THE COURT OF APPEAL

Neutral Citation Number: [206] IECA 346

Ryan P.
Peart J.
Hogan J.

Record No. 2015 404

BETWEEN/

JOHN SPENCER

PLAINTIFF/

APPELLANT

AND

IRISH BANK RESOLUTION CORPORATION LIMITED (IN SPECIAL LIQUIDATION)

FIRST NAMED DEFENDANT/

RESPONDENT

AND (BY ORDER)

STAPLEFORD FINANCE LIMITED

SECOND NAMED DEFENDANT/

RESPONDENT

JUDGMENT of Mr. Justice Gerard Hogan delivered the 23rd day of November 2016

Introduction

1. This is an appeal brought by the plaintiff and appellant, John Spencer ("the plaintiff"), against the decision of the High Court (Costello J.) where his claim for damages for negligent misstatement and misrepresentation in respect in respect of oral and written statements which he alleged were made to him by the first named defendant ("the Bank") was dismissed: see *Spencer v. Irish Bank Resolution Corporation* [2015] IEHC 395.

2. The background to these proceedings is complex, but it is admirably summarised by Costello J. in the comprehensive judgment which she delivered on 15th June 2015. In many instances in this judgment, I have adopted or adapted the helpful summary of the relevant facts and general narrative set out in the judgment of the trial judge. While I reach a different conclusion from Costello J. in respect of some key aspects of both her reasoning and the ultimate result, her summary of the facts and the issues and her presentation of the applicable legal questions has been of considerable assistance in the preparation of the judgment.

The background facts

3. The essence of the plaintiff's case is that his contention that as a result of certain representations made by the Bank he invested €1m. personally in a life assurance bond offered by Anglo Irish Assurance Company Limited ("AIAC") and he borrowed a further €1 m. from the Bank for the purpose of advancing that sum to a partnership, the Cashel Rock Partnership, so that the Partnership could purchase a life assurance bond from AIAC. In relation to the Partnership, the plaintiff initially claimed that he was an assignee of the interests of the Partnership and was entitled to sue in respect of the losses allegedly caused to the Partnership arising out of the investment in the bond. At the end of the case in the High Court it was accepted that the evidence did not establish an assignment of the Partnership interest and this claim was not maintained. Both of these bonds now have a nil value. It is, however, unnecessary for me now to examine the Castle Rock Partnership issue at all.

4. The plaintiff also advanced a distinct claim for negligent misrepresentation as against the Bank in connection with the representations which he alleges caused him to enter into a loan agreement with the Bank. The plaintiff also sought a declaration that discharges him from his obligations arising under the current loan agreement. He also sues for damages for breach of warranty, breach of duty and breach of fiduciary duty.

5. The second named defendant, Stapleford Finance Ltd. ("Stapleford") was joined by order of the High Court. It purchased the loan, the subject of the proceedings, from the Bank pursuant to s. 12(2) of the Irish Bank Resolution Corporation Act 2013. The second named defendant has counterclaimed seeking judgment against the plaintiff pursuant to the loan agreement. The plaintiff replies that he is entitled to set-off his claim in damages against the Bank in relation to the loan against the entire claim due and owing pursuant to the loan agreement. The plaintiff accepts that if his claim to a set-off fails that the second named defendant will then be entitled to judgment against him in respect of the loan.

6. The appellant did not appeal against certain aspects of the judgment of the High Court, a matter to which I will later refer as appropriate. Both the Bank and Stapleford lodged notices to vary in respect of the findings of misrepresentation made by the trial judge. I will also address this matter in due course.

The Whitgift Shopping Centre

7. The dispute itself concerns the purchase of certain property interests in Croydon, a southern suburb of London in 2005. In the 1960s the Whitgift Shopping Centre ("the Whitgift Centre") was constructed in central Croydon on lands owned by the Whitgift Foundation. It was refurbished in 1985 and 1998. By 2005 the Centre was a large retail/office centre. Part of the Centre comprised ageing offices and a car park which was leased to the British Home Office on a lease which was due to expire in December 2010.

8. The freehold title to the Centre vested in the Whitgift Foundation. The Whitgift Foundation was founded in 1596 and is comprised of two charities; it owns much of the freehold of central Croydon for, *inter alia*, educational trusts. There was a long reversionary lease held by the Royal London Mutual Insurance Society ("the Royal London") and a long sub-lease held by Whitgift Shopping Centre Partnership and property partners. In essence, therefore, the Whitgift Foundation and the Royal London each owned 25% of the interest in the Centre and the then managing company, the Whitgift Shopping Centre Partnership and property partners, owned the remaining 50%. This long leasehold interest was offered for sale in 2005 and is the subject of these proceedings.

9. Under the terms of the reversionary head lease, no development could be carried out without the consent of the Whitgift Foundation. In addition, even if the Foundation as landlord authorised developments to the Centre, the Whitgift Foundation and the Royal London would each have to agree to contribute to the costs of any proposed development on a *pro rata* basis. They were under no obligation to contribute to the costs of any development in excess of 5% of the rental income of the Centre.

The purchase of the long leasehold interest in the Whitgift Centre
10. Howard Holdings plc ("Howard Holdings") was an Irish and UK based property development, advisory and management company. It had over 50 staff and was itself based in Croydon. It had significant experience in the Irish, UK, European and South African property markets and at that time had approximately stg£1.5 billion of property under development. The Bank had established a successful working relationship with Howard Holdings during the development and management of two successful property developments in Cork.

11. On 29th March 2005, Howard Holdings made a presentation to the Bank in relation to the Whitgift Centre. The presentation provided a description of the "[s]ignificant opportunities for asset enhancement". The Bank was interested in joining with Howard Holdings in forming a joint venture to purchase and develop the asset.

12. The structure of the proposed purchase and investment was complex. The leasehold interest was to be acquired by AIAC, a subsidiary of the Bank, and was to be vested in a Jersey unit property trust ("the JUPT"). A fund known as the Whitgift Geared Property Fund was established by AIAC to acquire 77.3% of the units in the JUPT. The balance of the units were to be purchased by representatives of Howard Holdings ("the JV Partners"). The investors in the Whitgift Geared Property Fund would each purchase a life insurance bond from AIAC for the Fund. The value of each bond or policy was linked to the value of the underlying asset, being the long leasehold interest representing 50% of the interest in the Whitgift Centre.

13. The purchase price for the 50% stake in the Whitgift Centre was stg£225 million plus costs of stg£7 million. The source of funding was a debt facility of stg£166m. provided by the Bank and investor equity of stg£66 million. Of this equity, stg£15m. was to come from the JV Partners and stg£51m. was to be raised from the Bank's client base of high net worth individuals. Pending the raising of the equity, the Bank was to provide AIAC and Howard Holdings with bridging facilities in relation to stg£66m. which would be repaid upon receipt of investor equity.

14. The Bank was to be involved in this project in a number of ways. As provider of finance for the purchase of the leasehold interest it required approval from its Credit Committee for the proposed facility; as it was proposing to market and sell the Insurance Bonds in the Whitgift Geared Property Fund to its clients it required Product Committee approval for the investment product. These parallel approvals were pursued within the Bank between May 2005 and June 2005. While there were issues which were never resolved in evidence in relation to each of these approvals, the Bank proceeded on the basis that it had Credit Committee and Product Committee approval. This was never questioned by the Bank.

15. It was essential that a thorough due diligence investigation be carried out as part of the process of deciding whether or not AIAC should purchase the leasehold interest (and whether the Bank should provide finance and invite its clients to invest in the Whitgift Geared Property Fund). For this purpose the Bank instructed Davies Arnold Cooper solicitors to prepare a report dealing with the title and planning history of the Whitgift Centre. They furnished a report in July 2005. The Bank also instructed DTZ Debenham Tie Leung ("DTZ") to prepare a valuation report; this report was furnished on 22nd August 2005. In addition, the Bank had the benefit of a property report prepared by EC Harris LLP for the previous owners of the leasehold interest in the Whitgift Centre. The Bank instructed McCann Fitzgerald and Matheson Ormsby Prentice solicitors and KPMG Accountants to advise in respect of the legal and tax matters relevant to the proposed investment.

16. On 31st May 2005, Howard Holdings hosted an investment presentation in Croydon to a number of client relationship managers from the Bank during which they had the opportunity to visit the Whitgift Centre. On 20th June 2005, representatives of Howard Holdings and two representatives from the Bank met with representatives of the Whitgift Foundation in relation to the proposed acquisition of the 50% interest in the Whitgift Centre by Howard Holdings and AIAC. Another purpose of the 20th June 2005 was to assess the position of the Whitgift Foundation in relation to proposed developments of the Centre. As the meeting of the 20th June 2005 is of considerable importance to many of the issues arising in this appeal, the details of these meetings will be considered later in this judgment.

17. Once the Bank had completed the due diligence process to its satisfaction on 29th September 2005, AIAC entered into a contract to purchase the leasehold interest and the Bank advanced the finance (both bridging and long-term). The Bank and AIAC were now formally in a position to offer bonds in the Whitgift Geared Property Fund to their clients.

Planning in relation to the Whitgift Centre
18. The planning history in relation to the Whitgift Centre and an adjoining development was complex and still evolving throughout 2005. Prior to the acquisition of the Whitgift Centre by AIAC in 2005 the previous owners of the long leasehold interest had made two planning applications to develop the Centre. The first application, known as Bishops' Court 1, was refused on 4th April, 2003. A revised application in respect of the Whitgift Centre, known as Bishops' Court 2 was submitted. This also was refused but was appealed in 2005 to the Secretary of State. The appeal was rejected on 5th October 2005.

19. The owners also applied to develop the site of an existing car park between office blocks B and C on the Wellesley Road side of the Whitgift Centre to provide a new medium sized retail unit comprising of some 80,000 square feet. This application was referred to as the Phase IV development. It was on the site of the car park that was leased to the British Home Office together with various offices. That lease was due to expire in December 2010 so that the owners did not have an immediate right to vacant possession of this plot of land. (This is a detail which also assumes some considerable importance so far as the resolution of this appeal is concerned and to which I will later refer.) On 22nd December 2004, planning permission was granted in respect of the Phase IV development, but this could not immediately be acted upon without the cooperation of the Secretary of State and, specifically, without the surrender of the existing lease.

The plaintiff's investment in the Whitgift Geared Property Fund
20. The plaintiff is a solicitor who in 2005 had been in practice on his own account in Nenagh for some 20 years. He had developed a

substantial property portfolio of more than 15 properties both in Ireland and in England. He found managing a large number of individual properties was time consuming and wished to change to a less "hands on" form of property investment.

21. In the spring of 2005 he became aware of an opportunity to invest in a geared property fund offered by Quinlan Private in an asset in Knightsbridge in London ("the Knightsbridge Investment"). On 2nd and 3rd June 2005, the plaintiff wrote to Ms. Margot Deacy of the Private Client Division of the Bank asking for a loan to enable him to part-finance his proposed investment in the Knightsbridge Investment. On 16th June 2005, the Bank issued the plaintiff with the letter of offer to enable him to complete this investment. The Knightsbridge Investment was in sterling and the plaintiff wanted to fix the euro cost of the sterling he would require for the investment. The plaintiff agreed a rate and a purchase price for the relevant amount in sterling at that time.

22. Ms. Deacy was aware that the Whitgift Geared Property Fund would shortly be available to market to clients of the Bank. While she arranged for the loan to the plaintiff, she also urged that the plaintiff should consider the Whitgift option before finally committing himself to the Knightsbridge Investment.

23. On 22nd June 2005, Ms. Deacy met the plaintiff at his office in Nenagh and discussed a number of matters. They discussed an investment property owned by the plaintiff and three other partners in Nenagh; a property that they owned in Croydon (entirely unrelated to the Whitgift Centre); and the possibility of acquiring a new premises for another solicitor's practice in either Killaloe/Ballina. There was, in addition, a general discussion in relation to his pension provision. He indicated that he was interested in gearing up his pension with a view to purchasing a property. He was interested in family partnership and he requested a follow-up meeting on estate planning. At that meeting Ms. Deacy offered the plaintiff the opportunity to invest in the Whitgift Geared Property Fund.

24. Following the meeting of 22nd June, 2005, Ms. Deacy sent the plaintiff a loose-leaf brochure ("the first loose leaf brochure") in relation to the Whitgift Centre, together with a compliments slip. This was received by the plaintiff on 23rd June 2005. In summary, this brochure identified five asset management opportunities which had a total potential rent increases of stg£2.5m.. It identified five possible development opportunities offering a total potential development profit of stg£30m.. The return on equity was:-

> "projected at 150% over 10 years on conservative rent assumptions and NO development profits assumed. Based on Howard's Master Plan for the centre, our client ROEs could be as high as 250% (development profits included)."

25. The plaintiff was interested in involving a friend who resided in Australia in a property investment. On 27th June 2005, he faxed a friend, Ms. Catharine Scott, a handwritten note urging her to invest with him in the Whitgift Geared Property Fund together with a copy of the first loose-leaf brochure. (Although Ms. Scott has been based in Australia since 1979, she is originally from Ireland). While the issues in relation to Ms. Scott's involvement in the project featured in the judgment of Costello J., no issue was taken before this Court in relation to those issues and I accordingly propose to leave those issues to one side.

26. The next day the plaintiff emailed Ms. Deacy in relation to his pension mortgage in the following terms:-

> "Dear Margot,
>
> …The [pension] fund is due to receive €175,000 per annum for at least the next 7 - 8 years and I am aiming for a growth rate in it of 12% - 15% year on year...
>
> If it is possible to proceed on this basis I am interested in relying on the Anglo investment in Woodgift (sic), Croydon as recently discussed."

27. In late June 2005 the plaintiff was now considering both the Knightsbridge Investment and the Whitgift Investment as alternative opportunities. He continued to write to Quinlan Private in relation to the Knightsbridge Investment up to 30th June, 2005.

Decision to invest

28. On 15th July 2005, the plaintiff sent an email to the Bank confirming that he would not be proceeding with the Knightsbridge Investment and cancelling the pre-ordered sterling. He stated:-

> "Instead I propose to enter an investment vehicle formulated by Anglo Irish Bank which is due to come on stream in terms of its offer to the public in about 3 weeks."

29. Ms. Deacy sent him a second compliments slip which is stamp dated 15th July, 2005. There was considerable controversy as to what was enclosed with the compliments slip, but Costello J. ultimately found that it was the second version of the loose-leaf brochure which had been enclosed by Ms. Deasy.

30. The plaintiff's case is that as a result of receiving the second version of the loose-leaf brochure on 15th July 2005, and he decided to invest in the Whitgift Investment. He therefore abandoned the Knightsbridge Investment and he wrote on 15th July 2005 to cancel the pre ordered sterling he had required for that investment.

31. Having decided to invest in the Whitgift Geared Property Fund the plaintiff took the necessary steps to enable him to invest in the Fund. The plaintiff proceeded to realise a number of his assets in order that he could fund his own investment.

32. The plaintiff had two meetings with representatives from the Bank during September 2005. On 9th September 2005, he met with Ms. Deacy and Mr. Tynan and on 29th September 2005, he met Ms. Deacy. Mr. Tynan was involved in order to deal with the complications imposed by the involvement of Ms. Scott in the investment. Ms. Deacy stated that the plaintiff "really liked both the asset management and the development play associated with the Whitgift Fund".

33. By letter dated 5th October 2005, the plaintiff confirmed that he would be investing €1m. in the Whitgift Geared Property Fund in his own name and the Cashel Rock partnership would also invest €1m. For the reasons which I have already mentioned, it is now unnecessary to consider the position in relation the Cashel Rock partnership any further.

34. On some date between the 12th and the 19th October 2005, the plaintiff met representatives of the Bank, a Mr. David Hayes and Ms. Deacy, at the Radisson Blu Hotel in Galway. Mr. Hayes made a presentation to the plaintiff in respect of the proposed investment in the Fund. Mr. Hayes certainly had a brochure at the meeting. One of the contested issues was whether or not Mr. Hayes was in possession of the second loose-leaf brochure or whether it was the formal funds brochure colloquially referred to as "the Black Book". In a letter dated 19th October 2005, the plaintiff expressly acknowledged that he had an opportunity to read "the investment

information". In her judgment Costello J. found that that this was a reference to the Black Book as opposed to the second loose-leaf brochure. This is an issue of fact to which I will later return in this judgment.

35. On 19th October 2005, the plaintiff completed a number of documents in the presence of the Bank's officials. The first was a personal financial review with Ms. Deacy. The plaintiff indicated that he was prepared to invest 100% of his wealth in a high risk investment. Ms. Deacy recommended investment in the Whitgift Geared Fund and the plaintiff acknowledged that the recommendation was based upon the information he had disclosed and that he agreed with the recommendation. This document was signed by Ms. Deacy as sales intermediary and by the plaintiff on 19th October 2005.

36. Also on 19th October, 2005, the plaintiff and Ms. Deacy signed a letter of that date from the Bank to the plaintiff dealing with his investment objectives referred to as the 'Reasons Why' letter. The letter refers to a meeting had over the past few weeks and under the heading "Investment Objectives" stated as follows:-

> "You indicated that you had several investment objectives. I have outlined these below:
>
> • Diversification -you wish to develop and expand the types of investments you hold - in your case you would like to have exposure to the UK and other property markets as you have sufficient property holdings in Ireland.
>
> • Growth - you wish to get an improved return on your assets by investing in geared property investment options. You are aware that leveraged investments have additional risks; however [they] also have additional potential investment returns.
>
> • Security - you wish to invest in a well-managed investment however Capital Guarantees are not required and you could get less back than you invested.
>
> • Income - we have advised you that this investment does not provide a regular income and you have sufficient resources to cover your income requirements for the next 7-10 years".

37. The letter recorded the following information that had been provided in relation to his investment experience background and financial standing:-

> "• You are aware of property investments and have significant exposure to property investments in your own right
>
> • You have experience of geared property investments and you are aware of the additional risk due to the borrowing
>
> • You have invested in other types of investments including unitised funds, pensions, shares and life investments.
>
> • Your current financial standing allows you to invest in the proposed investment for the term and you are aware of the potential risks to both capital and returns.
>
> • You have had an opportunity to read the investment information and you are satisfied that it meets your investment requirements." (emphasis added)

38. The letter specifically recorded that in deciding how to invest his money and with a view to potentially higher returns he was prepared to take significant risk with capital. The letter stated that the Whitgift Geared Property Syndicate was a high-risk investment. The letter defined high-risk as where the capital was not guaranteed and could be subject to a high degree of volatility. It was acknowledged that he had an appetite for high-risk. The letter stated:-

> "• Recommendation
>
> • Based on the information discussed at our meeting and set out above, I recommend the following investment option as suitable to your circumstances:
>
> The Whitgift Geared Property Syndicate. The amount to be invested will be €1,000,000 in the name of John Spencer."

39. The plaintiff signed the letter and his signature was witnessed by Ms. Deacy.

40. By letter of loan offer dated 13th October 2005, the Bank offered to advance the plaintiff the sum of €1m. to part fund his investment in the AIAC Whitgift Geared Property Fund. Security for the loan was to be the assignment of his interest in the Fund. At the meeting with Ms. Deacy on 19th October 2005, the plaintiff accepted the letter of offer. He expressly waived his right to a 10 day period to consider the commitment to the agreement and he also waived any right which he may have to withdraw from the agreement under s. 30 or s. 50 of the Consumer Credit Act 1995. He confirmed by his signature that he had read the conditions of the letter and the general conditions in the credit agreement and acknowledged that they formed part of the agreement. His acceptance of the facility letter was witnessed by Ms. Deacy on 19th October 2005.

41. The plaintiff also applied on the same day to AIAC for an investment bond in the Whitgift Geared Property Fund. As this was a life assurance bond, the Life Assurance (Provision of Information) Regulations 2001 applied. Ms. Deacy signed the bond as the plaintiff's financial advisor. It is expressly noted that it was recommended that independent financial advice be taken when purchasing financial products. Both Ms. Deacy and the plaintiff executed the application for the investment bond on 19th October, 2005.

The Policy Documents

42. By letter dated 5th December, 2005, the Bank issued a receipt to the plaintiff in respect of bond number INB/0003006 in the Fund. The letter enclosed documents relevant to the Fund and the investment including: the policy documents, the Fund's brochure ("the Black Book") and disclosure documentation.

43. The Black Book set out the nine asset management opportunities and development opportunities that were set out in the loose-leaf brochure, including a statement that the Bank was satisfied from its meetings with the Foundation that the latter body was "in favour of Howard [Holdings'] plans for the Centre, but clearly can give no guarantee with regard to consents." By contrast, however, with the earlier loose-leaf brochures, it did not seek to monetise the expected return. On the contrary, on p. 20 it stated that it was

difficult to quantify the return potential from the opportunities. At p. 33 it set out the risk factors as follows:-

> "A geared property investment is considered to be high-risk and the following considers the types of risk associated with an investment of this kind. This brochure does not constitute investment advice, and prospective investors should consult their own legal, financial or tax advisors in relation to the participation in this investment…
>
> This brochure includes information obtained from external sources, and this information has been reproduced accurately from those sources, but Anglo and AIAC do not accept any responsibility for the accuracy or completeness of such information…
>
> Investors should note that a fall in the capital value of the property of approximately 26% would reduce the value of investor equity to zero assuming no surplus rental income and no reduction in Bank borrowings…
>
> Development Risk
>
> The intention to develop portions of the Property will attract further risks. However, any proposals to develop within the existing shopping centre or develop new properties on the site of the WhitgiftCentre, will have to satisfy Anglo and AIAC with regard to the feasibility and commerciality of same. AIAC will act in the best interests of the Fund investors when assessing such proposals.
>
> As mentioned previously, any capital expenditure on the Whitgift Centre in excess of 10% of gross annual income requires the consent of the Whitgift Foundation and the Royal London Mutual Insurance Society. It is worth noting that both bodies have given their consent to, and funded their share of the cost of, the historic major refurbishments carried out to date. Anglo is satisfied that it is in both parties commercial interest to continue to do so where a clear and compelling case exists."

44. At p. 22, under the heading "Asset Management/Redevelopment Opportunities", the brochure provided:-

> "One of the key attractions of the Whitgift Centre is the opportunity to add substantial value by way of active asset management and redevelopment opportunities. Howard and the JV Partners believe that the Centre has not been managed to maximise its existing potential. Howard believe that with entrepreneurial management of this Centre, significant value can be unlocked over a 5-7 year period, which coincides with the £2.5bn spend on Croydon in general…
>
> Redevelopment opportunities (subject to planning permission and, where applicable, head leaseholders/freeholders consents).
>
> The JV Partners have identified a potentially attractive range of development opportunities, comprising residential, office and mixed use schemes. While these are subject to detailed evaluation and planning consents, Anglo consider that they represent a substantial opportunity to enhance the earnings and overall value of the asset over the medium to long-term."(emphasis added)

45. In each case it is stated that the opportunities identified are not intended to be definitive or exhaustive.

46. The policy documents included supplementary provisions for the Whitgift Geared Property Fund which were stated to be supplementary provisions which attached to and formed part of the Bond. Paragraph 3.3 of the Bond provided:-

> "By signing your Application and requesting that contributions should be paid into the Whitgift Geared Property Fund you agree, accept and acknowledge that:-
>
> > 3.3.1 we have no responsibility to advise you as to the suitability of an investment in the Whitgift Geared Fund for your particular circumstances;…
> >
> > 3.3.4 you will not commence or bring and you hereby irrevocably waive any entitlement to commence or bring any legal or other proceedings against us arising out of or connected with the non performance of the assets forming part of the Whitgift Geared Property Fund or their failure to perform as you may have anticipated or expected".

47. Paragraph 3.4 provides:-

"You specifically agree by signing your Application and requesting that contributions should be paid into the Whitgift Geared Property Fund that these Supplementary Provisions are fair and reasonable in the particular circumstances of an investment into the Whitgift Geared Property Fund and you acknowledge that you have had the opportunity to raise any concerns relating to these Supplementary Provisions with us."

48. Enclosed with the other documentation was an investment bond cooling off notice which expressly gave the plaintiff a period of 30 days from the date of the letter to cancel the investment.

Developments in the period from 2006 – 2008

49. After concluding the two investments the plaintiff sought tax advice on the transactions from a Mr. Brian Bohan. In or around March 2006 he wrote to Mr. Bohan stating that the investment was expected to yield a return of 300% over a period of 7 - 9 years. He received no information from AIAC regarding the development of the Whitgift Centre, so he instructed UK solicitors on his behalf to conduct a planning search of the Whitgift Centre to ascertain if any applications for planning permission had been lodged. The results were negative. In February 2007 he wrote directly to Howard Holdings enquiring, inter alia, in relation to redevelopment proposals. The following year, on 6th February 2008, he wrote to the Bank stating that he was anxious to hear about the development plan for the Whitgift Centre and the results of any efforts to obtain planning permission.

50. While there may possibly have been some preparatory work done, it is not disputed that no application for planning permissions for re-development was ever applied for. None of the proposed potential developments ever came to pass.

The plaintiff's complaints

51. These proceedings were commenced in 2011. In his statement of claim the plaintiff pleaded that there were 3 specific oral and written representations made by the Bank:-

(1) That the Whitgift Shopping Centre was projected to increase its rental income by stg£2m. year on year.

(2) That there existed significant potential to increase the rental income by reason of "existing asset management" and "new development" opportunities.

(3) That the potential return on investment after 10 years was between 220% and 300%.

52. The plaintiff contended that the oral representations were made by Mr. Hayes and the written representations were in a brochure provided to the plaintiff by the Bank.

53. The written representations upon which the plaintiff relies are those set out in the second loose-leaf brochure. The brochure identified 5 asset management opportunities as follows:-

"• Relocate pedestrian access along M&S

☐ Forecast net added values £8.5m

☐ Timeframe 3-5 years.

• Planning exists for 80k sq. ft. new space

☐ Forecast net value added £5m

☐ Timeframe 3 years

• Early lease renewals

☐ Forecast value added £4.5m

☐ Timeframe 1-3 years.

• Reconfigure M&S and River Island units

☐ Forecast net value added £3.5m

☐ Timeframe 3-5 years

• Increase Mall Income

☐ Forecast net value added £3.5m

☐ Timeframe 1-3 years".

54. It identified 4 potential development opportunities:-

"WHITGIFT TOWER

25 STOREYS

200, 000 sq. ft.

OFFICES / RESIDENTIAL / HOTEL

PROFIT £15m

FOCUSHOUSE

15 STOREYS

125, 000 sq. ft.

OFFICES

PROFIT £10m

WESTERNGATEWAY

NEW RESIDENTIAL

FIVE STOREYS

110 FLATS

140,000 sq. ft.

PROFIT £12m

RESIDENTIAL TOWER

10 STOREYS

175 FLATS

160,000 sq. ft.

PROFIT £15m".

55. Under the heading *"Risks and Sensitivities"* the brochure stated:-

> **"Whitgift Foundation**. The WF owns the Freehold title to the property. Their consent must be received for all expenditure >£1m. We have met with the WF, who confirm that they will support and fund plans which will maximise the value of the Whitgift Centre."

The plaintiff's evidence in relation to the representations

56. In her judgment Costello J. found that the plaintiff's evidence was, in many respects, "wholly unreliable and frequently inconsistent", although she acknowledged he was giving evidence in respect of events which occurred nine years previously. He had no clear recollection of many of the key details of the case. He was clearly trying to reconstruct events to some extent by reference to the documents. Even making allowances for this fact, Costello J. stated that there were "some startling inconsistencies in his evidence."

57. The plaintiff had pleaded that he met Mr. Hayes and Ms. Deacy at the Radisson Blu Hotel in Galway in the autumn of 2005. He says it was at this meeting that Mr. Hayes made his oral presentation and furnished him with the loose-leaf brochure. This presentation was what persuaded him to invest in the Whitgift Investment.

58. On the other hand Costello J. noted that in his witness statement dated 4th June 2014, the plaintiff alleged for the first time that the meeting occurred during the period the 11th - 15th July 2005. He stressed in the High Court that this was the correct date as his decision to invest in the Whitgift Geared Property Fund was made when he decided not to proceed with the Knightsbridge Investment. He cancelled the sterling he had pre-ordered to enable him to invest in the Knightsbridge Investment on 15th July, 2005. It was clear therefore that his evidence was he decided to invest in the Whitgift Fund on or before the 15th July 2005, at the latest.

59. The plaintiff, however, pointed to a second compliments slip from Ms. Deacy which was date-stamped the 15th July 2005. It read:-

> "Attached please find up to date brochure FYI
>
> I have also attached a copy mandate for you & partner to complete
>
> Kind Regards
>
> Margot Deacy".

60. In view of the fact that it referred the most up to date version of the brochure, the plaintiff maintained that the loose-leaf brochure upon which he based his case was furnished to him by Ms. Deacy under cover of this compliments slip which he received on 15th July, 2005, rather than by Mr. Hayes at a meeting in the Radisson Blu Hotel in Galway. Costello J. then observed:

> "He now accepted this meeting took place in October of that year. From expenses claims from the Bank and correspondence it is clear that this was on the Friday between 12th and 19th October 2005. Given the inconsistency of the plaintiff's evidence in relation to this crucial meeting, I am unable to place any reliance on his evidence in relation to it.
>
> By the conclusion of his evidence, the plaintiff's case was that he decided to invest based on a brochure which he received in the post sometime on 15th July 2005. It was the second such brochure. He spoke with no one in the Bank in relation to the investment as outlined in that brochure, but in the late afternoon of 15th July 2005, he had made up his mind to invest in the Whitgift Geared Property Fund and to cancel his interest in the Knightsbridge Investment. Most importantly his decision to invest was made some months in advance of the oral presentation of Mr. Hayes upon which he had placed so much emphasis in his earlier testimony."

61. Costello J. found other aspects of Mr. Spencer's evidence were unreliable and that he was confused about the relevant dates and the times he received the different documentation. Some of the Bank employees were also uncertain about the critical times and dates. Here it must be recalled that all parties were giving evidence in 2014 about events which took place some nine years previously. Costello J. continued her narrative thus:

> "Ms. Deacy gave evidence on behalf of the Bank and she accepted in evidence that she enclosed a brochure that related to the Fund with that compliments slip. Her evidence was that this was the prospectus brochure known as the Black Book. As Mr. Gerard Davis, the author of the Black Book, gave evidence to the effect that the Black Book had not been completed until late August, 2005, clearly Ms. Deacy's evidence that the brochure referred to was the Black Book could not be correct. I accept on the balance of probabilities that Ms. Deacy enclosed a brochure with this compliments slip and on the balance of probabilities that it was not the Black Book. I am left to draw the inference that the loose-leaf brochure was enclosed with the compliments slip and the plaintiff had the brochure when he made his decision to invest in the Whitgift Fund. Therefore the written representations set out in the loose-leaf brochure were made to him prior to his decision to invest in the Fund. On the other hand I do not accept that the plaintiff has established that Mr. Hayes made the oral representation pleaded at para. 6(a) of the Statement of Claim. I dismiss his claim based upon oral

representations allegedly made by Mr. Hayes on behalf of the Bank."

62. No challenge was made in this Court to either of these two findings of fact.

Did the contents of the loose-leaf brochure amount to misstatements?
63. The plaintiff must, of course, establish as a prelude to any potential liability on the part of the Bank that the representations contained in the documentation which had been supplied to him were untrue. It is necessary to consider the evidence in relation to the asset management and development prospects of the Whitgift Centre in 2005. Given the way that the issues have been narrowed down for the purposes of an appeal to this Court, it is not necessary for me to review either the detailed planning or valuation evidence which has been comprehensively set out in the judgment of the trial judge. Nor do I find it necessary to review the evidence of the various banking experts adduced by both sides.

64. What is, however, of critical importance was the attitude of the Whitgift Foundation ("the Foundation"), since the representations made in relation to it and its attitude to any potential redevelopment formed a central part of the plaintiff's evidence before this Court. It is to this evidence – and especially that of the Foundation's surveyor, Mr. Stapleton - to which I will now turn.

The attitude of the Whitgift Foundation
65. The attitude of the Foundation was critical to the reasonableness and reality of many of either the asset management opportunities or the development opportunities. If the Foundation was likely to refuse consent to any development which required its consent or to refuse to contribute to the development costs of any development then, as Costello J. found:

> "In reality, there was no real prospect of the development being carried out. In that case it would not be reasonable to identify any such development as an opportunity. While in theory it might exist, if as a fact consent and / or investment would not be forthcoming, it could not proceed."

The evidence of Mr. Richard Stapleton
66. Mr. Richard Stapleton, the Surveyor to the Foundation gave evidence on behalf of the plaintiff. He had been surveyor to the Foundation since 1998. He indicated that the Foundation was an educational charity that had been established in the 16th century and had to be prudent in relation to its assets. He confirmed that prior to 2000 the Foundation had made capital investments in the Whitgift Centre alongside the other co-owners of the Centre to refurbish and improve parts of the Centre. He said that the Foundation had long formed the view that it should be reducing its investments in the Centre.

67. Mr. Stapleton said that he had two meetings with Howard Holdings in 2005. On the 27th May 2005, he met with representatives of Howard Holdings in Croydon. He confirmed that the Foundation's formal approval would be required for any redevelopment of the Centre. He further stated that the Foundation's established policy was to consider any specific proposals to improve the Centre on its merits and any decision as to the appropriateness of the Foundation giving its consent and/or investing in a proposal would depend on the advice it received at the time, including advice on viability, risk and availability of funds. It was made clear and it could not be assumed that the Foundation would be prepared to make any further investment. It was pointed out that under the terms of the lease there was no obligation on the Foundation to make further investment in excess of the capital limit (5% of net rental income). He stated that Howard Holdings' representatives did not discuss any specific plans or proposals at that meeting.

68. On 20th June 2005, Mr. Stapleton met with representatives of the Bank and Howard Holdings. The Foundation was questioned about its aspirations for the Whitgift Centre and it was indicated that the Foundation's prime concern was to ensure that the asset was properly managed and developed and that it was for the Asset Manager of the Centre to come forward with any specific development proposals. In the absence of specific proposals it was impossible to comment further. Mr. Stapleton said that he expressly asked the representatives of Howard Holdings to explain their plans for the Centre and they said they were not prepared to do so. None of the asset management opportunities or development opportunities identified in the loose-leaf brochure were raised at the meeting. Mr. Stapleton's evidence was that if the Foundation had been shown the loose-leaf brochure they would have said that they would not fund the development opportunities – which he regarded as "speculative" - identified in that loose-leaf brochure.

69. Mr. Stapleton said that on several occasions during the meeting both Howard Holdings and the Bank asked precisely what the Foundation's position would be on development proposals but that in the absence of specific proposals it was impossible to comment further. He said it was made clear that any proposal would have to be considered on its merits and that the Foundation did not have any significant funds to invest in the Centre.

70. Under cross-examination he agreed that in 2005 the Foundation was open to the idea of redevelopment of the Centre. He agreed that the attitude of the Foundation was one of openness to consideration of improvement in redevelopment opportunities, subject to detailed plans being submitted for consideration and risk assessment and with no guarantee that the Foundation would necessarily follow through with the proposed plan. He agreed that as no specific proposals had been discussed they were neither in nor were they out.

The plaintiff's evidence in relation to the representations
71. As Costello J. observed, a crucial issue which had to be resolved was to what extent the plaintiff relied upon the statements of the Bank in relation to the prospects for a return when he decided to invest in the Whitgift Fund. The plaintiff was examined by his counsel at the hearing in relation to his understanding of the projected return of 165% over a ten year period (the base case)

> "134Q… 165% return on investment, that would involve a growth of 65%: is that right?
>
> A. That is my understanding of it, yes." [6]

72. The plaintiff was also cross-examined in relation to the Bank's statement in the loose-leaf brochure to the effect that a combination of the base case, the asset management opportunities and the new development opportunities could give a return of 220%. He was questioned as to his understanding of this representation upon which he based his case. At one point the plaintiff commented:-

> "470…
>
> A. Yes. The figure of 220% including my investment would have been satisfactory to me.
>
> 471 Q. Well, the figure of 165 would too, if I'm right about the maths

A. Yes. Yes, it would.

472 Q. So if I'm right about that, if that's what the return means, in fact you were being offered a figure higher than the figure you would have been happy to invest in.

A. If you are right about that, that is true. But my case is all about the realism of the figures." 7

73. Costello J. found, based on the expert evidence, that a return of 165% meant the return of the investment plus 165%. This meant that the plaintiff's understanding of 220% as including the return of his investment was, in fact, less than what was meant by a return of 165% which, it is common case, was a reasonable representation for the Bank to have advanced in 2005.

74. The plaintiff gave evidence that he was particularly interested in the development angle of the Whitgift Investment. This was confirmed by Ms. Deacy in evidence on behalf of the Bank. The Knightsbridge Investment likewise involved development opportunities, though they were not spelt out to the same degree as in the loose-leaf brochure. The plaintiff accepted that, on the assumption that he had been provided with the loose-leaf brochure in or around July 2005, further documentation was to come. He accepted that as an experienced solicitor the loose-leaf brochure was not the sort of document that was going to be a legally binding document surrounding the conclusion of an agreement. He stated:-

"… I agree with you the loose-leaf [brochure] wouldn't have been an effective way of investing in this".

75. The plaintiff accepted that at the latest he received the Black Book on the 5th December 2005. He said that he read it; he absorbed it and pondered it. He was asked whether he understood the document, he was asked did he note the guarded terminology and the absence of figures and he answered, that, in the words of Costello J. "it was legalese" and:-

"… it's a different emphasis than what I had been told and what the brochure is saying or told me four months ago or three months ago."

76. He said that if somebody had asked him to sign the Black Book he would not have signed it. He said:-

"I was relying on my rights as I felt that they were in how I got here."

77. The plaintiff acknowledged that he understood that quite different things were being said to him in the Black Book. He believed that different things were being said to him in the Black Book than had been set out in the loose-leaf brochure. Specifically, he said that he believed that the Black Book was now saying that the Bank was not standing over the figures and that the development opportunities were difficult to quantify. He confirmed that he understood all of this and said that it did not dissuade him from proceeding.

78. In relation to the loose-leaf brochure he said that he took opportunities to be plans and that he took it that "the investment couldn't fail". On the other hand he accepted that it was a high-risk investment and that he understood the nature of geared investment.

Whether there had been any oral misstatements or misrepresentations
79. In her judgment Costello J. found that Mr. Spencer had not established on the balance of probabilities that any oral representation was made to him to the effect that the Whitgift Centre was projected to increase its rental income by stg£2m. year on year. She further noted that he had adduced no expert evidence in relation to this alleged representation and that this part of his claim could not succeed. This matter was not pursued on appeal.

The alleged misrepresentations
80. This left for consideration the allegations of the misstatements and misrepresentations contained in the Bank's documentation.

81. The plaintiff's case in negligent misstatement against the Bank rests upon representations which were made directly to him, as Costello J. had found that Ms. Deacy had posted him the loose-leaf brochure. It is clear, accordingly, that he is a person to whom the Bank owed a duty of care in accordance with the principle established in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465. If there were any doubt in the matter, I agree with Costello J. when she said that he was clearly "in the limited identifiable class of persons to whom the Bank sent the loose-leaf brochure and therefore to whom the Bank made the statements therein set out."

82. While it was not unreasonable for the Bank to state that there existed asset development opportunities which had the potential significantly to increase the value of the Centre, the Bank nonetheless owed the investors (such as the plaintiff) a duty of care to ensure that the statements which it made in that regard were accurate and not misleading.

83. The new development opportunities were high level concept ideas and not definite plans. This is abundantly clear from both the scant information and the round figures attributed to the identified opportunities. Having reviewed the evidence, Costello J. stated that she did not believe that:

"….the identified asset management opportunities and new development opportunities were not unreasonable and, accordingly, the representation that they existed as opportunities did not amount to a misstatement in and of itself. Therefore I hold that the second alleged misstatement upon which the plaintiff bases his case falls."

84. No appeal has been taken against that part of the High Court decision.

Misrepresentations contained in the loose-leaf brochure
85. At the heart of Mr. Spencer's case – and the focus of the appeal to this Court - is the contention that the Bank's written documentation contained a number of material misrepresentations. While these matters (which are, in any event, all inter-related) can now all be considered, I propose to turn first to an allegation of negligence, namely, that the Bank ought to have been aware of the letter which Mr. Stapleton (the surveyor to the Foundation) arranged to send to Mr. Sparrow of Howard Holdings some time after their first meeting on 27th May 2005.

86. The letter in question appears to have been dated 2nd March 2005 and was apparently addressed to the Foundation. The letter itself appears to have emanated from the solicitors for the superior landlord, the Royal London, whose consent (along with that of the Foundation) to any re-development would also have been necessary. It is, unfortunately, impossible to be more specific than this because the full text of the letter was not produced in evidence at the trial following objections from the Bank that it had not been

included in Mr. Stapleton's witness statement. The trial judge nonetheless ruled that the following portion of the letter could be received in evidence:

> "We believe that it may be misleading not to point out that in 2004 and on other occasions the superior landlord and landlord have declined to support proposals brought forward by Arlington, specifically, the Phase 4 scheme."

87. One way or another, the real significance of this letter is that it shows that the relevant landlords had previously refused to support the Phase 4 development just a year earlier.

88. Mr. Stapleton maintained in cross-examination that both Howard Holdings and the Bank were aware of this letter and that it formed the backdrop to the meeting of the June 20th meeting. The two witnesses from the Bank who were present at that meeting – Mr. Hayes and Ms. Lally – were not called to controvert that evidence. The Bank explained that Mr. Hayes was not available to it as a witness. Various explanations were proffered as to why Ms. Lally was not called.

89. In these circumstances, since Mr. Stapleton's evidence was not controverted and was otherwise accepted by the trial judge, the inevitable conclusion must be that the Bank was at least aware in general terms of the March 2005 letter prior to the meeting of June 20 2005 and the negative implications this might have had for any proposals to build out the Phase 4 scheme. The failure to disclose this highly material fact to the investors in the context of representations which the Bank made concerning the feasibility of building out the Phase IV project amounted, in my view, to a negligent misstatement.

90. I now turn to a consideration of the various misrepresentations of which the plaintiff complains.

First misrepresentation: mutually exclusive development opportunities

91. Two of the opportunities for development identified in the loose-leaf brochure were, in fact, mutually exclusive. These developments were mutually exclusive because they each related to the same site within the Whitgift Centre. It would not thus have been possible to complete both the Phase IV development and the Whitgift Tower. While it is clear from the coloured version of the loose-leaf brochure that the two opportunities occupy the same site, I agree with the comments of Costello J. that "the inclusion of the two as opportunities with no note indicating that they were alternatives was misleading." This was not seriously disputed by counsel for the Bank, Mr. McCullough S.C.

Second misrepresentation: the attitude of the Whitgift Foundation

92. Under the heading "Risks and Sensitivities", the loose-leaf brochure identified the Foundation as the owner of the freehold title to the property whose consent must be obtained for any expenditure in excess of stg£1m.. As I have already noted, the attitude of the Foundation was accordingly of central importance if any development opportunities were to be progressed.

93. The second loose-leaf brochure (which the plaintiff received prior to his decision to invest) stated:

> "We have met with the WF, who confirmed that they will support and fund plans which will maximise the value of the Whitgift Centre."

94. The evidence was that Howard Holdings had two meetings with representatives of the Foundation in May 2005 and in June 2005. The Bank attended the second meeting which took place on 20th June 2005. As it happens, Howard Holdings did not and would not disclose to the Foundation any of its plans for the Centre, even in the broadest outline. They were asked by the Foundation on several occasions to give details of their proposals and they declined to do so. The Foundation, accordingly, had no opportunity to express its opinion in relation to plans for development which included residential, office and hotel developments.

95. The Foundation's chief surveyor, Mr. Stapleton, emphatically rejected in evidence the suggestion that it had ever "confirmed" that it would support or fund such plans. He said that any proposal for re-development would have been considered on its merits. His note of the meeting of the 20th June 2005 was that the Foundation had expressly stated that "it did not have any significant funds to invest in the Centre."

96. Four representatives of the Foundation attended that meeting: the Chairman, the Chairman of the Finance Committee, the Clerk to the Foundation and himself. In evidence Mr. Stapleton stated that the Foundation considered that it was too heavily invested in the Centre already. He said that if the Foundation had been shown the loose-leaf brochure it would have said that they would not fund the development opportunities identified in that loose-leaf brochure which he personally regarded as speculative. He agreed that while the attitude of the Foundation was one of openness to consideration of improvement, there was no guarantee that the Foundation would necessarily approve any proposal.

97. In my judgment, in the light of the evidence available to the High Court, this statement by the Bank in the second loose-leaf brochure must be adjudged to be seriously misleading. There was no basis at all for the statement that the Foundation had "confirmed" that it "will" support and "fund" plans which will maximise the value of the Whitgift Centre. The Bank ought to have known that this statement – which was of central importance to the possibilities of re-development on the site – could not possibly have been true.

98. A key selling feature of the project was the identification of the four specified potential development opportunities in the loose-leaf brochure. As Costello J. herself recognised, it would have been fair for any reader of the brochure to assume that the Foundation's support for potential re-development would include at least some of the new development opportunities identified in the brochure itself. As Costello J. stated (at paras. 149 *et seq.* of her judgment):-

> "The approval of the Whitgift Foundation of the plans of the Whitgift Centre was absolutely fundamental to any of the new development opportunities. Simply put, none of them could be achieved without the consent of the Foundation and none of them could be realised without the pro rata funding commitment from both the Whitgift Foundation and Royal London. The Bank was fully aware of the vital importance of the Whitgift Foundation and yet failed to ascertain even in the broadest terms the attitude of the Foundation where representatives to the plans for the development of the Centre which it was promoting to its clients and potential investors in the Fund. The overall impression from the loose-leaf brochure was that the Whitgift Foundation was aware of the identified opportunities and was in principle supportive of the opportunities. This impression was subsequently reinforced by the Black Book where it was stated at p. 14:-
>
> > "The Whitgift Foundation has given its consent to, and funded its share of the cost of major refurbishments carried out in 1985 and 1998 respectively. Clearly it has an incentive to do so, as beneficiaries of c.25% of gross rental income. AIAC, Anglo and the JV Partners have met with the Whitgift Foundation and are satisfied that the

> Foundation is *in favour of the progressive nature of Howard's plans for the Centre, but clearly can give no guarantee with regard to any consents.*" (emphasis added) It was reasonable to assume that the Foundation had been informed of the broad nature of the plans outlined in the Black Book and was generally in favour of them. It is true that it was stated that the Bank could not guarantee that it would consent to any particular proposal. Nonetheless it appeared that the Bank had met with the representatives of the Foundation and ascertained that the Foundation was aware of the possible plans, that they included the plans identified in the Black Book and that it was in favour in principle of Howard Holdings' plans and that the Bank had no reason to believe otherwise."

99. The evidence established, however, that none of these development plans identified in the loose-leaf brochure (or, subsequently, in the Black Book) had ever been put before the Foundation, even though, as I have already noted on more than one occasion, at the one meeting at which the Bank attended (on 20th June 2005), the Foundation had specifically asked for details of what Howard Holdings and the Bank had in mind. It is striking that the Bank did not in fact put before the Foundation the re-development proposals which it was at the same time assiduously marketing to its clients as re-development opportunities which the Foundation would in principle support and fund. The available evidence suggests that the Foundation would not have countenanced speculative development of this kind, much less funded this.

100. The Bank had been present at a meeting where both it and Howard Holdings had consciously declined to specify the nature of any such re-development proposals to the Foundation. Indeed, this was acknowledged by Ms. Marian Lally, when she sent an email on 12th July 2005 to Mr. Sparrow of Howard Holdings in advance of a meeting with Royal London on 15th July 2005:

> "….given that [Royal London's] consent is required re any development/funding we undertake, we would need to satisfy ourselves that they were supportive. I'm not planning a hard commitment here – just something similar to our meeting with the Whitgift Foundation, to introduce ourselves etc."

101. This email is consistent with Mr. Stapleton's evidence to the effect that no proposals were advanced by either the Bank or Howard Holdings at that meeting, which Ms. Lally had clearly regarded as being simply introductory and non-committal in nature.

102. It followed that the Bank must have known that these representations in the second-loose leaf brochure regarding the Foundation's support and funding could not possibly have been true. I agree with the conclusions of Costello J. (at para. 149 of her judgment) that these representations were, accordingly, false and seriously misleading. I am also of the view that these misrepresentations were made in a negligent fashion.

Third misrepresentation: The Phase IV development

103. The second version of the loose-leaf brochure presented the Phase IV development ("Planning exists for 80k sq.ft. new space") as a current opportunity when, as it happens, the Home Secretary was in occupation of the land in question pursuant to a lease that was to run to December 2010. It also envisaged that this development would happen within a timeframe of three years.

104. The previous managers of the Centre had been negotiating with the Secretary of State in June and July 2005 for a surrender of the lease when the loose-leaf brochure(s) were being circulated and when the Black Book was being drafted. The Black Book stated (at p. 22), however, that:

> "Planning permission exists for 80,000 sq.ft. of new retail space in the Centre. Discussion regarding pre-lets are advanced with a view to complete in early 2006."

105. The managers believed that an agreement might be reached to surrender the lease in whole. Costello J. considered that it followed that "neither the loose-leaf brochure nor the Black Book were incorrect at the time that they were written." She added:

> "On balance, I do not accept that the failure to make clear that the right to develop the Phase IV plans would not have arisen until 2010 is sufficient to amount to a negligent misstatement."

106. For my part, I take a different view: I fear that I cannot agree that neither the loose-leaf brochure nor the Black Book were incorrect at the date of writing by failing to make this clear. The representation made by the Bank clearly implied that the lands were immediately available, when as matters stood the lands in question were not available for re-development for another five and a half years. Indeed, the second version of the loose-leaf brochure expressly mentioned a time frame of three years for the utilisation of the Phase IV planning permission. The Black Book added that "Discussions regarding pre-lets are advanced with a view to completion in early 2006." All of this underscored the clear impression which had been given that the lands were immediately available for re-development. It is hard to see how this is not a material misrepresentation of the true facts: who, for example, would be prepared to invest in a re-development project in respect of certain lands only later to be told that the developers did not have immediate access to the land and would only be entitled to obtain such access in five and a half years time?

107. It is true that the Bank had hopes that the Secretary of State might be prepared to effect a surrender of the lease and that negotiations to this effect were on-going in early summer of 2005. On 5th October 2005 the Secretary of State indicated that he was refusing to surrender the lease in question. This had the effect of dashing any hopes which either Howard Holdings or Anglo had for the development of Phase IV, certainly in the short to medium term.But this makes the failure to disclose these essential facts all the more troubling and, frankly, unacceptable.

Fourth misrepresentation: the statements in the Black Book

108. The formal fund brochure (known as "the Black Book") was prepared at the end of August 2005. Three fundamental representations were made by the Black Book:

109. First, the Bank endorsed the representations of the potential six new development opportunities in the form already identified in the second loose-leaf brochure which were repeated again. Specifically, the Bank stated that:

> "Anglo consider that they represent a substantial opportunity to enhance the earnings and overall value of the asset over the medium to long term."

110. This, however, was a just a re-statement of what had been stated in the second loose-leaf brochure and it was just as misleading. The clear impression was given that the Foundation had been informed of the identified potential projects (four of which were set out in pictorial form on the following page) and was broadly in favour of these developments. This, as we have seen, was untrue.

111. The second misrepresentation was that Anglo were satisfied "that the Foundation is in favour of the progressive nature of Howards' plans for the Centre, but clearly can give no guarantee with regard to any consents." This statement was completely untrue: as we have seen, Anglo and Howard had expressly declined to give the Foundation any outline of its proposed plans, so the Foundation could not possibly have given even broad assent to this.

112. The third misrepresentation was that planning permission "exists for 80,000 square feet of new retail space in the Centre. Discussions regarding pre-lets are advanced with a view to completion in 2006." It is true that planning permission had indeed been granted for this Phase IV proposal. But the utilisation of this planning permission was contingent on the appropriate consent being given by the Foundation and, to repeat, Anglo had never disclosed its plans in this regard to the Foundation.

113. In any event, the development of Phase IV was contingent on the surrender of the lease by the Home Office (Secretary of State), a fact which, as we have seen, was not revealed to investors. Nor was Mr. Spencer informed that on 5th October 2005 the Home Office had refused to surrender the lease. In this context, the statement contained in the Black Book to the effect that there had been discussions with regard to pre-lets with a view to completion in 2006 without disclosing this other information was grossly misleading.

Whether the plaintiff could rely on the loose-leaf brochure(s) to ground an action for misrepresentation and negligent mis-statement?

114. In her judgment Costello J. proceeded to examine whether the plaintiff could rely on the statements contained in the loose-leaf brochures. In this regard Costello J. referred with approval to the following statement of principle contained in the judgment of Lord Oliver in *Caparo Industries plc v. Dickman* [1990] 2 A.C. 605, 638:

> "… the necessary relationship between the maker of a statement or giver of advice ('the adviser') and the recipient who acts in reliance upon it ('the advisee') may typically be held to exist where (1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given;(2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose; (3) it is known either actually or inferentially, that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent inquiry, and (4) it is so acted upon by the advisee to his detriment."

115. Costello J. then continued:

> "It is necessary therefore to consider the representations in the context in which they were made. They were in a loose-leaf brochure that was given to certain clients of the Bank with a view to ascertaining whether or not they would be interested in investing in the Whitgift Geared Property Fund. If the client expressed an interest in the product then they would be furnished with additional, more detailed information than that set out in the loose-leaf brochure. They could attend oral presentations and they would receive the formal contract documentation including the Black Book. In the case of the plaintiff, he attended a presentation on the investment with Mr. Hayes in October, 2005 and he received all of the contract documentation including the Black Book. He had a 30 day cooling off period if, on reflection, he did not wish to proceed with the investment in the light of this finalised documentation. The plaintiff correctly accepted that the investment could not have been made on the basis of the loose-leaf brochure and he acknowledged that further documentation would be provided. The loose-leaf brochure was not the Bank's final word on the proposed investment. The plaintiff must show that the Bank should have realised that the statements were likely to be acted upon by the plaintiff for the purpose for which it was intended without independent inquiry. So the plaintiff must show that the purpose of the statements was to induce clients of the Bank to invest in the Fund and not simply to ascertain the level of interest amongst the clients of the Bank."

116. Costello J. then referred to the judgment of Clarke J. in *Raiffeisen Zentralbank Osterreich AG v. The Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm):

> "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": *IFE Fund SA v Goldman Sachs International* [2007] I Lloyd's Rep 264, per Toulson J at [50] (upheld by the Court of Appeal [2007] 2 Lloyd's Rep 499). 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 statement, of the person to whom it was made, and the relationship between them."

117. Costello J. then stated:

> "The plaintiff gave evidence that the loose-leaf brochure was not the sort of document that was going to be a legal binding document. He also says that he took the opportunities identified in the loose-leaf brochure to be plans and he took it that "the investment couldn't fail". He knew and accepted that further contractual documentation would be forthcoming. In determining the status of the loose-leaf brochure it is important to put it in context. It was provided to potential investors to ascertain their interest in investing in the Fund. It could not form the basis of the investment in the Fund. Further detailed documentation was required and was in fact forthcoming. Most importantly that documentation advised parties to take their own independent financial legal and tax advice and it afforded each of the investors a 30 day cooling off period. Seen in this context, I do not accept that the statements in the loose-leaf brochure had the character of statements upon which the representee was intended and was entitled to rely. So, on this basis his claim founded on the statements in the loose-leaf brochure must fail."

118. I find myself for several reasons in respectful disagreement with this analysis.

119. First, it has always been the law that pre-contractual representations could - in principle, at any rate - form the basis of a subsequent action for negligent misstatement, even though the parties always understood that the representations in themselves could not form the basis of a contractual agreement and that further, more formal documentation would be forthcoming.

120. Many, many examples of this proposition could be cited. One Supreme Court decision must suffice for the purposes of illustration: in *Gahan v. Boland*, Supreme Court, 20th November 1984, the plaintiff sought rescission of an agreement to purchase a house. It was accepted that the purchaser had inquired of the vendor whether the house in question would be affected by the construction of the (then) projected M50 motorway. It was further accepted that the vendor had assured the purchaser that this was not the case and the purchaser signed the contract based on that assurance. The purchaser later discovered that the proposed motorway was routed

to pass through the property.

121. While it was accepted that the representation was made innocently, the Supreme Court also noted that the evidence had also established that this representation was false; that it was a material one "with the intention of inducing the plaintiff to act on it" and that it was "one of the factors that induced the plaintiff to enter into the written contract on the following Monday to purchase the property."

122. In the present case the representations went beyond what O'Hanlon J. described in *Donnellan v. Dungoyne Ltd.* [1995] 1 I.L.R.M. 388, 396 as mere "sales talk." On the contrary, very clear and specific statements were made in the loose leaf brochure(s) which – if words are to have any meaning at all – were designed to induce the plaintiff to invest in the project.

123. Second, following on from this, it is quite clear that a key purpose of the loose-leaf brochure(s) was to persuade investors such as the plaintiff to invest in the project. I think, with respect, it would be quite unreal to regard the purpose of the brochure(s) as being simply to gauge the level of potential interest. It is rather the case that potential investors were interested in the project precisely because of the representations contain in these loose-leaf brochures.

124. This is borne out by what happened to the plaintiff himself. He had originally committed himself to investing in the Knightsbridge project, but Ms. Deacy requested him to defer investing in that project until she had an opportunity of persuading him to invest in the Whitgift Centre. There can be no suggestion that the plaintiff's will was somehow overborne by Ms. Deacy. It is, however, clear, that she wanted the plaintiff's business and the promotional loose-brochure(s) were an integral part of this sales-pitch.

125. As Costello J. herself found, by the end of June 2005 Ms. Deacy had met with the plaintiff for this purpose and then immediately sent him the first version of the loose-leaf brochure. The plaintiff committed himself in principle to the investment and by mid-July 2005 he was sent the second version of the loose-leaf brochure.

126. The only rational inference to be drawn from this sequence of events is that these brochures were sent not simply for the purpose of gauging interest in the project, but were also designed to persuade persons such as the plaintiff to invest. It would be manifestly unfair and at odds with the principles of good faith upon which the entire law of contract is founded, if those who made specific statements designed to induce others into enter into contractual relations were later to be allowed to resile from that position and to claim that such statements were not to be taken seriously.

127. Third, I cannot agree that it is material to this issue that the plaintiff had the opportunity of consulting legal or tax advisers or that he had the benefit of a 30 day cooling off period. His own legal and tax advisers would doubtless have assumed that the representations contained in the various documentation were true and had been fairly made. These advisers could have had no insight, for example, into whether the Foundation had committed itself to supporting and funding the Bank's proposals. To take another example: how, it might be asked, could they have known that the British Home Office had no intention of surrendering a lease of lands which the Bank's documentation had represented as being immediately available?

128. Nor is it relevant in this context that the plaintiff had a 30 day cooling off period. There must be little doubt that if the plaintiff had known at the time of the extent to which he had become the unwitting victim of a sustained series of misrepresentations at the hands of the Bank that he would have exercised his option to cancel the investment within the 30 day period. The party who uttered these misrepresentations cannot, however, be heard to place the onus on the plaintiff to cancel a contract which by their own actionable misrepresentations they had induced him to enter.

129. Fourth, it is true that all the parties (including the plaintiff) recognised that no investment could take place simply on the basis of the loose-leaf brochures and that further documentation (including the exchange of binding legal contracts) was required. But, it might be asked, what further investment-related documentation was the plaintiff going to receive?

130. Costello J. found that the plaintiff relied exclusively on the documentation supplied by the Bank and the Bank knew this when it supplied that documentation to him, as quite obviously he had no independent knowledge of these matters. In this context, the formal contractual and banking documentation relating to the loan itself had no bearing on the investment decision. This formal documentation was simply the vehicle whereby the contractual relationships came into existence and it quite obviously did not address the underlying commerciality of the project. It is quite clear, therefore, that all parties knew that the plaintiff's investment decision was going to be based on either the loose-leaf brochure(s) or the Black Book or a combination of the representations contained in this documentation.

131. All of this meant that the representations contained in these brochures and Black Book were potentially operative in any investment decisions which this plaintiff (or, for that matter, any other investor) was to take. As Smith J observed in the Australian case of *Jones v Dumbrell* [1981] V.R. 199, 203:

> "When a man makes a representation with the object of inducing another to enter into a contract with him, that other will ordinarily understand the representor, by his conduct in continuing the negotiations and concluding the contract, to be asserting, throughout, that the facts remain as they were initially represented to be. And the representor will ordinarily be well aware that his representation is still operating in this way, or at least will continue to desire that it shall do so. Commonly, therefore, an inducing representation is a 'continuing' representation, in reality and not merely by construction of law."

132. This passage was expressly approved by Lord Reed JSC for the UK Supreme Court in *Cramaso LLP v. Ogilvie-Grant* [2014] UKSC 9, [2014] A.C. 1093. Admittedly, Lord Reed acknowledged that there may be cases where a misrepresentation does not have a continuing effect, because "it is withdrawn or lapses", or because the other party discovers the true state of affairs before the contract is concluded, so that it cannot induce the other party to enter into the contract and therefore cannot affect its validity or give rise to a remedy in damages for any loss resulting from its conclusion. Critically, however, Lord Reed JSC added:

> "The continuing effect of a pre-contractual representation is reflected in a continuing responsibility of the representor for its accuracy. Thus a person who subsequently discovers the falsity of facts which he has innocently misrepresented may be liable in damages if he fails to disclose the inaccuracy of his earlier representation: *Brownlie v Miller* (1880) 7 R (HL) 66, 79; *Brownlie v Campbell* (1880) 5 App. Cas. 925, 950 per Lord Blackburn. The same continuing responsibility can be seen in the treatment of representations which are true when made, but which become false by the time the contract is entered into: see, for example, *Shankland & Co v Robinson & Co* 1920 SC (HL) 103, 111 *per* Lord Dunedin. The law is thus capable, in appropriate circumstances, of imposing a continuing responsibility upon the maker of a pre-contractual representation in situations where there is an interval of time between the making of the representation and the

conclusion of a contract in reliance upon it, on the basis that, where the representation has a continuing effect, the representor has a continuing responsibility in respect of its accuracy."

133. This principle is illustrated by the facts of Cramaso itself. In that case A considered taking a tenancy of a grouse moor in Scotland, but was concerned about possible over-shooting on the moor and the availability of sufficient levels of grouse. B, a representative of the owner, provided a count of the grouse which was designed to re-assure A. A did not in fact proceed with the transaction, but B then asked A to forward the assurance (contained in an email) to C who was also considering investing. Acting on foot of this representation, a few months later C entered into the lease of the lands.

134. C later discovered that the counting areas were not representative of the moor as a whole and that the grouse population was smaller than he had believed. It would in consequence take longer for the population to recover to the point where shooting could take place at the level which he had intended. The UK Supreme Court accepted that the email contained a material misrepresentation, namely an implicit representation that the counts were representative of the population of grouse on the moor. Critically, however, the Court found that the email was a continuing misrepresentation which had induced C into taking the lease of the lands.

135. In my view, the same was true here. The representations made in the loose-leaf brochures were obviously designed to induce investors to invest in this project and were obviously continuing representations. It is true that, as the plaintiff himself accepted in evidence, the language of the Black Book was, in some respects, more guarded than the loose-leaf brochure(s). There was, however, nothing at all to suggest that the Bank had expressly disavowed the earlier representations contained in the loose-leaf brochure to the degree that the law requires. This, however, is to anticipate somewhat, because it is next necessary to consider the evidence in relation to the Black Book.

The Black Book.

135. It is next necessary to review the evidence in relation to the formal fund document, the Black Book. Costello J. made a specific finding that the plaintiff had received this document at a meeting in a hotel in Galway on either 12th October 2005 or 19th October 2005. The significance of this is that she found that as the plaintiff had received the Black Book before he subsequently made any contractually binding investment decisions, this had the effect of superseding all previous representations contained in the loose leaf brochure.

136. What, then, was the evidence to justify that finding? The plaintiff himself denied that he had received the Black Book at that October 2005 meeting and that it was only supplied to him in December 2005. It should be noted, however, that Costello J. found that, given certain inconsistencies in Mr. Spencer's evidence, she could not place reliance upon it. On the other hand, the only evidence from the Bank referable to this point was that of one of its employees, Mr. Greg Tynan, who attended the Galway meeting. Mr. Tynan was cross-examined on his witness statement as follows:-

> "527 Q. It seems to me that you were very careful in that particular passage not to address the question of whether or not the fund brochure was actually given to Mr. Spencer at that meeting; isn't that correct?
>
> A. Well, I do not recall giving him a brochure. I am not sure, you know, where he got the brochure or if he got the brochure. All I can say is I don't remember giving him the brochure. The issue of whether, you know … I don't really understand in terms of … the point is that's what I remember. I can't say anything more than that. I don't remember giving him the brochure." (emphasis added)
>
> 528 Q. No, but in that paragraph you are referring to two different types of document; isn't fair to say?
>
> A. Yeah, well, I mean, for me, the brochure is the Black Book brochure."

137. However, the witness then went on to state that, as the Black Book was in circulation at that time, he believed that the plaintiff would have been provided with a copy at the meeting. Mr. Tynan was then further cross-examined as follows:-

> "548 Q. That document would absolutely have been discussed with Mr. Spencer?
>
> A. Whether ….
>
> 549 Q. Where in your statement do you say that?
>
> A. Well, I don't say it in that, but in my view is that it would have been discussed at that meeting. But before Mr. Spencer would have completed his full details, a full statement, that he definitely would have had a copy of that. My recollection …
>
> 550 Q. Sorry, hold on a moment now. We are moving on a little bit in terms of the narrative. Just deal with the meeting at the moment?
>
> A. Yes.
>
> 551 Q. Do you have a specific recollection of Mr. Spencer being given the black book at that meeting?
>
> A. I don't have a specific recollection. I didn't say that I did.
>
> 553 Q. Did you by what you said a moment ago suggest that he was given it on some prior occasion?
>
> A. No, I didn't suggest that. "

138. Pausing at this point, it cannot be said that the evidence of Mr. Tynan was unequivocal on this question. He agreed that he had no clear recollection as to whether Mr. Spencer had been given the Black Book at the meeting: taken at its height, his evidence was really that he assumed that the plaintiff would have been given the Black Book prior to the investment on the basis that this had been the Bank's standard practice. If the evidence had rested there, I consider that Costello J. would have been perfectly free to prefer the evidence of Mr. Tynan to that of the plaintiff and, accordingly, to conclude on the balance of probabilities that Mr. Tynan had given him the Black Book at the meeting.

139. There was, however, other relevant evidence in this context to which the trial judge did not refer. At least one other witness, a Mr. David Raethorne, stated unambiguously that he had invested in the Whitgift project on the basis of representations contained in the loose-leaf brochure(s) and before he had been supplied with the Black Book. He executed the appropriate documentation on the 11th October 2005 and transferred the funds some two weeks later. He gave unchallenged evidence to the effect that he had received an email from Ms. Lally on 1st November 2005 thanking him for his investment and stating that the policy documentation would be sent as soon as it was to hand. Mr. Raethorne stated that he had received the Black Book on 20th December 2005.

140. Counsel for the Bank, Mr. McCullough S.C., submitted that this Court was bound by the trial judge's finding by reference to standard *Hay v. O'Grady* principles (*Hay v. O'Grady* [1992] 2 I.R. 210). The Supreme Court has, however, made it clear that findings of fact of this nature are not inviolate where, in the words of Clarke J., there has been a "material and significant error in the assessment of the evidence" or where there has been "a failure to engage with a significant element of the evidence put forward": see *Wright v. AIB Finance and Leasing Ltd.* [2013] IESC 55 and *Doyle v. Banville* [2012] IESC 25.

141. Given the importance of this factual finding – on which, it would be fair to say, a good deal of the conclusions of the High Court ultimately rested – it was accordingly necessary for the trial judge to have engaged with the evidence of Mr. Raethorne. As we have seen, Mr. Tynan did not positively assert that he had given the Black Book to Mr. Spencer at the October 2005: rather, he had assumed that Mr. Spencer had the Black Book at the time because - it is to be inferred from his evidence - this was the Bank's standard practice. If, therefore, Mr. Raethorne's evidence was correct, then it tended to undermine a critical aspect of Mr. Tynan's evidence, because that was certainly a case where that practice (if such it was) was not followed.

142. Putting this another way: given the evidential conflict, then in any assessment of the evidence touching on the question of whether Mr. Spencer must have been given the Black Book in advance of investing and whether he received it at the October 2005 meeting, it would also have been necessary for the trial judge to consider and weigh the evidence of Mr. Raethorne. As, however, Costello J. did not do so, I find myself most reluctantly driven to the conclusion that for this reason alone that finding of fact cannot stand.

143. If matters stood at that point, then, given the paramount importance which this finding of fact assumed in Costello J.'s judgment, a re-trial might well have been necessary. In the event, however, for reasons I am about to set out, I do not think that such a step is in fact necessary.

Whether the Black Book had the effect of superseding all the earlier representations?

144. In her judgment Costello J. found that the plaintiff had acknowledged in evidence that the Black Book no longer contained the estimated returns contained in the earlier loose-leaf. The Black Book further indicated that the development opportunities were difficult to quantify. Costello J. then continued:

> "Despite these differences [between the loose-leaf brochure and the Black Book] this did not dissuade [the plaintiff] from continuing with the investment. In the light of this evidence I conclude that the plaintiff in fact did not rely upon the statements in the loose-leaf brochure or, to put it more correctly, purported to rely upon them when he had no entitlement to do so. Certainly, as concerns his case based on the figures in the loose-leaf brochure, these were corrected and were corrected to the knowledge of the plaintiff in the Black Book. He had absorbed it and pondered it and noted that the Bank was not standing over the figures and that the development opportunities were difficult to quantify. In my opinion this amounted on the part of the Bank to a correction of any misrepresentation that occurred in the loose-leaf brochure. As Cartwright stated at para. 3-11:-
>
> > "Since the test for whether a statement is an actual misrepresentation generally looks to whether it was false at the moment it was acted upon by the representee, it follows that a misrepresentation which is made but is adequately corrected before the representee acts upon it is not longer actionable. In such a case it can be said either that there is no longer a misrepresentation, or that the representee in acting in the knowledge of the truth is no longer relying on the representation. The correction may be made by the representor, or by a third party, or by the representee independently discovering the truth. But the correction must be sufficient to remove the effect of the original misrepresentation: a partial or inadequate statement is not sufficient. Where, however, the true position appears clearly from the very terms of the contract which the representee claims to have been induced to enter into by the misrepresentation, the misrepresentation will have been "corrected" as long as the claimant is bound by those terms."

145. Once again I find myself in respectful disagreement with the trial judge. The Black Book did not, of course, repeat the figures giving in the loose leaf brochure(s) regarding the potential rate of return. There was, indeed, a statement in the Black Book to the effect that it was difficult to quantify the rate of return. This, however, was the extent of the correction, if such it can be fairly described. One thing, however, is clear: even if the Black Book statements can be regarded as a correction, they are at best a partial correction and they could not be regarded as being sufficient to have removed the impression on investors regarding the potential rate of return which the loose-lead brochures had served to create.

146. In any event, this was the limit of the extent to which the earlier misrepresentations contained in the second loose-leaf brochure by the Black Book had been corrected. As I have earlier found, the Black Book still contained three serious misrepresentations, none of which were corrected – even partially – prior to the execution of the contract by the plaintiff in October 2005.

147. What, then, were the misrepresentations on the part of the Bank which were contained in the Black Book? First, it endorsed the development potential opportunities found in the Black Book, even though by this stage Anglo must have known that the Foundation had not been given any opportunity – either by it or by Howard Holdings - of considering these proposals. Second, it asserted that the Foundation was in favour of the progressive nature of Howard Holdings' plans for the Centre, when the Bank must have known that this was not so. Third, it asserted that some 80,000 sq.ft. of retail space was on the cusp of being developed in the course of the Phase IV development without revealing that this could not happen without the surrender of a lease by the British Home Office, which lease had still five years to run. Nor was the plaintiff told at the meeting at Radisson Blu Hotel in Galway which was held a few days thereafter (sometime between the 12th and 19th October 2005) that some days previously the Home Office had refused to surrender the lease.

148. This in itself is sufficient to doom the Bank's defence to the action for actionable misrepresentation, unless the Bank can show by unequivocal evidence that despite the actionable misrepresentations the plaintiff would have invested in the project in any event. It is true that the plaintiff was interested in the handsome returns projected by the Whitgift Centre project as a whole, but a critical element of that investment was the development potential which the Bank had held out to the investors (including the plaintiff) as having had the imprimatur in principle of the Foundation, when this was simply not the case.

Causation
149. At the heart of the Bank's defence on the causation point is that the plaintiff stated in evidence that he would have been prepared to accept a return of 165% even though this is what was projected from the so-called "dry" case scenario*, i.e.*, simply asset management of the Centre even without actual re-development or the utilisation of any of these development opportunities. It was accordingly submitted that the plaintiff would have invested in the project anyway in reliance on the project's "dry case" projected returns.

150. This submission was accepted by Costello J. when she said (at para. 165):

> "The plaintiff gave evidence that he would have invested in the Whitgift Fund if it gave a return of 220%. As referred to above, his understanding was that this meant 220% including his own investment of €1 million. It was common case that a return of 165% (as set out in the loose-leaf brochure) meant the return of an investor's investment plus 165%. It was reasonable for the Bank to make this statement. This meant that the Bank made a reasonable representation to the plaintiff that he would get a return which was greater than that upon which, on his own evidence, he would have been prepared to invest in the Fund. It follows therefore that he has not established that he would not have invested in the Fund had he known the true figures (as he alleges) in relation to the projected returns for the asset management opportunities or the new development opportunities."

151. Again, I find myself unpersuaded by this reasoning. As I have already found in this judgment, the Bank is guilty of a series of negligent statements which amounted to actionable misrepresentation. With one possible exception - the first misrepresentation regarding the development opportunities which were mutually exclusive – all of these misstatements and misrepresentations were seriously misleading. If the plaintiff was, indeed, aware of these matters in the Autumn of 2005, I find it difficult to believe that he (or any other reasonable investor) would have persevered with this investment.

152. In this respect the present case is very different from *McCaughey v. Anglo Irish Bank* [2011] IEHC 54. In that case it emerged that the Bank had failed to disclose a zoning difficulty to potential investors who were considering investing in a New York property project. Birmingham J. found no causation, saying:

> "….no reasonable, prudent investor who found the proposed investment otherwise attractive is likely to have been dissuaded from investing by being told about the reality of the zoning issue."

153. Applying that test to the present one, it is hard to see how any reasonable, prudent investor would have continued with the Whitgift project had they known, for example, that, contrary to the express representations made by the Bank, the Foundation had been given no proposals for re-development or that it was not prepared to fund such proposals or that the British Home Office was in occupation of some of the lands on a lease that had over five years to run and that they had declined to surrender that lease.

154. It is, in my view, impossible on the facts of this case to segregate out the development potential from the other asset management aspects of the project: indeed, the Bank's own promotional literature at the time was the first to trumpet the importance of the development potential of these assets. Like many investors, the plaintiff was probably influenced by a range of factors. But, as O'Hanlon J. observed in *Donnellan v. Dungoyne Ltd.* [1995] 1 I.L.R.M. 388, 397, it is sufficient that the issue of development potential was " a contributing factor in inducing the plaintiffs to undertake the contractual commitments to the defendant….".

155. All the evidence showed that this was so. The plaintiff gave evidence that he would have stayed with the Knightsbridge option if the Whitgift project had simply involved passive asset management. He had explained that while he would have been prepared to accept asset management in Knightsbridge given its prestigious location, he would not have done so in the case of Croydon. The irresistible inference from the evidence of Ms. Deacy – who fairly acknowledged the plaintiff's interest in the re-development potential of these projects within the Whitgift Centre - is that she persuaded him to avail of the Whitgift option and to cancel the Knightsbridge option, precisely because of the development potential associated with the Croydon project.

156. The plaintiff's subsequent actions are also consistent with this conclusion. Between 2006 and 2008 he pursued with the Croydon planning authorities the issue of whether any application for development of the Centre had ever been lodged. In the light of all that has occurred, it is, perhaps, not surprising to learn that no such planning application for any development was ever subsequently lodged.

Conclusions
157. It follows, therefore, that for all the reasons specified in this judgment, this appeal must be allowed.

158. The sorry events described in this judgment – a veritable Pelion of misrepresentations heaped upon an Ossa of negligence– bring little credit to the Bank. In all of these respects, the conduct of the Bank fell below the standards of responsibility which this Court has every right to expect and demand from the holder of a banking licence and from that of its employees.

159. This conduct has had serious consequences for the plaintiff. By 2010 the value of the equity of each investor dropped to nil. The loss has subsequently crystallised by the sale of the underlying asset by the IBRC. These are losses which the plaintiff is entitled to say he would have avoided but for these misrepresentations and negligence on the part of the Bank.

160. It is, of course, true that the plaintiff entered into this investment knowing that it was high risk. But even those who invest in high risk projects are entitled to be protected by the law in respect of negligence and misrepresentation.

161. I would accordingly allow the plaintiff's appeal and remit the matter to the High Court for an assessment of damages. It follows from the terms of this judgment that I would also dismiss the notices to vary lodged by both the Bank and Stapleford against those findings of misrepresentation made by the High Court.