that, if it was him he would probably have '*stuck in*' in terms of selling because of the impending deal between SOG and Avanta and would have waited to see how the economic recovery '*played out*'. In cross examination, Mr. Bareham said that he did not express any view in his witness statement on the decision to sell in 2013 as he was not asked to do so. He accepted that no advice was given to Irish Life in 2012 or 2013 to hold the property but said that whether he agreed or disagreed with the advice was a different matter. Mr. Marland's 2013 view was also influenced by the fact that Avanta had suffered losses of £1m in 2011 and £140k in 2012, missed its refinancing deadlines of September 2012, and Dun and Bradstreet had given it its lowest rating on their scale, N4 (negative asset value/high risk of company failure). While acknowledging Mr. Bareham's view based on an improving market sentiment, Mr. Marland said rents for the Austin Friars type of property, i.e. not top of the range; leasehold; reducing covenant strength; risks getting higher, had not moved very far and, at the end of the day, it was a judgment call. He said that, in July, 2013, there was more to lose if events went badly than if events well.

111. At the end of his cross-examination, Mr. Bareham said he wouldn't say that he disagreed with Mr. Marland's view that '*there was a good case to sell in July 2013*'. Irish Life's view of the Tenant Covenant

112. From mid-2010, Avanta, the tenant of Austin Friars, was in financial difficulty. From June 2010, Mr. Martin O'Reilly was Executive Manager of Fund Management at Irish Life and was responsible for commercial and syndicated properties. He was Fund Manager for a number of UK diversified property funds dating back to 1993. He summarised the tenant's problems in the years 2010 and 201 1 on day 7:

"There were a number of issues with Avanta. The largest one related to their banking position. Their business model in terms of serviced offices - there were two thrusts to it. One, as in Austin Friars, was whereby they took a lease of a property for a long duration and then sublet that out on a short term basis to multiple tenants. So that was one facet. Also, they acquired a number of properties themselves, so they became the freehold owner of them. Those acquisitions happened prior to this date in stronger market conditions. I don't have the actual timing of those but from our analysis and discussions with Avanta, it was clear they borrowed quite aggressively to acquire those properties. That had put pressure on the business in terms of being able to meet those loan repayments on that business. So that was one aspect of the stress. The other is going back to the business model whereby they took leases. The market conditions in Central London prior to that time and during that time was very challenging and the rental levels that they were getting were relatively low and lower than they may have planned when they took those leases out in the first instance".

113. As previously stated the essence of Avanta's business model was to take leases over long term and subsequently sublet them on a short term basis in the expectation of getting premium rents. The problem was that the short term rents in 2010 were lower than the long te1m rents Avanta had to pay on their leases.

114. Irish Life anticipated the insolvency of Avanta and sought advice. Insolvency would have triggered a loan demand from PTSB under Clause 7 of the Facility Letter, although at that time Irish Life and PTSB were still connected companies. At that time, however, new tenants could expect two years rent free as an inducement. Various proposals were discussed with Avanta in January 2011, but were not acceptable to Irish Life as each involved loan default. In the end, Irish Life agreed to a rent deferral until January/February 2012. While the decision to sell was made in February, 2012, and Austin Friars was put on the market in May, the property remained unsold at the end of 2012. Of eight possible purchasers expressing interest, six were concerned about covenant strength. The first formal offer was received in February 2013, and in March the bidder emerged whose final offer was ultimately accepted in July. However, in June, the covenant outlook improved with the take over of Avanta (CBRE expressed doubts about the market's perception of the new guarantor SOG because of its recent financial difficulties). This prompted Irish Life to again seek a further loan extension and, when it was refused, to request CBRE to investigate the availability of refinancing in the light of the strengthening covenant. CBRE reported that no finance was available.

#### **Availability of Finance**

115. The evidence shows that the credit markets, and in particular the availability of credit for property investment, had undergone an unprecedented and unforeseen collapse in Ireland and elsewhere. The generally held assumption in 2007, that refinance would be available at the end of a geared property fund's investment term, no longer applied after the market crashed. That was brought home, in stark terms, in the case of Austin Friars when the lender, PTSB, a sister company of Irish Life, a fact that gave brokers such

as Mr. Delaney added grounds in 2007 for their expectation of refinancing, was taken into State ownership in mid-2011 and thereafter the Department of Finance dictated its lending policy. PTSB needed to call in expiring loans to repair its loan-to-deposit ratio (the worst of any of the systemic banks operating in Ireland). Initially, Irish Life saw the difficulties of PTSB as an opportunity to negotiate a reduction of some of its borrowings if it could obtain refinancing elsewhere. Covenant strength in Austin Friars was an issue for lenders approached by Irish Life's agent, Bircroft and the refinancing project proved unsuccessful. Irish Life made six requests to PTSB for an extension of the Austin Friars loan. Apart from a six month extension to January 2013, granted in July 2012 at a fee of £300,000, PTSB refused all requests. In fact Irish Life achieved an extension of almost 12 months.

### **Conclusion I(iii)**

116. The decision to sell was dictated by market conditions, the general unavailability of finance caused by an unforeseeable credit crunch resulting in the country's banking system and PTSB in particular, requiring the protection of the State. Against the background of a direction to reduce its own LTV ratio (258%), PTSB indicated to Irish Life in 2011 and formally in January, 2012, that it would not extend the loan, first, not beyond maturity and, finally, not beyond January, 2013. The factors underlying Irish Life's decision to sell Austin Friars were the decision of PTSB not to renew the loan beyond January 2013, in the first instance, property market considerations, an uncertain market for non-premium properties, poor covenant strength of the Austin Friars lease, the remaining period of the lease reducing below ten years, and unavailability of refinancing at any stage, even in June, 2013, when it was known that Avanta was being taken over by a potentially stronger guarantor for the lease covenants.

117. In the context of property market conditions, it is clear from the balanced evidence of the two experts, Mr. Bareham and Mr. Marland, and the advices received by the defendants, that there were significant objective grounds justifying disposal of Austin Friars in 2012 and 2013. Ultimately the decision was, as Mr. Marland stated, *'a judgment call'*.

The evidence shows that Irish Life, in the exercise of its contractual discretion to terminate before or after the expected five years, did all it reasonably could in the circumstances to get the best outcome for investors and the plaintiffs in particular. The defendants did not breach their duty to the plaintiffs in contract or tort or their fiduciary duty to act in the best interests of the plaintiffs in so far as the contractual scheme underpinning the geared property fund allowed.

## **2 Would the plaintiffs have invested if they had known the five year term had no express right to extend?**

### **Mr. Eoin Doohan: Cautious Investor**

118. The principal plaintiff Mr. Doohan, said in direct evidence:

- (a) he would not have invested or recommended /advised any of his clients to invest had he known the terms of the loan; and,
- (b) he understood Irish Life would extend the loan after five years if conditions were unfavourable.

Mr. Doohan's depiction as a cautious investor/adviser can be assessed by reference to his involvement in other geared funds around the time of Austin Friars.

As of spring 2007, when he was considering the Austin Friars investment, Mr. Doohan had been, or was then involved in, three single asset geared property funds: Thames Court in London; Prince's Exchange in Leeds; and, Weinstrasse in Munich.

### **Thames Court**

119. This fund was introduced by Jaguar Capital and Anglo Irish Assurance Company Ltd. in June, 2004, with an investment term of four years. It was realised early in 2006 at a significant profit. The term of the loan was not mentioned in the brochure. Mr. Doohan did not know the term of the loan nor enquire about it.

### **Princes Exchange**

120. This was a Canada Life fund launched in January 2006 at a 75% LTV with an investment term of seven years matched by a loan limited to seven years. The term of the loan is not mentioned in the brochure. As will appear below, the evidence shows that Mr. Doohan was aware of the term of the loan prior to the launch of the fund. In April 2007, the investment was showing a significant profit.

121. The Doohan Financial Planning (DFP) brochure for Weinstrasse Munich predicted an internal rate of return for Princes Exchange of 15%, equating to a return on capital of 191% after seven years. In his letter of 13th April, 2007, Mr Doohan told prospective investors:

"This is our third Geared Commercial Property Fund with our two previous funds already showing sparkling returns:

Thames Court- London- Nov '04 +96% Princes Exchange- Leeds- Feb '06 +37%"

122. Prince's Exchange was still very successful in April 2007; however, in 2012, the property was sold before the end of the expected term at a loss for investors of 80% when the lender, KBC, indicated it would not extend the loan and neither Canada Life nor Mr. Doohan himself could organise refinancing. Mr. Doohan instructed solicitors following the sale of Prince's Exchange.

123. In their letter of 12th August, 2012, Mr Doohan's solicitors claimed, as he does here, that the reason the property was put up for sale was that the bank, KBC, was unwilling to extend the seven year loan and the brochure seriously misrepresented the risk position in that it *'failed to make any reference to a lender or a term/to the risk that the borrowing was for a limited period of seven years.'* The brochure stated, at p. 7 under the heading 'Investment strategy':

"The current strategy is to hold the property for seven years. However the property may be sold earlier. If a viable sales opportunity cannot be identified after seven years, Canada Life retains the right to delay the sale of the property."

124. Canada Life's response, of 21st September, pointed out that that their records showed that the lending arrangements were discussed with Mr. Doohan and his colleague Mr. Widger at a meeting in the Kilashee Hotel Naas on 5th October, 2005, prior to the launch of the fund, that he was aware of the term of the loan and that it was intended to borrow 75-80% of the purchase price from KBC for a term of seven years. The letter stated, at para. 8:

"The brochure complied in full with all legal and regulatory requirements. Our clients' records confirm that your clients were aware of our client's pre purchase finance tender, KBC Bank's involvement and the loan term prior to promoting the investment as independent financial advisors and raising equity."

125. Para. 7 stated:

"You will appreciate that any losses are as a result of unforeseeable market forces or acts of independent third parties which may include the acts or omissions of independent financial advisors for which our client is not responsible. Yes, the KBC Bank loan was due to expire on 15th January 2013. Despite reasonable efforts on the part of our client, KBC Bank refused to extend the loan for any period after that date. We must presume that KBC Bank made its decision in the context of underlying market conditions. Consequently, our client conducted a professional re-financing tender exercise. None of the nine banks contacted were willing to offer finance on any terms'.

No subsequent correspondence was adduced in evidence.

126. As regards Princes Exchange, Mr. Doohan knew that he was letting himself into a geared property fund contractual scheme where the loan was for a limited period and any extension depended on the availability of refinancing. Weinstrasse, Munich

127. Mr. Doohan organised this geared property fund himself in April, 2007. This was for a fixed seven year investment term with finance by way of a seven year loan of €14.69m from Anglo Irish Bank.

He knew that the seven year term of the Munich fund matched the term of the loan. In his own words, although he claimed he would not, he *'tied himself into a fund where there was a specific redemption date on it'*.

128. The Munich fund was refinanced in 2008, through a German bank, Hypo, with assistance from AIB. It was suggested to him that the Munich situation in 2008 was exactly the same as happened with Austin Friars; namely, whether the term loan could be extended depended entirely upon whether or not the bank would give further credit or whether it could be refinanced elsewhere. Mr. Doohan said that he was not privy to the negotiations. When it was pointed out that he knew the term of the loan was seven years he said that he did not see any loan documentation. The DFP brochure under the heading "Financing Structure" states:

"A bank loan of €14.69 million is being provided by Anglo Irish Bank to part finance the acquisition. The loan is for seven years, and is being provided with recourse only to the property (i.e. non recourse to the investors)."

I do not accept Mr Doohan's evidence as regards his knowledge of the loan terms in these two funds.

129. It was put to him that he invested and persuaded his clients to invest with a brochure predicting a return of 191% with hardly a hint of caution. He said that his:

"definition of caution in relation to property was to do with the locations of the properties and the quality of those locations."

He also stated that *'the issue of risk and caution would have been discussed in our meetings with customers'* but agreed that it was not reduced to writing in the brochure.

130. Finally, he said that *'an awful lot of our customers would not have paid attention to the loan'*. In response to counsel's suggestion that nobody focussed on the loan, Mr. Doohan said that *'the focus was on the property and the growth potential for it'*.

#### **DFP Austin Friars Brochure**

131. Mr. Doohan's own Austin Friars brochure included a two page insert entitled *'London Commercial Property Market'* from a financial journalist, Mr. Jeremy Warner. Mr. Doohan agreed that the article was a *'relentlessly upbeat'* assessment of the London market. Asked whether it reflected his own view, he eventually said that, in general terms, he was *'positive towards the London property market'* and that agreed he communicated that message to his clients.

132. The DFP brochure made no mention of the loan term. Under the heading "Exit Strategy" the brochure stated:

"The Fund will be administered by Irish Life Investment Managers (ILIM). Doohan Financial Planning in consultation with ILIM will determine when the property is to be sold in order to maximise returns and benefits for investors...It is anticipated that the property will be held for an investment term of four-six years."

133. Under the heading "Property Risk" the brochure states:

"On realisation there is no guarantee that investors will receive the full value of their investment. ...When the property is put for sale it may be difficult to sell and investors should be aware of this".

134. In contrast, Mr Doohan said at para. 17 of his witness statement:

"[I]t was specifically stated that Irish Life would retain ownership of the property and would only dispose of it when market conditions were favourable for policyholders."

135. And again at para. 44:

"This was an investment that was intended to be short-term but the property was meant to be sold when the investors would get a good return and market conditions were right."

In cross-examination, Mr. Doohan rejected the suggestion that the explanation in his own brochure of the property risk reflected the correct position, namely, he knew that the property might have to be sold in a downturn as expressly set out in the Irish Life brochure.

#### **The Irish Life Brochure**

136. The references to risk are set out earlier in this judgment. The term of the PTSB loan is not mentioned in the brochure or in any of the contractual documents.

Mr. Doohan did not ask about it in any meetings or correspondence with Irish Life officials prior to investing.

The Austin Friars Geared Property Fund was a high risk investment on a single property "play" which depended on significant capital



growth over a short-term.

#### **Reaction to PTSB decision and decision to sell**

137. By email of 14th February, 2012, Graham Fox of Irish Life Brokerage informed Mr. Doohan of difficulties with the renewal of the PTSB loan. The advance copy of the Performance Report of 291 February sent to Mr. Doohan stated that the lender indicated that it was unlikely to be in a position to extend the loan. Following representations by the brokers, the final version stated that the loan matured in July, 2012, and would have to be repaid. The July Update said that the bank had indicated that the loan would not be extended.

138. The reaction of brokers, on being informed of PTSB's decision not to extend the loan and Irish Life's decision to sell, is a guide to the weight to be attached to their assertion that they understood from the brochure that Irish Life's discretion was unfettered and that if they had known otherwise they would not have invested. One would have expected an immediate reminder to Irish Life to the effect that this was a breach of an express representation in the brochure that Irish Life had complete discretion to hold the property, until market conditions were favourable.

139. In his letter of 1 th March, to Mr. Tony Lawless, General Manager Brokerage, Mr. Doohan's main complaint was the '*reputational damage*' from the decision by Mr. Martin O'Reilly that '*it was the right time to sell this property*', a decision which was made '*without any regard to the investors who supported the fund as presented by ILIM and without any consultation with the fund's promoters*'. He told Mr. Cush S.C. that he did not know why he did not mention Irish Life's sole discretion to extend the term at that time. Neither did he raise it at the meeting of 22<sup>nd</sup> March as appears from his account of that meeting in his witness statement at paras.33 and 34 or in his email to Mr. Hassett of the following day 23rd March. He said his sole focus was that it was the wrong time to sell and to try to overturn the decision.

140. At the beginning of his evidence, Mr. Doohan accepted that fund managers were entitled to make the decision as to when to sell. His complaint was that the decision was not taken in the interests of investors and not that it was in breach of a representation of an ability to hold as long as was necessary. It was three months before the case, now being made, was put to Irish Life at a meeting of brokers with CEO Mr. Kevin Murphy on 25th May.

141. I am satisfied that Mr. Doohan, having invested in two geared property funds in the knowledge that the underlying loans were limited to seven years with no express right to extend the term, would have invested in Austin Friars on the same basis.

#### **Mr. Frank O'Mahony**

142. Mr. O'Mahony is a broker in partnership with his brother in O'Mahony Insurances Limited. He had significant experience of the commercial property market. He said that Austin Friars was his first geared property fund and he was delighted to be asked to participate. He had twenty-seven years experience of dealing with Irish Life in the life assurance and pensions business. Mr. O'Mahony said- '*(Mr Doohan) (o)urselves, BHP and later PPS Delaney acted together in this investment, . Mr. Doohan was the brokers' spokesman due to his experience in geared investments. Between 2007 and 2010 it was through Mr. Doohan that the brokers directed any queries relating to the performance reports. He was at the meeting in April 2007 where Mr. Kyle made the presentation of the property fund on behalf of Irish Life to the brokers. He said that they were very excited and stated 'we could only dream about being involved in a property of that magnitude and that potential'. He recollected Mr. Hoey asking the question 'what if the market conditions are not in our favour after 5 years?' He stated the reply that they were given was 'we would have the wherewithal to extend the fund beyond that period, as they wouldn't like to be or want to be forced sellers'. He said that 'if he had known the true terms of the loan, he would not have had the same appetite towards the investment;' further, he said he 'would not have invested without a safety-net.'* He said he would have put it before his clients due to the trust he had in Irish Life for over twenty years.

143. In cross-examination, it was put to him that a representation that the property '*would be held until market conditions were favourable*' was never made either at a meeting or in the brochure and that investors were explicitly told in the brochure that the property might have to be sold in a downturn. Mr. O'Mahony acknowledged that the brochure stated that the property might have to be sold in a downturn. He said that the brochure also stated that Austin Friars '*may not be sold after five years and may be extended for a further period until favourable conditions are available.*'

144. He was referred at this point to para. 8 of his witness statement: "Counsel: October 2010 was the first time I think you were told the loan extension period was a three year period. And you say '[f]rom all our conversations with Irish Life and from the documents they produced for the fund, they had never mentioned a specific term of the extension...' and that's correct. But then you say: 'and had suggested that the extension was open ended.' I have to suggest to you that that's absolutely not the case.

Mr O'Mahony: If somebody doesn't put a closing date is it not normal to assume its open ended?"

145. Mr. O'Mahony maintained that they had been 'promised and told' that Irish Life could extend the loan term with PTSB. He reassured his clients saying- '*We have the lifeboats, we have Irish Life on our side.*' He said '*This is a simple case. Our clients put their trust in us. We put our trust in Irish Life. Irish Life broke that trust.*' He believed Irish Life breached his trust by selling the investment in July, 2013, and by misrepresenting that they had the ability to extend the loan term.

146. Mr. O'Mahony has not said he would not have invested in Austin Friars, he goes no further than saying he wouldn't have had the '*same appetite*' for it and would have put his clients into it. As an experienced property investor, familiar with the role of credit he could not have understood from the Brochure that a high risk investment for an intended term of 5 years was in fact '*open-ended*' and could be held beyond that period by the fund provider until market conditions were favourable for sale.

#### **Mr. John Hoey**

147. Mr Hoey was one of the brokers who attended the meeting with Irish Life in April, 2007. At the outset of his evidence he qualified para. 4 of his witness statement, which alleged that Irish Life representatives gave an assurance at the meeting in April 2007, stating:

"...that Irish Life could, if necessary, extend the loan and hold on to the building until the market recovered." (Emphasis added)

He said that the loan was not discussed and that he was really referring to the investment term. He described this as 'a slight mistake'.

148. In his evidence, he identified himself as the person who '*expressed concern*' at the risk of a fall in the market at the end of five years and Mr. Willie Holmes as the Irish Life official who gave the assurance. He used the Irish Life Brochure and the DFP brochure to

explain the investment to his clients. He said he believed there was flexibility to extend the five year term for two to three years. At para. 5 of his witness statement, he said that, at a meeting with the Walsh brothers of Grand Liquors on 5th September 2007, he told Mr. Brendan Walsh that *'based on the information he had received from Irish Life that they could hold the property as long as was needed for the market to recover.'*

149. In cross-examination, it was put to him that the statement to Mr. Walsh was a *'nonsense'* because it would make Austin Friars a risk-free investment and he had introduced the *'nuance'* of two to three years to make the proposition (*'as long as was needed to recover'*) more palatable. He said that all his customers were fully aware that the investment was high risk and what he meant by recovery was *'until market conditions were more favourable'*. It was put to him that, in his letter to Mr Walsh of 25th September summarising the Austin Friars investment and setting out the risks, including the worst case scenario where he could lose the entire of his investment and the fact that it was Irish Life who would decide when the property would be sold, there is no mention of their meeting or the assurance from Mr. Holmes of Irish Life. In response, he said that he referred to what the brochure says about flexibility and also their meeting with Irish Life.

150. He agreed that if Austin Friars had been sold within the anticipated investment of three to five years, as stated in his own brochure, the results would have been *'disastrous.'*

He disagreed with counsel's suggestion that the reason there was not much discussion about the loan at the meeting on 22nd March when he became *'officially'* aware that PTSB were not renewing the loan was because *'nobody was under the impression there was guaranteed flexibility.'* He referred to the email from Mr. Graham Fox in 2010 stating Irish Life had the ability to extend the loan for three years.

151. It was put to him that the reason nobody asked anything about the loan at the outset demonstrated that had the facility letter been put in front of him, he would have gone ahead with the investment. He disagreed saying it was an Irish Life product and they trusted them to have the best facilities available for his customers.

152. Mr. Hoey was involved in other geared property funds prior to Austin Friars, in Paris, Staines in London, and Princes Exchange in Leeds. PTSB granted loan extensions of two years for Paris and Staines. Mr. Hoey agreed that had the loan extensions not been granted the properties would have had to be sold.

153. I am satisfied Mr. Hoey understood and invested in geared property funds on the basis of the market's assumption that refinancing would be available, if necessary.

#### **Mr. Brendan Walsh**

154. Mr. Walsh is a Director of Grand Liquor Ltd and invested in the Austin Friars pension product through Mr. Hoey's company; BHP. He said that he was told by Mr. Hoey that Irish Life could hold the property if it was losing money; otherwise he would not have invested as it was too risky.

155. He agreed in cross-examination that the investment was high risk and the brochure stated that the property might have to be sold in a market downturn. It was put to him that, if so, he could not have been under the impression, appearing at para. 10 of his witness statement, that Irish Life would only sell when market conditions were right. He said that was his impression at the time. Mr Walsh was asked:

Q: So if in 2007, you had been told - 'We've got a five year loan from the bank, we can apply to extend it, that's the loan we have' - back in 2007 - that wouldn't have bothered you one wit?

A: It didn't really bother me one bit, no."

156. Mr. Philip Delaney, of PPP Delaney Life and Pensions, was not at the initial meeting on 22nd April, 2007. He was involved with Irish Life and PTSB, in a geared property fund in Daresbury between Liverpool and Manchester, in 2006. That fund was for a term of seven years. When contacted by Mr. Barry Skelton of Irish Life about the Austin Friars fund, he met with Mr. Skelton and Mr. Pat Brennan, an account manager in the brokerage division of Irish Life. Subsequently, on receiving clarification from Mr. Brennan on a number of points, which he could not remember, he travelled to London to look at the property and the surrounding area. It was in a good location, right beside the Bank of England. When he subsequently received the DFP and the Irish Life brochures, he said that he realised that the term was five years. He said that he phoned Mr. Skelton about this and stated that Mr. Skelton told him that if the climate was not right to sell after five years, Irish Life would extend the fund. He did not discuss loan arrangements with Mr. Skelton. The conversation was not about commission. He said that, as his clients' money was pension money, he would not have invested it and neither would he have invested himself, if he'd known the terms of the PTSB facility letter.

157. In cross-examination Mr. Delaney disagreed with Mr. Skelton's recollection that the thrust of the discussion was Mr. Delaney's query as to why the investment was guided at three to five years. He said that it was about the term. He received the assurances and he went away happy and that was why he rang Mr. Skelton in the first place.

158. He accepted that, contrary to what he said in para. 12 of his witness statement, Mr. Skelton was not at the brokers meeting with Irish Life on 29th February, 2012. He accepted that, when told at the meeting about PTSB's position on the loan and Irish Life's view that it was the right time to sell, he had taken issue with the decision to sell, but that he did not raise the assurance, given by Mr. Skelton, that Irish Life could extend the loan. Pressed that an assurance at the beginning that Irish Life could extend the loan *'no matter what'* would have been *'dramatic news'*, Mr Delaney said:

"I felt obviously because it was with PTSB...I know that circumstances had changed but in 2007 they were sister companies and the loan was coming from PTSB and the connections that were there. I knew Denis Casey and that Irish Life would have the availability to extend the loan."

159. He agreed it was a high risk investment because of the gearing and that he told his clients that they might lose all of their investment and that Irish Life had the discretion as to when to sell but he said that he had received assurances from Irish Life that, if the time wasn't right, or the circumstances correct, they wouldn't sell the property. He disagreed that such an assurance would be inconsistent with a high risk investment. He said that the high risk was because of the gearing. He said he wasn't going to expose his clients to a short term investment. When put to him that he agreed earlier that, back in 2007, it was everybody's expectation that you could extend loans and refinance, he said that he trusted Irish Life- *'it wasn't just everybody. I mean you're talking about the leading life and pensions company in the country'*. He had the previous experience of the Daresbury seven year fund with Irish Life and that was why he was looking for a seven year term.

160. Mr. Skelton recalls discussing the expected term of the fund being between three and five years with Mr. Delaney but he said that the call was in the context of brokers fees and that he had no recollection of giving any assurance to Mr. Delaney that Irish Life could automatically extend the fund after five years. He was not cross examined on the matter. This, together with the omission to refer to Mr. Skelton's alleged assurance at the meeting of 29<sup>th</sup> February, 2012, are significant pointers to the weight to be attached to Mr. Delaney's evidence on the question as to what was discussed in their conversation.

161. I am satisfied, on the balance of probabilities, that Mr. Skelton did not give the assurance in this phone call as alleged. I am also satisfied Mr. Delaney invested in the knowledge and belief that refinance was available on the maturity of the fund. Mr. Delaney said he was independent of Mr. Doohan but '*stayed in touch.*' The evidence was that he used the DFP brochure for Austin Friars.

162. Mr. Hubert O'Donoghue, a client of Mr. Delany, invested €50,000 in Austin Friars in August, 2007. He said that he did not read the brochure but that Mr. Delaney told him that Irish Life had the option to '*roll-over*' the investment and the loan after five years. He said that he probably would not have invested if he knew there was no flexibility.

163. In cross-examination, Mr. O'Donoghue said that he received his information from his broker, Mr. Delaney, and that he had not referred to the brochure until he had the discussion with Mr. Delaney. He admitted, when pressed, that he was not aware of any entitlement to roll-over the loan; it was the investment. He was referred to the various warnings in the Irish Life brochure. He said that the initial DFP brochure, which told him that the sale of Austin Friars was at the discretion of Irish Life in consultation with DFP, indicated that there was flexibility. He said that he relied on Mr. Delaney's assurances and Irish Life's discretion in the brochure to extend the term beyond five years.

164. Mr. Porter agreed that in the light of there being no reference to the term of the loan in the brochure, if it was important to the client or to the broker they would ask for it. He also agreed that it would be a '*professional thing to do*' for brokers to carry out a number of 'what if' scenarios to convey to the client the impact of gearing on the investment capital and what could be the potential outcomes at the end of the stated investment term of 5 years should any of the different scenarios come to pass. He was not aware that any such testing was carried out in respect of the decision of individuals to invest in Austin Friars.

165. In their submissions, the plaintiffs rely on an answer in cross-examination by defence witness Mr. Kevin O'Connor, business manager of Self Directed Business with Canada Life, in support of the proposition that a geared property fund, containing a loan without an express right to extend, would be unmarketable. Mr. O'Connor was a witness to fact in relation to Canada Life's dealings with Mr. Doohan in the Princes Exchange geared property fund.

166. At the beginning of his cross-examination, when asked about the meaning of "right" in the brochure, he repeated his position. When asked about the legal meaning of a right, he said he wasn't a legal person. When then asked about the meaning of right as a 'matter of plain English', he disagreed that a right to delay meant an entitlement to retain the asset or that it could be held for as long as was needed. Ultimately, Mr. O'Connor agreed that it was an essential part of the promotion of geared property investments that the investor could be assured that the promoter would hold beyond the period if needed.

167. Two points arise from this. The first is that Mr. O'Connor's answer is incorrect as a matter of fact. He was clearly able to sell such a product to a leading broker, and his clients, namely, Mr. Doohan, who, according to the legal correspondence, had full knowledge of the lending arrangements, the terms of the pre finance tender and the term of the loan months before investing. The loan was for a limited period of seven years without an option to extend.

Secondly, Mr. O'Connor's answer must be seen in the context of his evidence as a whole.

168. The cross-examination of Mr. O'Connor focussed upon a statement in the Princes Exchange brochure headed 'Investment Strategy' in the following terms: "The current strategy is to hold the property for seven years. However, the property may be sold earlier. If a viable sales opportunity cannot be identified after seven years, Canada Life retains *the right* to delay the sale of the property." (Emphasis added)

169. In direct examination he was asked if the right referred to was '*an unqualified right in the sense that has been aired in this case ...*'. He replied in the following terms:

"We would always in our brochure state that we had the option to sell earlier or to delay the sale, but that would have been obviously on the assumption that we could, if need be, refinance the property at that point of time."

170. When asked why that was not stated in the brochure, he said:

"It's a general assumption that if you wanted to refinance or if you wanted to continue it on, we would have to agree alternative refinancing or get that particular lender to roll over the financing. But I don't recall it being specifically stated in any of our brochures or any other brochures that I saw at the time."

171. The cross examination of Mr. Michael O'Driscoll on day eleven is relevant in this regard. He was questioned by Mr. Gordon S.C. as follows:

"Q Isn't it the case that without that that discretion the brokers won't sell it and the investors won't buy it?

A: I don't agree. I think the investment term stated, either five or seven years, will dictate whether it's suitable to sell to the investor or not.

Q: Would you advise anybody to invest in a product which was for five years or seven years in circumstances where there was no discretion to extend it in the light of the prevailing circumstances at the time?

A: If it was stated there was absolutely no opportunity to extend it...it would warrant an additional risk to the client. But where the discretion was suggested and where it was understood that it was based on the liquidity of the market at the time of the decision to make the original investment then it was reasonable to assume that that one could continue ad infinitum.

Q: No broker would suggest to a client that they should put their money into a property when there was no control over

the outcome of it?

A: I think it's fair and reasonable that the investment experience at the time would have inferred a continuation of the positive growth of the commercial property market and the recency of the period before this investment was made confirmed returns which within a five to seven year time horizon would have delivered results for clients, had all things stayed the same, but they didn't.'

Q: 'Subject to favourable market conditions' under Exit Proceeds in the Austin Friars brochure is favourable in the best interests of the investor?

A: Well, it confirms that if the property can be held, it should be held. If it can't be held, it can't be held and has to be sold.

Q: Where does it say that?

A: It says "subject to market conditions." I mean market liquidity and the availability of finance is an inherent market condition

Q: "Favourable market conditions" leaves the client with the reassurance that Irish Life can continue to hold this as long as necessary until such time as there is a favourable market for the disposal of the investment?.

A : It confirms the authority of Irish Life to decide when the investment has, of their choosing, to be sold."

172. Mr. O'Driscoll was asked as to why he hadn't included the term of the loan in the section of his report entitled- '*What further queries could be reasonably made to Irish Life before advising a client to proceed with the investment?*'. He said that the investment term is given as 5 years and in his experience the loan terms matched the investment term, the loan term was not a significant issue for brokers and he hadn't queried such issues himself. Of the twelve brochures put to Ms Le Monnier he said two referred to the loan term. Mr. O'Driscoll's company, CFD was involved in two other funds, City Park 1 and 3, in Brighton. He didn't enquire about the loan terms or seek to see the facility letters in either.

### Conclusions- Question Two

1. The evidence shows that the plaintiffs understood that their investment was a geared property fund in which the bulk of the funding was provided by a loan secured on a single illiquid asset; that Austin Friars was high risk; and, that if the value of the property fell by 32% they could lose all of their investment.

2. Mr. Doohan knew, from his experience, that, in these funds, the investment term matched the term of the loan and that the market in geared property funds operated on the assumption of refinancing being available at maturity if required. Prior to Austin Friars, Mr. Doohan invested in three geared property funds. In Princes Exchange and Weinstrasse Munich, he knew there was no express right to extend the loan terms. He invested in Thames Court in 2004 without inquiring about the loan term.

3. The evidence shows that none of the plaintiffs inquired about the Austin Friars loan term in 2007.

4. Brokers and knowledgeable high net worth investors did not inquire about loan terms at that time because:

a. The loan term matched the investment term. No evidence was adduced of a geared property fund where the term of the loan and the investment differed, and, specifically, where the loan term was longer than the investment term;

b. The market in geared property funds in Ireland operated on the assumption, that, if necessary, the loan could be refinanced. Only two of geared property fund brochures considered in evidence mentioned the term of the loan; of these neither expressly stated there was no right to extend the loan. That was because:

1. the market for geared property funds operated on the assumption refinancing would be available, and;

11. there was no such loan giving the borrower an unconditional right to extend the loan term available on the Irish market.

Mr. Hoey and Mr. Delaney knew how the market operated. Mr. Hoey participated in previous geared property funds, two of which obtained loan extensions. Mr Delaney agreed that 'everybody's expectation in 2007 [was] that you could extend loans and refinance'.

c. The Irish property market was driven by an irrational appetite for risk in pursuit of capital gain fuelled by easy credit from banks fighting to win business and lend money. In so far as there was any caution, the focus of brokers and investors was on the location of the property. The plaintiffs knew from the brochure and other documents that the investment was high risk, required significant capital growth over a short period in order for investors to recover their investment, that the property might have to be sold in a downturn and that they could lose all their investment, the last risk highlighted in the case of pension contributions

It is therefore not credible that investors who agreed the investment was high risk, only invested because they understood the discretion of Irish Life was 'open-ended', or a 'life boat', and meant that the property could be held 'until conditions were favourable' or 'for as long as was necessary'.

5. The plaintiffs' case relies on a restricted literal meaning of '*discretion*' in the sense of an absolute right freed from association with the term '*depending on market conditions*' with which it is linked on all occasions in the contractual documents and brochure and therefore from the matrix of facts relevant to its interpretation.

The plaintiffs who gave evidence were experienced property investors. A loan giving the borrower an express right to extend the term would have been unique in any business persons experience. The documents did not state that Irish Life had such a loan facility. If the plaintiffs understood the documents to mean that Irish Life had such a facility then, as prudent investors, they should have clarified the position and obtained sight of the loan facility letter at the outset. It was not until after the decision to sell Austin Friars that the brokers, through Mr. Doohan, sought a copy of the loan facility and not until after he had checked out the details of the attempts by Irish Life to extend the loan and obtain refinancing did they complain about the lack of a real option to extend. The Court concludes from the plaintiffs' lack of concern about the loan that it was not important to them, they understood that no such loan existed and that any extension depended on refinancing.

173. The possibility that economic and thus market conditions would alter so radically was, as Mr. McArdle pointed out, not foreseen or foreseeable by anybody in 2007 at the time of the launch of the Austin Friars Geared Property Fund. That is the context in which the plaintiffs' case must be considered.

In the Court's view, the plaintiffs would have invested knowing there was no express right to extend the loan and must conclude their assertions to the contrary are based on hindsight.

**Result**

174. As the Court has decided the liability issues, I (i), I (ii), 1 (iii), and 2 in the defendants favour, it is not necessary to consider the issue of damages.

I would dismiss the plaintiffs' claim