Neutral Citation Number: [2013] EWHC 3560 (Comm)

Case No: 2011 FOLIO 1267

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/11/2013

Before :

MR JUSTICE LEGGATT

- -

Between :

Gestmin SGPS S.A.	**Claimant**
- and -	
(1) Credit Suisse (UK) Limited **(2) Credit Suisse Securities (Europe) Limited**	**Defendants**

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- -

Philip Moser QC and **Fiona Banks** (instructed by **Ashfords LLP**) for the **Claimant**
Adrian Beltrami QC and **David Simpson** (instructed by **Gibson & Co. Solicitors Limited**) for the **Defendants**

Hearing dates: 3 – 21 October 2013

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Judgment

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MR JUSTICE LEGGATT:

A. INTRODUCTION

1. On 8 December 2005 the claimant in this case ("Gestmin") invested €11,150,000 in an Initial Public Offering of shares in a company called Queen's Walk Investment Limited ("QWIL"). It did so on the advice of the second defendant, Credit Suisse Securities (Europe) Limited. In this action Gestmin claims that the advice was negligent and asks the court to award damages for loss suffered as a result of making the investment.

The parties and the contract

2. Gestmin is a Portuguese company established in 2004 as an investment vehicle for Mr Manuel Champalimaud.

3. The defendants are companies in the Credit Suisse group of companies. It is common ground that the proper party to the claim is the second defendant and for convenience I shall refer to that company as "Credit Suisse".

4. It is not in dispute that in April 2005 Gestmin and Credit Suisse entered into a Client Agreement under which Credit Suisse agreed to provide private banking services to Gestmin consisting of "general investment advisory and dealing services in securities". The relationship manager for Gestmin and Mr Champalimaud's point of contact with Credit Suisse was Mr Humberto de Sousa who, like Mr Champalimaud, is Portuguese. At the relevant time Mr Sousa was a director of Credit Suisse, based in London but dealing mainly with Portuguese and Spanish clients.

The claim in brief

5. Between July 2005 and July 2006 Gestmin made a series of investments in financial products on the advice of Credit Suisse.

6. Gestmin's claim in this action relates to only one of the investments made: the purchase in December 2005 of 1,115,000 shares in QWIL at a price of €10 per share. QWIL was an investment company whose strategy was to invest in the 'equity' or 'first loss' tranche of mortgage-backed securities. For reasons that are now well known, that strategy has not proved to be a rewarding one for those who held investments in such securities at the time of the 'sub prime mortgage crisis' which began in 2007 and reached its height in 2008. In the last quarter of 2008 the quoted price of shares in QWIL fell as low as €0.51 per share. The value of the shares subsequently recovered somewhat but is still far below the price for which they were purchased by Gestmin.

7. Gestmin gave instructions to Credit Suisse in September 2006 to try to sell several of its investments, including its shareholding in QWIL. In November 2006 Credit Suisse was instructed to liquidate Gestmin's entire portfolio. For reasons which are in dispute, the shares in QWIL have still not been sold. It is agreed between the parties' financial experts that as at 30 September 2013 the value of the shares was around €3.9 million.

8. The first notification of a potential claim by Gestmin was a letter sent on its behalf by English solicitors to Credit Suisse on 14 September 2010. The present action was begun in October 2011, almost six years after the investment in QWIL was made.

9. Gestmin's central complaint is that QWIL was an unsuitable investment for Credit Suisse to recommend because it was an investment with high risk and low liquidity, whereas Gestmin's objectives were allegedly to make investments with low risk and high liquidity which would provide collateral for loans up to a high percentage of their value.

10. A striking difficulty which Gestmin faces in advancing this case is that, when Gestmin opened its account with Credit Suisse, Mr Champalimaud signed forms which identified Gestmin's investment objective as long term capital growth and indicated that Gestmin was prepared to accept a high level of risk and that its liquidity needs were low. Gestmin's response to this has been to allege that Mr Champalimaud signed the forms under a mistake as to their contents and that Credit Suisse was aware of and indeed responsible for this mistake.

11. Gestmin further alleges that Credit Suisse misrepresented and/or failed to explain to Gestmin the risks of investing in QWIL. A point is also taken that offering shares in QWIL to Gestmin allegedly involved a breach of Portuguese law.

Witnesses

12. In addition to Mr Champalimaud, Gestmin called six further witnesses of fact. They were:

    i) Mr Jorge de Abreu, a Portuguese lawyer who is an old friend of Mr Champalimaud;

    ii) Mr Fernando Lopes, the former Financial Director of Gestmin;

    iii) Ms Isabel Santos, who is Mr Champalimaud's secretary;

    iv) Mr Antonio Oliveira, the Investments Director of Gestmin;

    v) Mr Luis Medeiros, who is employed by Gestmin as a Financial Analyst; and

    vi) Mr Manuel Berberan, who works for Banco Portugues de Investimento ("BPI").

13. Credit Suisse called three witnesses of fact: Mr Sousa; his assistant Mr Clausell; and Mr Andreas Wichmann who also worked for Credit Suisse at the relevant time.

14. In addition, each party called an expert witness on financial investment and Gestmin (but not Credit Suisse) called an expert on Portuguese securities law.

Evidence based on recollection

15. An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.

16. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.

17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).

18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually

months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

21. It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.

22. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.

23. It is in this way that I have approached the evidence in the present case.

B. FACTUAL HISTORY

24. Before addressing the issues raised by Gestmin's claim, I will first recount the history of the relationship between the parties and record my findings on various matters of disputed fact.

Manuel Champalimaud

25. Mr Champalimaud is one of seven children of very rich parents. His father was a leading industrialist who was reported to be the wealthiest person in Portugal and his mother's family was also very wealthy. Mr Champalimaud's university education was interrupted first by military service and then by strikes and other protests in Portugal which culminated in the revolution in 1974. At that time he went to live in Brazil where he remained until the early 1980s. According to the evidence of his friend, Mr de Abreu, as a result of his family wealth Mr Champalimaud was "able to dedicate himself to leisure areas of life, where he became an outstanding sportsman (sailing, motorcar racing, shooting and flying – on which he took courses and qualifications)".

26. In terms of work experience Mr Champalimaud while in Brazil held a "corporate representative position" in a cement business owned by his father and, after returning to Portugal in the early 1980s, was involved in some real estate projects. His experience of investment was largely confined to property and industry rather than financial investments.

Incorporation of Gestmin

27. In April 2004, Mr Champalimaud's father died. Mr Champalimaud inherited substantial assets. Gestmin was incorporated at the end of 2004 to administer his inheritance. The assets transferred to Gestmin comprised shares in Banco Santander valued at €90 million, deposits of €31 million with BPI and shares in the holding company for the family businesses in Brazil.

28. In late 2004 a close friend of Mr Champalimaud suggested that he should consider using a first class financial institution such as Credit Suisse to help him invest his inheritance. The friend was himself a client of Credit Suisse and he introduced Mr Champalimaud to Mr Sousa.

Meeting in Zurich in March 2005

29. Mr Sousa set up an introductory meeting for Mr Champalimaud in Zurich. The program lasted two full days on 9 and 10 March 2005 and included presentations on a range of subjects from senior managers at Credit Suisse. As described in an internal Credit Suisse email, the object was "for us to roll out the VVIP welcome mat" and "talk expertly about topics like asset allocation, hedge funds, family office management etc in general terms". Mr Sousa further explained in evidence that Mr Champalimaud was a very important prospect for Credit Suisse and that on such occasions the "whole Credit Suisse 'machine' and resources are prepared to win a client like this".

30. The pitch was very successful, as on 15 March 2005 Mr Champalimaud wrote effusive emails to Mr Sousa and to one of Mr Sousa's colleagues at Credit Suisse stating how impressed he was with the quality of the meetings. He asked Mr Sousa to send the documentation needed to open accounts with Credit Suisse.

Mr Champalimaud's understanding of English

31. The presentations in Zurich were given in English. There was a good deal of evidence at the trial directed to the question of how well Mr Champalimaud understood English in 2005. Mr Champalimaud's ability to understand spoken and written English now is good. His witness statement was made in English and, although he began giving his evidence at the trial in Portuguese, he soon dispensed with the interpreter. Mr Champalimaud understood most of the questions asked and most of the text of English documents that he was asked to read, with only the occasional need for assistance. He said, however, that his English has improved greatly since 2005 and that his English at that time was "basic" and nothing like as good as it is now.

32. I accept that Mr Champalimaud's understanding of English has improved since 2005 but not that the change has been as dramatic as he has sought to suggest. I accept his

evidence that during the two day period of meetings held in Zurich there were various occasions when he was unsure of what was being said and needed some help from Mr Sousa to translate into Portuguese. I am sure, however, that Mr Sousa did not and did not need to act as a general interpreter and that Mr Champalimaud understood most of what was said in English at this and other later meetings without any assistance. I am also satisfied on the evidence that Mr Champalimaud was able to read and understand what I would term everyday communications in English such as emails, newspaper articles and presentation slides with reasonable fluency – albeit that he would have struggled with complex contractual and financial documents. For example, his communications with Mr Andreas Wichmann, who advised Mr Champalimaud on a part of his portfolio as I shall mention later, were all in English and I accept as reliable Mr Wichmann's evidence that he and Mr Champalimaud communicated without difficulty.

33. Almost all of Mr Champalimaud's communications with Mr Sousa were, naturally, in Portuguese; and where in this judgment I refer to or quote from emails between them I have relied on an agreed English translation of the original document.

Interest in buying the family cement business

34. On 8 March 2005, the day before his meetings with Credit Suisse in Zurich, Mr Champalimaud had attended a family meeting in Lausanne at which he and his brothers formally inherited the shareholdings in the company which controlled the family's Brazilian businesses. Mr Champalimaud's holding represented 9.5% of the share capital. He wanted, if he could, to acquire a controlling interest in the company – his plan then being to keep the main cement business and sell the other assets. Mr Champalimaud estimated that he would need around €120-130 million to do this.

35. Mr Champalimaud's evidence was that during his trip to Zurich he explained this to Mr Sousa and said that he would need to have liquidity available for this purpose. In his witness statement Mr Champalimaud also used the term "leverage" and said that he explained to Mr Sousa that "I needed to ensure that my financial assets had leverage so that I could take up the opportunity to buy the cement business in Brazil". In his oral evidence, however, Mr Champalimaud explained that there is more than one meaning of "leverage" and that he was not referring to borrowing money from a bank on the security of assets; rather he meant being able to transform his assets into something different – i.e. to use them to buy the Brazilian business.

36. It is inherently likely, and I find, that in Zurich Mr Champalimaud told Mr Sousa about his interest in acquiring the Brazilian business, should it prove possible – in which event most of Gestmin's assets would be needed for that purpose and there would be few funds remaining to invest through Credit Suisse. I also think it likely, however, that Mr Champalimaud would have regarded and described this possibility as unlikely to materialise, which was why he was actively considering investing his inheritance in financial assets on the advice of Credit Suisse. I think it unlikely that Mr Champalimaud mentioned to Mr Sousa the possibility of his investing in other industrial businesses because I do not think that he had developed any such plan at that stage.

37. After the meeting in Zurich Mr Champalimaud had further talks with his brother who also wanted to acquire the Brazilian businesses and very quickly concluded that,

because his brother had the support of another major shareholder, he would not succeed if he competed with his brother for control. Rather than remain a minority shareholder, Mr Champalimaud therefore decided to sell his 9.5% shareholding to his brother, which he did for €19 million. Accordingly, by the time Mr Champalimaud opened accounts with Credit Suisse in early April 2005 any possibility of buying the Brazilian businesses had gone.

Mr Champalimaud's financial sophistication

38. In his evidence Mr Champalimaud was at pains to emphasise his lack of expertise in financial investment and his reliance on Mr Sousa to guide him on what investments Gestmin should or should not make. I find that, when he was introduced to Credit Suisse, Mr Champalimaud had very little experience of financial investment and was not familiar with sophisticated financial products such as hedge funds. However, I consider that Mr Champalimaud had a good understanding of basic principles of finance and well understood concepts such as liquidity, leverage, diversification, income and capital growth, market fluctuations and the balance between investment risk and return.

Opening Gestmin's account

39. On 15 March 2005, in immediate response to Mr Champalimaud's email requesting the documentation needed to open accounts with Credit Suisse, Mr Sousa sent the necessary documents as attachments to an email addressed to Mr Champalimaud's secretary, Ms Isabel Santos. Like many of his emails to clients, this email had been drafted for Mr Sousa by his assistant, Mr Jose Clausell. The email ended with the statement: "I will contact you shortly to help with completion of the documents."

40. I am sure that Credit Suisse did indeed contact Ms Santos by telephone shortly afterwards to help her complete the documents and that the individual who did so was Mr Clausell, to whom Mr Sousa delegated such matters. That was Ms Santos' evidence and it is plain that she would not have been capable of completing the account-opening documents without assistance. The documents of most importance for present purposes are the Customer Profile Form and, to a lesser extent, the Portfolio Mandate which formed part of the Client Agreement. In the light of Gestmin's contention that Mr Champalimaud signed these documents under a mistake as to their contents, considerable attention has been devoted to attempts to reconstruct how and by whom these forms were completed.

The Customer Profile Form

41. In the case of the Customer Profile Form it is possible to reconstruct this process with a reasonable degree of certainty. Gestmin has retained a copy of the form marked "minuta" (i.e. "draft") on which all the handwriting is that of Ms Santos. In some places she has written "ver c/Mr Champalimaud" – meaning "check with Mr Champalimaud". It is clear, therefore, that Ms Santos had not yet spoken to Mr Champalimaud when she prepared this draft. It is also clear that Ms Santos would not without being told have known what to write on the form when specifying, for example, Gestmin's reason for opening the account and its investment objectives. I find that, as Ms Santos claimed in evidence, she entered this and other information on the form following guidance given to her over the telephone by Mr Clausell.

42. In a section of the form headed "Investment Objectives" the customer was asked to indicate "which of the following criteria represent the investment objectives of this account": (a) "Income", (b) "Capital Growth", (c) "Short Term" or (d) "Other". The customer was also asked to indicate "the level of risk this account is prepared to accept" as "High", "Moderate" or "Low". In answer to these questions, Ms Santos indicated "Capital Growth" and "High" risk. In addition, she ticked all the available boxes for the products in which Credit Suisse was authorised to deal and wrote "Hedge Funds" in the box where the customer was asked to specify any "other" products. Further, in a section about funding, Ms Santos indicated that there were no calls on Gestmin's income or funds that Credit Suisse should be aware of or take into account when planning the investments of the account.

43. Another section of the Customer Profile Form required the customer to give details of previous trading experience and to "describe the knowledge of investment risks and the extent to which any investment experience enables the person authorised to give orders on this account to assess the risks in the investment markets". At the top of this section of the form Ms Santos wrote "ver c/Mr Champalimaud" – meaning "check with Mr Champalimaud". In the boxes for indicating previous trading experience she wrote as an "example" 15 years' experience of trading in equities with an average size trade of US$1 million and an average frequency of two trades per month. To describe the customer's knowledge of investment risks she wrote:

> "Having traded for more than 10 years in all the kind of asset classes in my own name with several banks."

I find that all these answers were dictated or suggested by Mr Clausell.

44. Following her telephone conversation with Mr Clausell, Ms Santos prepared a fair copy of the Customer Profile Form, which she must have given to Mr Champalimaud to check – in particular where there were answers that specifically needed to be confirmed by him. The fair version of the form followed the draft in all material respects, except that Ms Santos left blank the boxes to indicate previous trading experience. I infer that she explained to Mr Champalimaud what Mr Clausell had said about this section, including the example he had given. Mr Champalimaud completed the relevant boxes so as to indicate that his experience comprised 10 years of trading in equities with an average size trade of US$1 million and an average frequency of one trade per month, and also 10 years' experience of trading in fixed income products with an average size trade of US$2 million and an average of 1-6 trades per month. Mr Champalimaud also altered the description of the customer's knowledge of investment risks so that it stated:

> "Having traded for more than 10 years in ~~all~~ the ~~kind of~~ asset classes <u>above</u> in my own name with several banks."

45. Mr Champalimaud acknowledged in evidence that the information he entered in the Customer Profile Form about his previous investment experience was false. He did not have the level of experience of trading in equities or fixed income products that he stated, or anything like it. The explanation given by Mr Champalimaud for this deliberate falsehood was that he was advised to insert the answers that he gave by Mr Sousa. I doubt that Mr Champalimaud spoke directly to Mr Sousa when he was completing the form. I do think it likely, however, that Mr Clausell told Ms Santos,

and that she passed on to Mr Champalimaud, something along the lines that in order to make investments for a customer in higher risk products such as hedge funds it would be necessary to demonstrate internally within Credit Suisse that Mr Champalimaud had substantial previous investment experience - consisting, for example, in having traded relatively frequently for at least 10 years in several asset classes. I further infer that Mr Champalimaud was willing to falsify his previous investment experience in response to this indication because he was attracted to the idea of investing in hedge funds, as had probably been suggested to him by Mr Sousa in Zurich.

46. In due course, when Mr Champalimaud decided to make various investments in hedge funds, Mr Clausell (on behalf of Mr Sousa) completed "transaction suitability forms" for the investments as an internal requirement within Credit Suisse. In completing these forms, Mr Clausell and Mr Sousa had to "explain why you think that this investment meets the needs and demands of the client and why you think that the client has sufficient knowledge and experience with financial products to evaluate the merits and risks of the proposed investment." Mr Clausell's approach in completing these forms, which was sanctioned by Mr Sousa, can most charitably be described as unconcerned with the truth. In answering the question in relation to investments made in July 2005 he wrote:

> "Client has invested in similar alternative investments through other banks not only in Hedge Funds but also in Private Equity."

This went well beyond even the lies which Mr Champalimaud had furnished in the Customer Profile Form. Mr Champalimaud had not invested in any such alternative investments previously through other banks and Mr Clausell had no reason to believe – and I am sure did not believe – that he had.

Portfolio Mandate

47. Another one of the account opening forms which Ms Santos completed – again, as I find, under the guidance of Mr Clausell – was a Portfolio Mandate. This form also required information about the customer's investment objectives. Four alternative investment objectives were described labelled "Income", "Balanced", "Growth" or "Cash Management", of which the customer was asked to select only one. Ms Santos ticked the box for "Growth". The description given for this objective was:

> "An emphasis on growth in capital over time. The pursuit of high returns results in greater risk to capital. The investment horizon is typically long term and liquidity needs are low."

48. Mr Champalimaud signed this form but was not required to date it. I infer that it was signed at or about the same time as Mr Champalimaud signed the Customer Profile Form on 28 March 2005.

Visit to London in April 2005

49. On 18 March 2005 Mr Sousa sent an email to someone at Cheyne Capital Management Limited ("Cheyne"). Cheyne is one of the largest UK hedge fund

managers and had a very close relationship with Credit Suisse. According to Mr Sousa, most of his clients and Credit Suisse's clients were invested in Cheyne hedge funds. In the email Mr Sousa said that Mr Champalimaud was going to be in London on 5 and 6 April 2005 and that he would like to arrange a meeting to present Cheyne and its different hedge funds to Mr Champalimaud. He stated that the objective would be to build a portfolio with Cheyne's hedge funds.

50. Gestmin has contended that Mr Sousa devised this objective without having discussed with Mr Champalimaud his willingness to invest in hedge funds. I regard that as improbable. I have no doubt that Mr Sousa was keen to encourage Mr Champalimaud to invest in hedge funds and specifically in those managed by Cheyne and another major UK hedge fund manager, Permal Investment Management Services Limited ("Permal"), with whom Credit Suisse also had a close relationship. It was clear from Mr Sousa's evidence that he regarded such investments as good for his clients and also good for himself and Credit Suisse because they were long term investments on which Credit Suisse received substantial fees and commissions on a recurring basis year after year. Mr Sousa explained that he was not paid a salary by Credit Suisse and that his entire remuneration depended on the amount of fees and commissions that he generated. I am also sure, however, that Mr Sousa would have been keen to advertise the advantages of investing in hedge funds to Mr Champalimaud at the earliest opportunity and would not have arranged meetings for him in London without having first discussed with him the object of the trip and the kinds of investment which were to be presented. I do not suppose that Mr Sousa had by that stage discussed with Mr Champalimaud a specific objective of building a portfolio with Cheyne's five hedge funds. I think it probable, however, that Mr Sousa had discussed and agreed with Mr Champalimaud in Zurich the plan that Mr Champalimaud would make a trip to London during which Mr Sousa would introduce him to the two hedge fund managers most favoured by Credit Suisse and receive presentations on their products. I have no doubt that there were also explanations given to Mr Champalimaud in Zurich of the general nature of hedge fund investment.

51. Mr Champalimaud duly came to London on 5 April 2005 and received presentations on that day from representatives of Cheyne and Permal, followed by dinner with Mr Sousa. On 6 April 2005 there were further meetings with various Credit Suisse personnel, which included presentations on topics such as "investment strategies", "investment management process" and "global strategy".

52. Mr Champalimaud brought with him to London the account opening documents, including the Customer Profile Form and Portfolio Mandate, which he had signed and which were then counter-signed by representatives of Credit Suisse on 6 and 7 April 2005.

53. Mr Champalimaud did not bring with him evidence of identification for the signatories on the accounts (who included Ms Santos and Mr Champalimaud's children). To avoid troubling Mr Champalimaud with a request to provide this, Mr Clausell prepared and signed in Mr Sousa's name on 7 April 2005 a series of documents entitled "record of home visit by a [Credit Suisse] employee". I am sure that these documents were prepared with Mr Sousa's blessing. Each such document purported to confirm that Mr Sousa had met with the person concerned at his/her principal residence at a specified address in Portugal – thereby dispensing with the need for further evidence of identification. As Mr Sousa and Mr Clausell

acknowledged, these statements were in each case wilfully false, as Mr Sousa had not visited the principal residence of any of the relevant individuals. This is another example of the low standard of ethics practised by Mr Sousa and his team at Credit Suisse as revealed by this case.

Meeting with Mr Wichmann

54. There was no rush to invest after Mr Champalimaud's visit to London. The next relevant event was a meeting in Lisbon on 31 May 2005 between Mr Champalimaud, Mr Sousa and Mr Andreas Wichmann. Mr Wichmann worked for the Investment Consulting Group within Credit Suisse and the purpose of the meeting was for Mr Wichmann to explain to Mr Champalimaud what services his group could offer. What was proposed was that Mr Wichmann would be allocated a relatively small proportion of the overall Gestmin account (€15 million in the first instance) which he would actively manage in consultation with Mr Champalimaud. The intention was to invest in whatever were considered to be the best investment opportunities at any particular time. It was proposed that, once this "advisory" portfolio had been built up over a period of about three months, it would be leveraged with another €15 million so as to increase the amount invested to €30 million.

55. Mr Sousa sent Mr Champalimaud on 10 June 2005 a résumé of what had been discussed with Mr Wichmann. The proposal to build the advisory portfolio was discussed again at Mr Sousa's next meeting with Mr Champalimaud, which took place on 24 June 2005 in Gestmin's offices in Cascais outside Lisbon. On this occasion Mr Sousa was also introduced to Gestmin's new Financial Manager, Mr Fernando Lopes, who had begun to work for Gestmin in May 2005.

Mr Lopes

56. In giving evidence, Mr Lopes was concerned to maintain, in the face of various documents showing otherwise, that his role at Gestmin was strictly limited to matters of accounting and that he was never involved with any financial investment made by Gestmin. I reject that evidence as demonstrably untrue. I do accept, however, that Mr Lopes had little experience or expertise in investment analysis.

The July 2005 investments

57. In July 2005 Gestmin made its first investments on the advice of Credit Suisse. These comprised a portfolio of hedge funds managed by Permal, Cheyne and another manager, GSO, and the advisory portfolio to be managed by Mr Wichmann. The total amount invested in hedge funds was €40 million, of which €15 million was invested in four Permal funds, €15 million in two Cheyne funds and €10 million in a GSO fund.

58. In an email to Mr Champalimaud dated 18 July 2005 Mr Sousa summarised in some detail the investment strategy he had agreed with Mr Champalimaud. This email recorded that the aim of the hedge fund portfolio was to generate above average absolute returns with a lower level of volatility and risk than investing in equities. Mr Sousa's email pointed out the various early redemption penalties and other restrictions on liquidity which attached to these investments. I am sure that these hedge fund investments, and the advisory portfolio, were understood and intended by Mr

Champalimaud to be long term investments pursuing an objective of capital growth. I am also sure that Mr Champalimaud understood that, in comparison with cash, the investments would have low liquidity and involve high risk.

59. Also mentioned in Mr Sousa's email dated 18 July 2005 and in other communications at around this time was the plan which Credit Suisse was pursuing, in consultation with Mr Champalimaud, of gradually selling Gestmin's very large holding of shares in Santander.

Industrial investment

60. At around the same time as these investments were made, in July 2005, Mr Antonio d'Oliveira joined Gestmin as Investments Director. His job was to identify potential investment opportunities in industrial companies. In giving oral evidence Mr d'Oliveira said that, when he started, he was given a budget of up to €50 million as the maximum amount for such investments. This corresponds to a statement made by Mr Sousa in an internal Credit Suisse memorandum in December 2006 that, when Mr Champalimaud started working with Credit Suisse, "he said that his direct investment would be capped at €50 million".

61. I find that this was Mr Champalimaud's intention in July 2005. His aim at that time was, with the assistance of Mr d'Oliveira, to look for some opportunities to invest directly in industry but only up to a maximum of €50 million. His intention was to invest most of his assets in a portfolio of financial investments through Credit Suisse. Mr Champalimaud may well have said to Mr d'Oliveira, as the latter recalled, that the financial portfolio would serve as "the lungs of the group", providing income for Gestmin to live off and potential for leverage to fund investments in industry. I do not consider, however, that Mr Champalimaud identified at that time any need for Gestmin's financial portfolio to have a high loan to value ratio ("LTV") or high liquidity.

62. As recorded in an email from Mr Sousa to Mr Jeremy Marshall, the CEO of Credit Suisse UK, on 21 August 2005, Credit Suisse had at that time a total of €130 million under management for Gestmin with the following breakdown:

i) €30 million in the advisory portfolio managed by Mr Wichmann;

ii) €40 million in a hedge fund portfolio;

iii) €37 million still invested in Santander shares (though these were gradually being sold); and

iv) The remaining amount (of €27 million) invested in money market funds and term deposits.

63. In that email Mr Sousa was happy to report to Mr Marshall that the account was generating commissions in excess of €1 million for Credit Suisse on an annualised basis. I find that the amounts of commission received by Credit Suisse were never disclosed by Credit Suisse to Gestmin nor did Credit Suisse ever provide Gestmin with any document disclosing the basis of commissions or other remuneration

receivable by Credit Suisse in connection with any transaction, as required by the terms of the Client Agreement.

Two more alternative investments

64. At a meeting with Mr Champalimaud in early October 2005 Mr Sousa presented two more alternative investments. These were China Harvest Fund LP, whose object was to invest in real estate in China, and CS Global Private Real Estate Fund LP, another property investment fund. It would have been apparent to Mr Champalimaud that these funds were long term investments with low liquidity. Gestmin subsequently invested in each of these funds.

Investment in QWIL

65. The investment in QWIL which is the subject of Gestmin's claim in this action was made on 8 December 2005. There is no documentary record of any meeting between Mr Sousa and Mr Champalimaud to discuss this investment. The only documents recording relevant communications are:

i) An email from Mr Sousa to Mr Clausell sent on 20 November 2005, evidently in anticipation of a trip to Portugal, instructing Mr Clausell to bring various information for Gestmin including (a) "consolidated figures to present to Fernando Lopes" and (b) a presentation from Credit Suisse on "Cheyne IPO" – which must be a reference to the Initial Public Offering of shares in QWIL. It appears that no copy of the presentation to which this email refers has survived.

ii) A Credit Suisse log entry for a meeting with Fernando Lopes at the Ritz Hotel on 22 November 2005 between 4 and 5 pm.

iii) A letter from Mr Clausell to Mr Lopes dated 29 November 2005 enclosing the preliminary prospectus for the QWIL share offer.

iv) An email from Mr Sousa to Mr Champalimaud (also copied to Mr Lopes) dated 8 December 2005, which refers to a telephone conversation the previous day and confirms two investments, one of which was the purchase of 1,115,000 shares in QWIL.

v) Emails from Mr Sousa to his CEO, Mr Marshall, dated 9 and 12 December 2005 arguing that Mr Sousa's group should receive a larger than usual share of the commission received by Credit Suisse from the sale of QWIL shares. One of the reasons advanced by Mr Sousa was his team's "efforts made in pitching our clients". He explained that "in order to be able to place Queen's Walk, we travelled together with Queen's Walk's managers to meet our clients and also had several conference calls with them."

66. Mr Champalimaud's evidence was that he specifically remembered discussing QWIL with Mr Sousa at the headquarters of Gestmin in Cascais. Mr Champalimaud did not remember Mr Lopes being at the meeting. Mr Champalimaud said that he could not remember what Mr Sousa said about the product but he recalls being worried about being over-exposed to investments managed by Cheyne. According to Mr

Champalimaud, Mr Sousa reassured him by telling him that the QWIL investment was a low risk product and equivalent to an AAA bond but with a return of over 13%. In his witness statement Mr Champalimaud referred to this as "an expected return of over 13%". In his oral evidence he described it as a "guaranteed" return. Mr Champalimaud also gave evidence that Mr Sousa told him that Credit Suisse was itself making a substantial investment in QWIL of €250,000.

67. Mr Lopes said in evidence that he remembered meeting Mr Sousa at the Ritz Hotel on 22 November 2005. He said that Mr Champalimaud asked him to go there and that Mr Sousa handed him some documents, which he then handed to Mr Champalimaud. He did not believe that he had any discussions with Mr Sousa about any financial products or investments; his only purpose was to collect documents for Mr Champalimaud.

68. Mr Sousa acknowledged that he had no recollection of any meeting with Gestmin to discuss investing in QWIL. However, he said that he arranged for all his clients in Spain and Portugal to receive presentations on QWIL from the Cheyne managers. In some cases he travelled to see the client, in some cases the client came to London to meet the managers, and in other cases the presentation to the client was made in a conference call. Mr Sousa was unable to state whether the presentation to Gestmin was made in a meeting or conference call and, if in a meeting, where the meeting was held. Mr Sousa denied that he would have made any of the representations alleged by Mr Champalimaud apart from mentioning a 13% return (which is indicated in the prospectus).

69. On this sparse evidence I am unable to come to any clear or definite conclusion as to how the investment in QWIL was presented to Gestmin. I think it likely, however, that Mr Sousa made a presentation of QWIL at a meeting on 22 November 2005 at the Ritz Hotel in Lisbon attended by Mr Lopes. I think it unlikely that Mr Champalimaud was also present for the following reasons:

i) Mr Sousa's email of 20 November 2005 and the log entry for the meeting refer only to Mr Lopes;

ii) The preliminary prospectus was subsequently sent to Mr Lopes;

iii) Mr Lopes's recollection of the meeting (for what it was worth) was that he collected documents to take back to Mr Champalimaud; and

iv) It is apparent that Mr Lopes was being given a fair degree of delegated responsibility at around this time to discuss investments – as evidenced by the fact that in January 2006 Mr Lopes made a two day visit to London without Mr Champalimaud during which he met (amongst others) Mr Wichmann and managers at Cheyne and Permal.

70. Mr Sousa's email of 8 December 2005 mentioned earlier shows that he had spoken on the telephone to Mr Champalimaud on 7 December 2005 to inform him of the number of shares in QWIL that Gestmin had been allocated – being about 89% of its order of 1,250,000 shares in circumstances where the offer had been over-subscribed. I am sure that Mr Champalimaud would not have decided to invest in QWIL without some prior discussion directly with Mr Sousa, and that Mr Sousa would have been keen to

speak to Mr Champalimaud in order to "pitch" the investment to him. I therefore think it likely that there was at least one earlier telephone conversation between Mr Sousa and Mr Champalimaud in which the investment was discussed. This may well have included a conference call with one of the Cheyne managers responsible for QWIL.

71. I will return to the question whether Mr Sousa made the representations alleged by Mr Champalimaud when I address the issues raised by Gestmin's claim.

72. Among the documents disclosed by Gestmin is a research report on QWIL prepared by Citigroup dated 8 November 2005. When asked about this document, Mr Champalimaud said he has been told by Mr Medeiros, who joined Gestmin in August 2006, that it was Mr Medeiros who obtained this document. I think that unlikely. I note that on 9 March 2006 one of Mr Sousa's assistants sent a similar Citigroup research bulletin on QWIL dated 8 February 2006 by email to Mr Lopes. I think it most likely that the November 2005 Citigroup research document was given to Mr Lopes at the meeting on 22 November 2005.

More investments

73. On 26 December 2005 Mr Champalimaud sent an email to Mr Sousa to confirm his agreement to make a number of new investments in January and February 2006. The email refers to "our various conversations on the subject of investments, particularly on 24 December 2005". It is apparent from an earlier email that Mr Champalimaud and Mr Sousa had had lunch together on Christmas Eve and that they were at that time on close terms. The new investments approved by Mr Champalimaud on 26 December 2005 were:

i) €9.5 million to be invested in two Permal funds;

ii) €10 million to be invested in the Cheyne Special Situation B Fund;

iii) The purchase of €2 million of shares in Caterpillar;

iv) Various investments recommended by Mr Wichmann for the advisory portfolio; and

v) Authority to leverage the advisory portfolio up to €15 million.

74. At the end of February 2006 Mr Sousa helped Mr Champalimaud and Mr Lopes to prepare a job description for a financial analyst. It is evident that Mr Champalimaud was looking to recruit someone to monitor Gestmin's portfolio of financial assets who had specific expertise in that area, which Mr Lopes did not have.

75. At a meeting with Mr Sousa on 9 March 2006 Mr Champalimaud agreed to switch €5 million from the Cheyne Multi Strategy Fund to the Cheyne Multi Strategy Leveraged Fund. A note of the meeting made by Mr Clausell indicates that this decision was influenced by the fact that "client knows Cheyne house". The note also records that, in addition to Gestmin's account, Mr Champalimaud had decided to open a personal account with Credit Suisse.

76. At the end of March 2006, on Mr Champalimaud's instructions, Gestmin made another hedge fund investment of US$7.5 million in the Jolly Roger Off-Shore Fund and a further €10 million was invested through Mr Champalimaud's personal account which included an investment of €5 million in the Cheyne Global Catalyst Fund.

The Celbi bid

77. On 7 April 2006 Gestmin submitted an indication of interest in acquiring a Portuguese company called Cellulose Beira Industrial SA ("Celbi"). Celbi was a company which had been started by Mr Champalimaud's mother's family in partnership with Swedish investors. Its business was producing paper pulp. Mr Champalimaud's mother's family had sold their share but now the owners of the company wanted to sell it. Mr Champalimaud decided that he wanted to make a bid for Celbi. In its indication of interest, Gestmin proposed to pay a cash purchase price of €425 million.

78. In late May 2006 Mr Champalimaud asked Credit Suisse to indicate how much it would lend Gestmin on the security of the financial portfolio in order to help finance a bid for Celbi. I find, however, that nothing about this prospective investment was said by Mr Champalimaud to Mr Sousa before then.

Meeting in April 2006

79. Mr Sousa had a meeting with Mr Champalimaud on 20 April 2006 to review the financial portfolio. A long summary of the matters discussed at this meeting sent by Mr Sousa to Mr Champalimaud on 24 April 2006 makes no mention of Celbi. The summary records investment decisions taken by Mr Champalimaud in relation to his and Gestmin's financial portfolio which reduced the potential to leverage the portfolio for purposes other than further financial investment. In particular, Mr Champalimaud decided that he wanted to increase the target return of the portfolio to double figures by making investments in leveraged products. To that end, he gave instructions to switch Gestmin's remaining investment of €5 million in the Cheyne Multi Strategy Fund to the Cheyne Multi Strategy Leverage Fund and to invest €5 million in a Credit Suisse structured product which was three times leveraged and represented a "dynamic basket of Permal hedge funds". Mr Champalimaud also gave instructions for two further hedge fund investments of US$2 million and €1 million. Further potential hedge fund investments were also discussed which might be added to the portfolio after the sale of the remaining Santander shares.

80. A decision was also made at the meeting on 20 April 2006 to sell a number of shares in QWIL to reduce that investment to €10 million. The strategy agreed was to sell the shares gradually without putting pressure on their price, "given the low liquidity of these shares". To reduce the investment to €10 million (at the price paid of €10 per share) it would have been necessary to sell 115,000 shares. However, only 10,000 shares were in fact sold at that time.

81. On 25 April 2006 Mr Champalimaud sent an email to Mr Sousa in which he confirmed that Mr Sousa's summary of their meeting "fully reflects the matters we addressed". There was nothing in Mr Sousa's summary about Mr Champalimaud's interest in bidding for Celbi or about the possibility of financing any direct investment in industry by leveraging the portfolio.

Loan request

82. On 30 May 2006 Mr Sousa sent to Mr Champalimaud as an attachment to an email a letter of that date from the credit department of Credit Suisse. The letter gave indicative lending values for the portfolio based on four different options. The options involved either keeping Gestmin's remaining holding in Santander shares or selling the Santander shares and using the proceeds in three alternative ways. On the most favourable option, the LTV indicated was 48%.

83. I infer that the request for these figures was made very shortly before they were provided, as an internal email from Mr Sousa dated 31 May 2006 refers to the "fast delivery" of the proposals.

84. A file note made by Mr Sousa of a telephone call from Mr Champalimaud on 1 June 2006 records that "the client was expecting a better LTV and asked us how could we improve it." Mr Sousa's file note also indicates that Gestmin was under pressure at that time to finalise its bid for Celbi, for which the deadline was 9 June 2006. The final offer which Gestmin submitted for the acquisition of Celbi on 5 June 2006 offered a purchase price of €333 million, which comprised debt of €200 million to be financed from the cash flow of the business and cash equity of €133 million. According to Mr d'Oliveira, Mr Champalimaud had expected to be able to raise the full amount of the proposed equity investment by leveraging the financial portfolio. As the value of the portfolio at that time was around €160 million, this would have required a LTV of the order of 80% - much higher than the maximum of 48% which Credit Suisse in fact offered. In his note of that telephone call Mr Sousa recorded that he went through with Mr Champalimaud "the liquidity issues related with his portfolio, mainly the lack of liquidity on private equity and hedge fund investments".

85. In his memorandum summarising the history of the account prepared in December 2006, Mr Sousa recorded that in this telephone call Mr Champalimaud showed his disappointment with the level of the LTV offered saying that he was frustrated with the lack of commitment from Credit Suisse backing his investments and that "any other bank could lend me much more … It looks like those assets are not mine!" In his evidence at the trial Mr Sousa said, I am sure accurately, that in his conversation with Mr Champalimaud on 1 June 2006 there was a change in tone from all their previous communications.

86. A conclusion I draw from Mr Champalimaud's reaction to the LTVs indicated by Credit Suisse is that, although he had understood that many of the portfolio investments – particularly those in hedge funds – were less liquid than, for example, his shares in Santander, and would if he had thought about it have appreciated that investments which were already leveraged would have a lower LTV, he had not previously recognised the implications which this would have for his ability to borrow against the portfolio. That was probably because he had not had cause to apply his mind to the value of the portfolio as collateral until he decided to bid for Celbi.

87. On 2 June 2006, as agreed in their telephone conversation the previous day, Mr Sousa sent by email to Mr Champalimaud "liquidity maps" showing the estimated value, LTV and liquidity (measured by the expected length of time it would take to realise the investment) for each investment in the portfolio. As shown in these liquidity maps, the most illiquid investments (such as China Harvest) had a LTV of 0. For

most of the hedge funds, the LTV was 40%. The investment in QWIL was also in this category, with a LTV of 40% and liquidity of 90 days.

88. There is no evidence that the lower than expected LTV indicated by Credit Suisse caused Gestmin to make a lower offer for Celbi than it would otherwise have done. In the event Gestmin was not successful in acquiring Celbi because another bidder made an offer which was almost 30% higher than Gestmin's.

89. In his witness statement dated 21 March 2013, Mr Champalimaud asserted that the lack of leverage available from his portfolio had the consequence that he "was not able to allow Gestmin to go forward and proceed with this attempt to purchase Celbi". This assertion was withdrawn and his witness statement corrected at the start of his evidence at the trial. By this time Mr Champalimaud had obviously been reminded of the documents which showed that Gestmin had in fact gone forward and submitted a final offer for Celbi and that the failure of its bid was unconnected with the LTV of the portfolio. In his evidence Mr Champalimaud attributed the error in his witness statement to a mistake made by Gestmin's former solicitors which was passed on to Gestmin's current solicitors. The mistake must have originated, however, from Mr Champalimaud's instructions and I have no doubt that he was still under the mistake when he made his witness statement. The significance of this error is simply that it is one of many illustrations of the extent to which Mr Champalimaud's recollection of relevant events so many years after they occurred has diverged materially from what actually happened.

Meetings in June and July 2006

90. Although Mr Champalimaud's disappointment at the lack of leverage available from Credit Suisse damaged their relationship, the damage was by no means terminal; nor did it cause Mr Champalimaud at that stage to change his investment strategy. Mr Champalimaud's confidence in Credit Suisse, however, was not improved by the fact that in May 2006 the portfolio recorded a negative return for the first time since the start of the relationship. This was discussed at a monthly meeting on 21 June 2006 when Mr Sousa visited Gestmin's offices. At this meeting Mr Sousa also discussed with Mr Champalimaud the asset allocation in the portfolio and went through the liquidity and redemption periods for each asset class.

91. The next monthly meeting on 20 July 2006 was also attended by Mr Wichmann and Mr Medeiros (who was shortly going to be joining Gestmin as a financial analyst). Mr Wichmann recorded afterwards:

> "I got a very positive feeling from our meeting with Gestmin in Cascais …"

Arrangements were made at the meeting for Mr Champalimaud's daughter to attend a Young Investors Program in Zurich organised by Credit Suisse – a further sign that Mr Champalimaud's relationship with Mr Sousa was still friendly. In so far as Mr Champalimaud sought to suggest that he was purely putting on a front at that time in maintaining good relations with Credit Suisse, I reject his evidence.

Gestmin's change of strategy

92. At the meeting on 21 June 2006 Mr Champalimaud told Mr Sousa that, although his bid for Celbi had not been successful, Gestmin would be looking for more direct investment opportunities in the short to medium term. He asked to have a new facility put in place secured on the portfolio for €45 million.

93. Mr Medeiros spent his first formal day in employment at Gestmin on 28 August 2006. In an email sent that day he informed Mr Sousa that one of his first objectives, along with the optimisation of the portfolio, would be to prepare a list of the assets in the portfolio in terms of their liquidity and the possibility of using them as collateral in the event of a financing operation. Mr Medeiros also indicated that he was open to ideas from Credit Suisse "to assess whether they fit into the strategy that Mr Champalimaud wants to implement".

94. On 21 September 2006 Mr Sousa and Mr Clausell attended a meeting at Gestmin's offices in Cascais with Mr Champalimaud and Mr Medeiros. At this meeting Credit Suisse was informed that Gestmin had now established new objectives for its portfolio. These objectives were confirmed in an email which Mr Medeiros sent the next day to Mr Sousa. As stated in that email, the new objectives were:

> "• High liquidity (specifically in terms of collateralisation)
>
> • Volatility of around 5% - 8% or one-off opportunities, substantiated, with higher volatility …
>
> • 2-digit profitability objective"

95. Mr Medeiros recognised that these were "peculiar conditions that reward the short term (in detriment to the long term), but which should not totally penalise profitability". He also stated that he was organising a fax to inform Credit Suisse of the changes to the objectives in the portfolio "under the terms we discussed".

96. Such a fax, prepared by Mr Medeiros and signed by Mr Champalimaud, was duly sent to Credit Suisse on 10 October 2006. The fax was written in English and stated as follows:

> "<u>Change in Gestmin's Investment Objectives</u>
>
> Gestmin announces that, following the Celbi acquisition process, it intends to change the investment objectives of its portfolio in Credit Suisse.
>
> The new objectives look for the maximisation of the liquidity in the portfolio, maintaining the current return/volatility bias.
>
> Following that change, we request Credit Suisse to re-analyse the current asset allocation and take the best efforts to search a solution for some of the illiquid positions."

97. Both Mr Champalimaud and Mr Medeiros in their evidence sought to suggest that what this fax meant was that Gestmin was changing the investment objectives for its

portfolio so as to bring them into line with the objective which Mr Champalimaud had always had of a liquid portfolio which could be used as collateral for direct investment in industry. I regard that evidence as an attempt to argue that black means white or white means black. The fax which Mr Medeiros drafted simply does not say that Gestmin wished to bring the portfolio into line with what had always been its objective of looking to maximise the liquidity of the portfolio. On the contrary, it stated that the maximisation of liquidity in the portfolio was a "new objective" and represented a "change in Gestmin's investment objectives".

98. Another suggestion made by Mr Medeiros and Mr Champalimaud is that the fax was prepared at the request of Mr Sousa and that they did not object to sending it because Gestmin needed the assistance of Credit Suisse in selling some of the investments in the portfolio. I think it likely that the fax was requested by Mr Sousa. That provides no reason to believe, however, that what it said was not true. The fax was in any case not the only communication from Gestmin which made it clear that its investment objectives had changed. In particular, as I have indicated, the fact that Gestmin had set new objectives for the portfolio which included high liquidity of assets to provide collateral for borrowing had already been explained in the email sent by Mr Medeiros to Mr Sousa on 22 September 2006.

99. I am in no doubt that the change in Gestmin's investment objectives first announced at the meeting on 21 September 2006 and recorded in the fax dated 10 October 2006 followed a broader change of strategy on Mr Champalimaud's part in the aftermath of the Celbi bid to look for other similar investment opportunities which might require greater borrowing than had previously been contemplated. Moreover, I infer from the reference in Mr Clausell's note of the meeting on 21 September 2006 to "the possibility of a new private equity deal … similar to the Celbi deal" that such an opportunity was by then under consideration. This was probably the investment made by Gestmin in the acquisition of a telecommunications company called ONI which was announced on 10 November 2006.

Instructions to sell QWIL

100. At the meeting on 21 September 2006 instructions were also given to Credit Suisse to use its best efforts to sell four of the more illiquid holdings in the portfolio. These included the shares in QWIL. The email sent by Mr Medeiros to Mr Sousa on 22 September 2006 summarising the instructions given at the meeting requested Credit Suisse to attempt to sell Gestmin's full holding in QWIL at a price up to 5 cents below the average price of the shares during the previous 15 days. The other investments which Gestmin also decided to sell were its holdings in China Harvest, the Credit Suisse Global Private Real Estate Fund and the Cheyne Multi-Strategy Leveraged Fund.

101. An internal presentation produced by Mr Sousa (or by one of his assistants on his instructions) dated 25 September 2006 gave the following "executive summary" of the position at that time:

> "• Gestmin is working on a new private equity transaction that
> will lead to important cash/leverage needs;

- Gestmin decided to review their CS portfolio's Asset Allocation by increasing its level of liquidity, in order to maximise its collateralised leverage;

- Our Credit Department is willing to lend €84MM against Gestmin's current portfolio worth €157MM (around 54% LTV), which is not enough for Gestmin's cash needs (€100MM+);

- The Client asked CS "best effort" to sell 4 of their illiquid holdings that have zero or very low assigned LTVs;

- The amounts invested/committed in those 4 holdings are in excess of €37MM;

- Client's decision to "sell" these holdings is related with their asset re-allocation (Gestmin feels comfortable with these investments and when they have invested in those assets they knew well the terms of the investments, namely their liquidity conditions);

- Given the importance of this Client (AUM €157MM / Annual Revenues in excess of €1.5MM) it is key to involve management and other CS groups in this process."

102. A further presentation slide relating to the investment in QWIL stated that the average daily volume was 3000 shares and identified for follow-up: "approach Cheyne Capital, other clients holding QWIL".

103. In October 2006 an opportunity arose to sell €500,000 worth of QWIL shares. Gestmin was willing to accept a price below the quoted ask price but above the bid price which the potential buyer was looking for. However, no deal materialised. Attempts were also made to sell QWIL shares in small tranches of 5000, though with a limit of €10.70 placed on the price which Gestmin would accept. However, only 3,915 shares were sold in this way.

Liquidation of the portfolio

104. In November 2006 Gestmin gave further instructions to Credit Suisse to sell most of the portfolio. An email from Mr Champalimaud dated 17 November 2006 informing Mr Sousa of this decision explained that it was due to other investments that Gestmin was making and disappointment with the quality, liquidity and performance of its investments with Credit Suisse. The CEO of Credit Suisse, Mr Marshall, travelled with Mr Sousa to Portugal for a meeting with Mr Champalimaud on 11 December 2006, in an attempt to rescue the relationship. However, Mr Champalimaud was now set on a strategy of investing Gestmin's funds directly in industry, with further such investments in the pipeline. He was intent on liquidating Gestmin's financial assets to raise cash for this purpose, even though this involved incurring penalties for early redemption in the case of some of the investments.

105. Over the following months, with the assistance of Credit Suisse, Gestmin sold almost all its financial portfolio. As Mr Medeiros explained in his witness statement, the selling of the investments which had low liquidity was undertaken “even if the performance of those products was good and in many cases despite the fact that there were relatively heavy redemption fees to be paid”. The reason for the sales was that Mr Champalimaud wanted Gestmin to have the money available to invest in industry.

106. Only two investments were not disposed of. One of these was an investment in the GSO Special Situations Fund, which Gestmin has still not been able to redeem. The other is the shareholding in QWIL which is the subject of this claim.

Subsequent history of the QWIL investment

107. The reasons why Gestmin did not sell any more of its shares in QWIL do not emerge with any clarity from the disclosed documents. Although there is conflicting evidence about trading volumes, it is apparent that there was little liquidity in the stock. There is also evidence that, although Gestmin wanted to sell its shares, it was not willing to do so at the prices offered in the market, which were lower than the price paid by Gestmin and what it believed the fair value of the shares to be. A further factor which informed Gestmin’s view of what the shares were worth was that in 2006 and 2007 QWIL was paying and expecting to continue to pay substantial dividends, with a target yield of at least 10%.

108. On 21 February 2007 Mr Medeiros reported in an email to Mr Champalimaud that the listed price of shares in QWIL had fallen to €9.4 per share, 6% below the IPO price, although the dividend yield remained above 10%. Mr Medeiros considered that Gestmin “should keep an eye on the position with a view to a possible sale at a price that we consider fair (around €10.75)”.

109. By 30 May 2007 the quoted price of shares in QWIL had dropped to €6.45. Credit Suisse arranged for a conference call on that day to enable Mr Medeiros to discuss the investment with Mr Jonathan Lourie, the President of Cheyne Capital. According to Mr Clausell’s note of the conference call, Mr Lourie suggested that the shares were trading at a price which did not reflect the net asset value and dividend prospects for the company. He also indicated that QWIL was looking into a program to buy back shares which would also improve their liquidity.

110. A buy-back program was approved in July 2007. This was followed by a tender offer in September 2007 in which the company offered to purchase between 10 and 25% of its shares for up to €25 million. The price paid depended on tenders received by QWIL and in the event the highest tender price accepted was €5.55. Another similar tender offer with a maximum payment of €15 million took place in December 2007.

111. Gestmin decided not to participate in these tender offers. As explained by Mr Medeiros in his witness statement, the difficulty with them was that they were at levels significantly lower than the price of €10 per share paid by Gestmin, and as a result they were considered unattractive.

112. In 2008 the quoted price of QWIL shares fell further. According to information produced by Dr Fitzgerald, the financial expert instructed by Credit Suisse, in December 2008 (shortly after the collapse of Lehmann Brothers) the quoted price

reached a low of €0.51. The price subsequently recovered somewhat and in the period 2010 – 2012 the quoted share price was in the region of €1-2 per share.

113. Gestmin still retains its entire shareholding of 1,115,000 shares purchased in December 2005, apart from the 13,915 shares sold in 2006.

Notification of Gestmin's claim

114. Notice of Gestmin's claim for damages for loss flowing from its investment in QWIL was first given to Credit Suisse in a solicitors' letter dated 14 September 2010. I accept the evidence of Mr Champalimaud and of Mr de Abreu that Mr Champalimaud had started to consider the possibility of making a claim some time earlier, probably in late 2008, and that there was some delay in finding and instructing English solicitors to act for Gestmin. The fact remains, however, that by the time the claim was first asserted almost five years had elapsed since the shares in QWIL were purchased.

115. As formulated in the particulars of claim and advanced at trial, Gestmin's case is that, in advising Gestmin to purchase the QWIL shares, Credit Suisse was negligent and in breach of duties of care owed to Gestmin in contract and in tort.

C. DUTIES OWED BY CREDIT SUISSE

116. As mentioned earlier, under the Client Agreement made with Gestmin, Credit Suisse agreed to provide "general investment advisory and dealing services". It is common ground that it was an implied term of the contract that Credit Suisse would perform those services with reasonable skill and care. It is also common ground that Credit Suisse owed a concurrent duty of care to Gestmin in tort.

117. The duty to exercise reasonable skill and care in giving investment advice applied only where such advice was given by Credit Suisse. Clause 1.6 of the Terms of Business of Credit Suisse which were incorporated in the Client Agreement stated:

> "You may on occasion ask us to effect certain transactions on your behalf without seeking our advice as to the merits of the transaction. On these occasions we will not be responsible for advising you as to their investment merits."

118. In its Defence and in opening its case at the trial, Credit Suisse did not admit that Mr Sousa had made any recommendation or given any advice to Gestmin as to the merits of buying shares in QWIL. That was never a promising position to adopt, particularly when (according to a letter dated 25 September 2013 from the solicitors acting for Credit Suisse) Mr Sousa's team received €140,490 in commission for selling the QWIL shares to Gestmin, and when Mr Sousa had argued at the time for an even larger slice of the total remuneration received by Credit Suisse in the light of his efforts made in pitching the deal to his clients. The position was rightly abandoned by Credit Suisse in its closing submissions, by which time Mr Sousa had admitted in evidence (albeit amidst considerable evasion) that he had indeed recommended the investment to Gestmin.

119. It is not in dispute that the duty of care owed by Credit Suisse to Gestmin in recommending the purchase of shares in QWIL included:

i) a duty to ensure that the investment was suitable for Gestmin, taking into account its investment objectives; and

ii) a duty to ensure that any statements made about the investment were factually accurate.

120. There is, however, an issue between the parties as to whether the duty of care owed by Credit Suisse also included a duty to explain and ensure that Gestmin understood the nature and risks of the proposed investment.

Was there a duty to explain risks?

121. In arguing that Credit Suisse owed a duty of care to ensure that Gestmin understood the risks of the investment, Mr Phillip Moser QC placed reliance on the provisions of the FSA Handbook at the relevant time relating to "private" customers. In particular, COB Rule 5.4.3 stated that a firm must not (amongst other things) make a personal recommendation of a transaction to a private customer "unless it has taken reasonable steps to ensure that the private customer understands the nature of the risks involved." Mr Moser submitted that, whilst the ambit of the duty of care owed by a financial advisor at common law is not necessarily co-extensive with the duties owed by that advisor under the applicable regulatory regime, its regulatory obligations afford strong evidence of what is expected of a competent advisor in most situations.

122. During the trial the Court of Appeal handed down judgment in the case of <u>Green and Rowley v The Royal Bank of Scotland PLC</u> [2013] EWCA Civ 1197. In that case the Court of Appeal rejected an attempt to argue that the mere existence of a regulatory duty <u>of itself</u> brings about the creation of a co-extensive common law duty. Tomlinson LJ (with whom Richards and Hallett LJJ agreed) emphasised that it is the nature of the relationship between the parties which gives rise to a duty of care at common law even where the performance of a statutory duty has brought about that relationship. Thus, the claimants in that case could not rely on COB Rule 5.4.3 to establish a duty to ensure an understanding of the risks involved in the transaction in circumstances where the relationship between the parties was not an advisory one. However, no doubt was cast on the proposition that where an advisory duty is undertaken – as it was by Credit Suisse in this case – the content of that duty is in part informed by the relevant regulatory rules. As Tomlinson LJ noted (at para 18), that approach has been endorsed on at least four occasions by first instance judges. The reasoning of those cases is that the skill and care to be expected of a financial advisor would ordinarily include compliance with the rules of the relevant regulator: see e.g. <u>Loosemore v Financial Concepts</u> [2001] Lloyds PNLR 235, 241, and <u>Shore v Cedric Financial Services Ltd</u> [2007] EWHC 2059 (QB).

123. I did not understand Mr Adrian Beltrami QC on behalf of Credit Suisse to dispute this proposition. However, he submitted that Gestmin did not fall within the definition of a "private" customer so that COB Rule 5.4.3 did not apply. That submission was plainly correct. In the FSA Handbook at the relevant time the definition of a "private" customer excluded a client who is an "intermediate" customer. The definition of an "intermediate" customer included a client who is not a "market counterparty" and

who is a body corporate with net assets of at least £5 million. Gestmin fell within that description. For the purpose of the regulations, Gestmin was therefore an "intermediate" customer and not a "private" customer. Accordingly, COB Rule 5.4.3 did not apply.

124. Mr Moser QC advanced an alternative argument, relying on a statement by Jonathan Parker J in Martin v Britannia Life Ltd [2000] Lloyd's Rep PN 412 at 6.2.2 that "the advisor's duty is to make sure, as far as he can, that the client's decision is an informed one". I find it difficult to accept that statement as an unqualified assertion. It seems to me that the extent of an advisor's responsibility to explain the nature and risks of a transaction must depend on the particular circumstances. I would accept, however, that where an advisor recommends an investment by pointing out potential benefits to the client, the advisor must take care to ensure that the presentation is a fair one and that it is not skewed or misleading by reason of omitting to mention material risks. What risks are sufficiently material that they ought to be specifically explained or highlighted is a matter of fact which depends on the context.

D. ALLEGED BREACHES OF DUTY

125. Gestmin's case that Credit Suisse was negligent and in breach of duty in advising Gestmin as to the merits of buying shares in QWIL has been put on five grounds.

126. Gestmin's primary contention is that the QWIL shares were an unsuitable investment having regard to Gestmin's investment objectives because the shares were a high risk investment with low liquidity whereas Gestmin required low risk investments and high liquidity which could be used as collateral for a high percentage of their value. This case presupposes that Gestmin's investment objectives were incorrectly stated in the Customer Profile Form and Portfolio Mandate. As mentioned earlier, Gestmin alleges that Mr Champalimaud signed those forms under a mistake as to their contents and seeks, if necessary, an order for rectification of the forms based on the doctrine of unilateral mistake.

127. As an alternative case, Gestmin argues that, even if the QWIL investment was consistent with its stated objectives, the investment was still unsuitable because of the risks involved.

128. Thirdly, Gestmin claims that it was induced to buy the QWIL shares by misrepresentations about the nature of the investment allegedly made by Mr Sousa in a conversation with Mr Champalimaud.

129. The fourth way in which the case is put is that Credit Suisse is said to have failed properly to explain the risks of the investment.

130. Lastly, Gestmin makes a case that it was mis-sold the shares because under Portuguese law it was only permissible to sell shares in the initial offer to "institutional investors", and Gestmin was not such an investor.

131. I will consider each of these five bases of the claim in turn.

(1) Consistency with Gestmin's investment objectives

132. Gestmin's primary case is based on the contention that its investment objectives at the time of the investment in QWIL were not as stated in the Customer Profile Form and Portfolio Mandate. Gestmin contends that, contrary to what was stated in those forms, it required low risk investments, with high liquidity and a high LTV. The experts have agreed that the QWIL shares represented a high risk investment which would not have been a suitable investment for a client with those objectives.

133. The first question which it is necessary to decide is therefore whether the account opening documents accurately stated Gestmin's investment objectives. I am satisfied that they did for the following seven reasons.

134. First, while I have found that the relevant parts of the Customer Profile Form and Portfolio Mandate were completed by Ms Santos under the guidance of Mr Clausell of Credit Suisse, I reject as fanciful the suggestion that Mr Clausell or Mr Sousa suggested answers to the questions about Gestmin's investment objectives which they did not believe or had no reason to believe were true. Given my finding of false statements made in other documents, I do not start with any presumption of integrity in their favour. But simple prudence and the incentive to build a successful relationship with a potentially very important customer provided powerful reasons not to pursue investment objectives which Mr Champalimaud had not actually endorsed and not to miss-state his objectives in the forms he was asked to sign. It would have been foolhardy to invite Ms Santos to indicate false investment objectives in the forms in the hope that Mr Champalimaud would not notice. Credit Suisse had to expect that Mr Champalimaud would read through the forms before he signed and returned them, whether or not he in fact did. The allegation made on behalf of Gestmin that there was some (not clearly specified) form of sharp practice by Credit Suisse is therefore in my view improbable and entirely unsubstantiated.

135. There is at least in theory an alternative possibility that a failure of communication or misunderstanding might have occurred with regard to Gestmin's investment objectives between Mr Champalimaud and Mr Sousa or between Mr Sousa and Mr Clausell or between Mr Clausell and Ms Santos. However, that possibility seems to me to be fairly remote.

136. Second, I am sure that Mr Champalimaud did in fact read through at least the Customer Profile Form and that he understood its contents. The form was only a few pages long, was well within Mr Champalimaud's capacity to understand and was of obvious importance. Moreover, he was specifically asked to check some of the information given in the form and did so, making and initialling hand written amendments. On looking through the form, the circles around the words "Capital Growth" under the heading "Investment Objectives" and "High" in relation to the level of risk stand out. Indeed Mr Champalimaud accepted in his evidence that he must have read the selection of "High" risk and that he understood the ordinary meaning of those words. Mr Champalimaud's explanation of why in these circumstances he signed the form involved a motor racing analogy. He likened using the services of Credit Suisse to agreeing to be driven by the Formula One driver Lewis Hamilton. He said that if he was told that he was going to be driven very fast with risky driving, he would trust that with someone as skilled as Hamilton he would be safe; and in the same way he trusted that he would be safe investing through Credit

Suisse. He said he thought "high risk to Credit Suisse was relative, something that could be low risk for me could be high risk to Credit Suisse and I did accept this in a naïve way".

137. That evidence from Mr Champalimaud amounts to saying that he deliberately chose to invest in high risk financial products and did so because he had confidence in the skill and judgment of Credit Suisse. Whether or not that confidence was misplaced, this evidence is inconsistent with Gestmin's case. It shows that Mr Champalimaud was indeed prepared to accept a high level of risk, as stated in the Customer Profile Form.

138. Although I cannot be so confident of this, I think it is also more likely than not that Mr Champalimaud read, understood and knowingly approved (a) the indication on the Customer Profile Form that there were no anticipated expenditure requirements Credit Suisse should be aware of or take into account when planning the investments for Gestmin's account and (b) the selection in the Portfolio Mandate of "Growth" as Gestmin's investment objectives, including the description of this objective as suitable where the investment horizon is long term and "liquidity needs are low".

139. Third, if there were otherwise any doubt about whether Mr Champalimaud deliberately chose to invest in higher risk products through Credit Suisse it is removed by the terms of an email which he sent on 9 May 2005 to Mr Berberan, a manager in the Private Banking Department of BPI, who had also made a proposal to Mr Champalimaud for financial investment. In that email Mr Champalimaud wrote:

> "I'm studying some applications with Credit Suisse that involve higher risk but which also have promising returns. I intend to substantially reduce my liquidity in BPI, not because of any lack of service, but because I am interested in products that are not available in BPI."

140. Fourth, the investments which Mr Champalimaud decided to make in July 2005 on the advice of Mr Sousa in hedge funds and in an "advisory portfolio" which would be leveraged using the initial investment as collateral were obviously of a long term, illiquid nature and required acceptance of higher risks in pursuit of higher returns. I am sure that Mr Champalimaud understood that, not least because it was made clear in the email sent to him by Mr Sousa on 18 July 2005. The same applies to most, if not all, of the subsequent investments made in December 2005 and April 2006, including the investment in QWIL. I am sure, for example, that when in April 2006 Mr Champalimaud adopted the aim of achieving a double digit annual return by investing in leveraged hedge funds, he was consciously pursuing a strategy of investing in higher risk products with low liquidity in the hope of high returns.

141. Fifth, I consider that Mr Champalimaud was happy to adopt that strategy because he did not at the time have any plan to allocate a significant proportion of his wealth to direct investments in industrial companies. I have found that any idea of acquiring the family cement business, to the extent that it was ever a serious prospect, disappeared before Mr Champalimaud opened Gestmin's account with Credit Suisse and that his intention at the time when he was deciding on the investments for Gestmin's financial portfolio was to limit any direct investment in industry to a maximum of €50 million – which would not require the portfolio to be liquid. It was

only when Mr Champalimaud decided to bid for Celbi and then re-evaluated Gestmin's investment objectives in the aftermath of that bid that the need for high liquidity and a high LTV arose.

142. Sixth, I have found that the change in Gestmin's investment objectives communicated to Credit Suisse in September and October 2006 was exactly that, and involved adopting a new objective of maximising the liquidity of the portfolio in order to support greater borrowing for direct investments – as recorded in the contemporaneous documents. It is notable that even in September 2006, although now seeking high liquidity, Gestmin was still pursuing an objective of two digit profitability – which indicates that Mr Champalimaud (now assisted by Mr Medeiros) was even then still prepared to accept a high level of risk in pursuit of high returns.

143. Mr Champalimaud's decision to attempt to sell Gestmin's shares in QWIL was therefore taken only after Gestmin's investment objectives changed and the company now required high liquidity.

144. Seventh, if Mr Champalimaud had believed at the time when he decided to liquidate Gestmin's portfolio that the investment in QWIL – and all the other illiquid investments in the portfolio – had been inconsistent with Gestmin's objectives when they were made, I do not consider that he is a man who would have kept silent about that. I reject the suggestion that a decision was taken not to say anything critical of Credit Suisse because their co-operation was needed in trying to dispose of the unwanted investments. If Mr Champalimaud had thought that Credit Suisse had failed to respect Gestmin's investment objectives when they had recommended the QWIL investment (or any other investment) to him, I am sure he would have said so and given that complaint as a reason why he expected Credit Suisse to help him dispose of the investment on the best possible terms. He would certainly not have waited several years, as in fact occurred, before making any complaint about the recommendation to invest in QWIL.

145. For all these reasons, I conclude that Gestmin's investment objectives were correctly stated in the Customer Profile Form and Portfolio Mandate and remained accurate when Mr Champalimaud accepted the recommendation to buy shares in QWIL. The QWIL investment was therefore consistent with Gestmin's investment objectives.

(2) Gestmin's alternative case on suitability

146. In opening Gestmin's case at the trial, Mr Moser QC made a submission that, even if the Customer Profile Form accurately identified Gestmin's investment objectives, Credit Suisse acted in breach of its duty only to recommend suitable investments in light of "the litany of risk factors associated with the QWIL investment". No details of this alternative case were given in the particulars of claim, where the allegation of unsuitability is based solely on the premise that Gestmin's objectives required investments to be (a) low risk, (b) fully liquid and (c) suitable for use as collateral for a high percentage of their value. However, Mr Moser sought to base his submission on the evidence of Gestmin's financial expert, Dr Wallace Wormley.

147. In his expert report Dr Wormley explained that he had been instructed to answer two questions regarding the suitability of the QWIL investment. Those questions were whether the QWIL shares were a suitable investment for Gestmin on the alternative

hypotheses (a) that the Customer Profile Form correctly reflected Gestmin's investment objectives and (b) that Gestmin's objectives were as pleaded in the particulars of claim and stated in Mr Champalimaud's witness statement. Unfortunately, in giving his opinion in his report, Dr Wormley did not answer these two separate questions, in that he addressed the issue of suitability without at any point indicating whether he was doing so on the assumption that the Customer Profile Form did, or that it did not, accurately reflect Gestmin's investment objectives.

148. Even apart from this elementary flaw, the evidence on the issue of suitability given by Dr Wormley in his report was not satisfactory. The basis of his opinion that QWIL was not a suitable investment for Gestmin in 2005 was stated as being "the extraordinary litany of risk factors" articulated in the pathfinder prospectus and final prospectus for the QWIL shares. Having made this statement, Dr Wormley set out over the following five pages of his report a list of some 40 risk factors taken from the QWIL prospectus. He then asserted that this long list of risk factors made investing in QWIL "a step too far into the risk quagmire".

149. No analysis or explanation was offered by Dr Wormley, however, as to which of the 40 factors listed in the prospectus took Gestmin too far into the "risk quagmire", or why, or indeed how the question of what in Dr Wormley's opinion was too far into the quagmire is to be decided. To the extent that it was possible to guess what, if any, thinking underlay Dr Wormley's statement, the impression given was that he thought that the sheer number of risk factors mentioned in the prospectus was what made the investment unsuitable for Gestmin. This impression gained some encouragement from the conclusion stated at the end of Dr Wormley's report:

> "I conclude that given the overwhelming number of risk factors and the lack of mapping of the client's articulated objectives of liquidity to purchase operating business [sic] an investment in a risky fund, without liquidity was not a suitable product for Gestmin."

This suggested that, in so far as Dr Wormley's opinion did not depend on the assumption that Gestmin's articulated investment objectives included a requirement of high liquidity, it was simply the number of factors listed in the prospectus which in Dr Wormley's view made QWIL an unsuitable product for Gestmin.

150. An approach which measures financial risk by simply counting the number of risk factors mentioned in an investment prospectus would seem, at least to the uninitiated, hopelessly simplistic. It would make sense only if all risk factors carry equal weight, which they manifestly do not. Moreover, in commenting on Dr Wormley's report, the expert instructed by Credit Suisse, Dr Desmond Fitzgerald, observed that issuers habitually provide exhaustive lists of potential risks to would-be investors to avoid any danger of later being accused of not describing any of the risks and that there was nothing abnormal in the number of risk factors mentioned in the QWIL prospectus. I accept that evidence.

151. In the event, in his oral evidence Dr Wormley did not maintain that the number of risk factors listed in the prospectus entailed that the QWIL shares were an unsuitable product. However, he picked out in the witness box six of the 40 factors listed in the prospectus and in his report and suggested that it was the combination of those six

factors which made the QWIL investment unsuitable. Why those factors, or the combination of them, rather than other risk factors listed were regarded by Dr Wormley as particularly significant, or significant for Gestmin, never became clear from his evidence. The selection of some of them – for example the risk that there might be changes in the tax treatment of investments and special purpose vehicles – appeared more or less arbitrary. It was difficult to avoid the impression that, in giving his opinions, Dr Wormley was making them up as he went along.

152. Dr Wormley was rightly pressed by Mr Beltrami QC as to whether he was saying that the combination of risk factors that he highlighted made the QWIL shares an unsuitable investment for any investor or only an unsuitable investment for Gestmin. Dr Wormley never properly answered that question. Although QWIL's strategy of investing in the first loss tranche of mortgage-backed securities has proved to be a bad one, Dr Wormley did not suggest that this should have been apparent to any reasonably competent financial advisor in 2005. He accepted that Cheyne, the investment manager for QWIL, was a well-reputed manager, that the share offering was underwritten by three major investment banks and that the research departments of at least two major investment banks took a positive view of QWIL as an investment. It is notable too that the share offer was over-subscribed. In these circumstances it would seem hard to maintain – and I did not understand Dr Wormley to try to maintain – that QWIL was an inherently unsuitable investment for any reasonably competent financial advisor to recommend to any client. On the other hand, Dr Wormley did not identify any particular characteristics of Gestmin which made the investment unsuitable for Gestmin on the assumption (which I have found to be correct) that Gestmin was prepared to accept a relatively high level of risk and low liquidity in pursuit of higher returns.

153. In so far as it was based on anything other than the untenable suggestion that the mere number of risk factors listed in the prospectus made the QWIL investment unsuitable, I do not consider that the alternative case heralded by Mr Moser in opening is one which it was open to Gestmin to advance. No notice of such a case had been given before Dr Wormley gave oral evidence. No such case was put in cross-examination to Mr Sousa, and Credit Suisse did not have a fair opportunity to meet it. But in any case Dr Wormley's evidence was incoherent and did not provide any reasonable basis for any alternative case as to the alleged unsuitability of the QWIL shares.

(1) The misrepresentation claim

154. The claim that Gestmin was induced to buy the QWIL shares by misrepresentations made by Mr Sousa to Mr Champalimaud depends entirely on the recollection of Mr Champalimaud eight years after the relevant events. The representations are said to have been made orally at a meeting in Gestmin's offices in Cascais some time in November 2005. As mentioned earlier, the representations alleged are that QWIL: (a) was a "low risk product" and was equivalent to an "AAA bond"; (b) had an expected return of over 13%; and (c) had been the subject of a substantial investment from Credit Suisse.

155. There is no record of or reference to any of these representations in any contemporaneous document – nor even in any non-contemporaneous document created before this action was begun. There is no witness to the alleged representations other than Mr Champalimaud. And I have found that the meeting at

which they are said to have been made probably did not take place. I have also found Mr Champalimaud's recollection of relevant events to be generally unreliable. These circumstances alone mean that the misrepresentation claim must fail for lack of proof.

156. There are five further reasons, however, why I cannot give credence to Mr Champalimaud's testimony that the alleged representations were made:

i) As mentioned earlier, it was Mr Champalimaud's evidence that the representations were made to reassure him when he expressed concern that there was too much investment with Cheyne. I think it unlikely, however, that Mr Champalimaud expressed or had such a concern at the time, not least because he chose on 24 December 2005 (immediately after the QWIL investment) to invest a further €10 million with Cheyne, followed by another €5 million investment in the Cheyne Global Catalyst Fund at the end of March 2006.

ii) I think it inherently unlikely that Mr Sousa would have described QWIL as a "low risk product" or the equivalent of an "AAA Bond" when it was apparent from the preliminary prospectus and from the Citigroup research bulletin which was also probably provided to Gestmin that QWIL was not a low risk investment and plainly nothing like an AAA bond. Although Mr Sousa would not necessarily have expected Mr Champalimaud to study the prospectus or the Citigroup research, I do not think he could or would have assumed that Mr Champalimaud would ignore those documents.

iii) It is quite conceivable that Mr Sousa said that QWIL had an expected return of at least 13%, as this was indicated in the prospectus and the Citigroup research. If such a representation was made, it would therefore have been true. I think it equally, if not more likely, however, that Mr Champalimaud's recollection of this information derives from reading one or both of those documents (either at the time of receiving them or, more probably, some time later when he became concerned about the investment). Moreover, the fact that in his oral testimony Mr Champalimaud embellished what he had said in his witness statement by claiming that Mr Sousa had represented that the return was "guaranteed" further illustrates the unreliability of his evidence.

iv) Mr Champalimaud's evidence that he was told by Mr Sousa that Credit Suisse had itself made a substantial investment in QWIL is not credible. Credit Suisse did not itself invest in QWIL and it is improbable that Mr Sousa would have invented such a claim. Moreover, Gestmin's case and Mr Champalimaud's evidence as to the amount of the alleged investment has vacillated. In the particulars of claim dated 20 February 2012 it was said to be €250 million. However, in Mr Champalimaud's witness statement dated 21 March 2013 the amount was said to be €250,000. At the start of the trial, presumably on instructions, Mr Moser applied for and was granted permission to amend the particulars of claim to change the figure of €250 million to €250,000 in line with Mr Champalimaud's witness statement. However, when called to give evidence, Mr Champalimaud said that the figure of €250,000 given in his witness statement should be changed to €250 million. The difficulty for Mr Champalimaud, which probably explains his vacillation on the point, is that neither figure makes sense. An investment of €250,000 would not have been a significant sum for Credit Suisse or much of an inducement to Mr Champalimaud to invest over €11 million of Gestmin's money. On the other hand, €250 million would have been more than the entire value of the offer shares (which was €225 million). The origin of Mr Champalimaud's recollection may be a statement in the prospectus that the Underwriters of the share offer (Citigroup and Goldman Sachs) would subscribe for 250,000 shares (at the offer price of €10 per share). Mr Champalimaud may well have transposed this information into a belief that he was told that Credit Suisse (which was not an underwriter but was a co-manager) would be investing in shares worth €250,000 (or €250 million).

v) The reliability of Mr Champalimaud's evidence is undermined yet further by the fact that the representations alleged were not mentioned in the letter before claim dated 14 September 2010. That letter did contain a general allegation that "the characteristics of the QWIL investment were misrepresented/not disclosed by [Credit Suisse]". However, when Credit Suisse asked for particulars of this allegation, the answer given by Gestmin's solicitors (in a letter dated 28 October 2010) indicated that no specific representation was being alleged; the contention was that by presenting QWIL as an investment suitable for Gestmin Mr Sousa impliedly represented that it conformed with Gestmin's objectives and was therefore a low risk, liquid investment with a high LTV. The first occasion on which specific oral misrepresentations by Mr Sousa were alleged was in the particulars of claim dated 20 February 2012. Mr Champalimaud sought to attribute the omission of this allegation from the letter before claim and subsequent correspondence to the incompetence of his former solicitors. I think it much more likely that Mr Champalimaud did not at that stage recall the representations allegedly made by Mr Sousa and that his subsequent recollection is not founded on fact.

157. I accordingly reject Gestmin's misrepresentation claim.

(4) Alleged failure to explain the risks

158. Part of Gestmin's case, as stated in the particulars of claim, is that Credit Suisse failed to provide any or any proper advice or explanation as to the nature and risks of the QWIL investment. I have already considered the extent to which it can be said that Credit Suisse owed a duty to give any such advice or explanation as a matter of law. As a matter of fact, however, no details of any specific risks which Credit Suisse ought allegedly to have explained were identified in Gestmin's statements of case; nor did Dr Wormley address this question in his expert report.

159. Despite this, in its closing submissions at the end of the trial Gestmin set out nine alleged risks of the QWIL investment and argued that Credit Suisse had a duty to advise and to warn Gestmin of all of these risks. In making this argument Gestmin sought to rely on answers given during cross-examination by Dr Fitzgerald, the expert witness called by Credit Suisse.

160. Gestmin's attempt to develop its case in this way at the end of the trial is not legitimate. It is a basic principle of procedural fairness that a party is entitled to know what case it has to meet before it presents its own case and its witnesses give

evidence. Gestmin's approach, if permitted, would stand that principle on its head. For this reason even if for no other, Gestmin's claim must be rejected.

161. In any event, with one exception, the evidence of Dr Fitzgerald on which Gestmin seeks to rely went no further than to agree that various factors put to him were risks of the QWIL investment. He did not express any opinion – and it was not suggested to him – that the risks in question were of sufficient importance that they should have been specifically highlighted or drawn to Gestmin's attention. In the case of most of the factors, it is scarcely surprising that no such suggestion was made. For example, I find it difficult to see why the fact that Gestmin had already invested substantial sums in other funds managed by Cheyne should be regarded as a significant risk factor, especially when different individuals were managing the different funds and the company which chose and employed them (Cheyne) evidently had a good track record and reputation. The risk was described as an "operational" risk that Cheyne might become insolvent thereby causing difficulties for all the funds under its management. However, that concern strikes me – in the absence of any evidence to the contrary, of which there was none – to fall a long way down the risk scale.

162. The risk factor on which Mr Moser sought chiefly to rely in his closing argument was that there was "an extra volatility on top of net asset value" arising from the structure of QWIL as a company with shares listed on the stock exchange. In relation to this factor, unlike any of the others, Mr Moser obtained the support of Dr Fitzgerald's acceptance in cross-examination that it would be a "good thing" for an investment advisor to ensure that a client understood the nature of this risk. I think it probable, however, that in December 2005 Mr Champalimaud had sufficient understanding of investments to appreciate, without needing to be specifically warned, that the market price of a share does not necessarily correspond to the net value of the company's assets and may be subject to volatility. Mr Sousa, for what little it is worth, said in evidence that he is "100% sure" that Mr Champalimaud understood this. That aside, based on my general impression of Mr Champalimaud's level of financial knowledge at the time, I am not prepared to find that an advisor presenting the QWIL investment to Mr Champalimaud would have needed to spell out this characteristic of an equity investment.

163. A further fatal defect in Gestmin's case is that it has failed to prove that Mr Sousa did not in fact explain or ensure that Mr Champalimaud understood the risk of "extra volatility" or any of the other risks canvassed with Dr Fitzgerald. Mr Champalimaud was not asked whether or not Mr Sousa had warned him of those risks – for the very good reason that at the time when he was giving evidence the duty to warn of those particular risks did not yet form part of Gestmin's case. It was in any case clear and inevitable that neither Mr Champalimaud nor Mr Sousa had any real recollection of what Mr Sousa said about the nature and risks of the QWIL investment. Furthermore, as mentioned earlier, the written presentation which Credit Suisse apparently prepared does not appear to have survived. In these circumstances there is no evidence on which I could properly conclude that Credit Suisse failed sufficiently to explain to Gestmin any material feature or risk of the QWIL investment.

164. In its closing argument Gestmin submitted that the court is in no position to make a finding that Gestmin was properly advised of the risks inherent in the investment. I accept that submission. However, the court is also in no position to find that Gestmin was <u>not</u> properly advised of such risks. It is Gestmin which bears the burden of

proving its claim and it was unable to do so. Even if the case which Gestmin has sought to pursue on this issue were open to it, therefore, that case must be rejected for lack of proof.

(5) The Portuguese law issue

165. The final issue raised by Gestmin's claim is a discrete point arising out of the fact that the preliminary prospectus for the QWIL IPO sent by Credit Suisse to Gestmin on 29 November 2005 contains the following statement:

> "… The Offer Shares may only be sold, offered or distributed in Portugal, in compliance with Article 110 of the Portuguese Securities Code … to Institutional Investors … Accordingly, this Prospectus … may only be distributed in Portugal to Portuguese Institutional Investors and may not, in any circumstances, in whole or in part, be reproduced, redistributed, published or delivered, nor their contents disclosed by any means, directly or indirectly, to any other person. Any action taken contravening the aforementioned restrictions may cause the application of Portuguese legal provisions governing public offers of securities in Portugal…"

166. Gestmin adduced evidence from an expert on Portuguese law, Professor Camara, establishing that Gestmin was not an "institutional investor" as defined in the Portuguese Securities Code (Article 30). Professor Camara also confirmed that to make a public offer of shares in Portugal aimed at people who were not institutional investors would have involved a breach of the Securities Code by the offeror, although it would not have been a breach to accept such an offer.

167. Gestmin contended that in these circumstances the QWIL shares were not a suitable investment for Credit Suisse to recommend to Gestmin and that it was negligent of Credit Suisse to do so. Alternatively, Gestmin contended that the restriction stated in the prospectus ought to have been specifically drawn to Mr Champalimaud's attention and that, had that been done, Gestmin would not have purchased shares in QWIL.

168. As Professor Camara confirmed, the relevant provisions of the Portuguese Securities Code applied, by reason of Article 108 to public offers aimed specifically at persons residing or established in Portugal. The definition of a "public offer" in Article 109 included, relevantly, an offer addressed wholly or partly to unidentified recipients (which itself included an offer made through "standardised communications" even if the recipients were individually identified) and an offer addressed to more than 200 people. Article 110 excluded from the definition "offers aimed solely at institutional investors", which were designated as offers "always considered private".

169. Article 134 stated that any public offer made relating to securities must be preceded by the publication of a prospectus. Article 140 required approval from the regulator prior to publication. There was provision (in Article 147) for the recognition of approval of the prospectus by the competent authority of another Member State but registration with the Portuguese regulator was still required.

170. Against this legislative background, the purpose of including in the preliminary prospectus the restriction quoted above (and other similar restrictions in relation to other countries) was evidently to protect the issuer and promoters of the shares against the risk of being held liable for making a public offer in Portugal, in circumstances where the preliminary prospectus had not been approved by or registered with the regulatory authority. By reason of Article 110, the Securities Code provided that if the preliminary prospectus was distributed and the shares were offered only to institutional investors, there could not be a public offer.

171. I see no reason to infer that the restriction stated in the preliminary prospectus reflected the level of financial risk of the investment or indicated that the shares were an inherently unsuitable investment for anyone other than an institutional investor. It is notable in that regard that, once the IPO had taken place, the shares were freely tradable on the stock market.

172. It appears that the actual sale of the QWIL shares to Gestmin took place in the UK, where Gestmin's holding was purchased by a Credit Suisse company on its behalf. However, although I have not been able to determine with any certainty exactly what communications took place prior to the sale, I have found that a meeting took place in Lisbon on 22 November 2005 which was attended by Mr Lopes on behalf of Gestmin at which Credit Suisse gave a presentation recommending the QWIL shares as an investment. According to the uncontradicted opinion of Professor Camara, such a recommendation to invest in the QWIL shares constituted an offer relating to securities addressed specifically to a person in Portugal for the purposes of Articles 108 and 109 of the Securities Code. Furthermore, the fact that such an offer was addressed to Gestmin and that Gestmin was not an institutional investor meant that the offer was not aimed solely at institutional investors and therefore was not an offer automatically considered private by reason of Article 110.

173. It does not follow, however, that there was a breach of the Securities Code in offering shares in QWIL to Gestmin. Professor Camara confirmed that the fact that QWIL shares were offered to Gestmin and that Gestmin was not an institutional investor would not itself involve any illegality; a breach of the Securities Code would occur only if there was a "public offer". As indicated, proof that there was a "public offer" would require evidence that an offer of shares in QWIL was addressed to more than 200 people or to unidentified recipients. There is no such evidence. The only evidence about the scope of the offer was that, in addition to Gestmin, Credit Suisse recommended investment in QWIL to three or four other clients in Spain and Portugal who had also previously invested in other funds managed by Cheyne. Assuming that these other clients were likewise not institutional investors, this evidence falls far short of showing that there was a "public offer" within the meaning of Article 109 of the Securities Code. It follows that no breach of the Securities Code has been established.

174. In these circumstances I do not accept that the existence of the restriction in the preliminary prospectus made the QWIL shares an unsuitable investment for Gestmin or meant that it was negligent for Credit Suisse to recommend them. Nor do I consider that it was necessary for Credit Suisse specifically to point out the restriction or to explain its meaning. Had Credit Suisse done so I am confident that it would in any case have made no difference to Mr Champalimaud's decision to invest. Professor Camara confirmed that, even if there had been a breach of the Securities

Code, the breach would have been by the offeror of the shares and not by Gestmin. Mr Champalimaud's evidence that, if advised of the restriction, he would not have agreed to buy the shares would be entirely credible if by buying the shares Gestmin was breaking the law (as I think Mr Champalimaud probably had the impression when he gave that evidence). Had it been explained to Mr Champalimaud that buying shares in QWIL would not place Gestmin in breach of any Portuguese legal provision, however, it is improbable that he would have been deterred from buying the shares by the possibility that if the shares were marketed widely enough to constitute a public offer this would involve a breach of the Portuguese Securities Code by someone else.

175. I conclude that Gestmin has also failed to make good its case based on an alleged breach of Portuguese law.

Conclusion on liability

176. I accordingly hold that Gestmin has failed to show that Credit Suisse was in breach of duty in any of the respects alleged. It follows that Credit Suisse has no liability to pay damages to Gestmin.

E. QUANTUM OF LOSS

177. In view of my conclusion on liability, the question of what loss Gestmin has suffered as a result of investing in QWIL does not arise. For completeness, however, I will briefly indicate my findings on this question.

Date of loss

178. The main point in dispute is the date at which Gestmin's loss should be assessed. Gestmin contends that the appropriate date is the date of the trial. Credit Suisse argues for an earlier date.

179. The general rule in contract and in tort is that damages are assessed as at the date of breach. However, damages may be assessed by reference to another date if the court considers that to do so would more fairly and appropriately give effect to the basic compensatory principle of seeking to put the claimant in the same financial position as if the wrong had not occurred.

180. In accordance with that basic compensatory principle, where the claimant acquires property as a result of a wrong committed by the defendant, the ordinary measure of damages is the difference between the price paid and the value of the property acquired by the claimant. The leading authority on the question of the date at which the property should be valued in such a case is the decision of the House of Lords in Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd [1997] AC 254. That was a case in which the plaintiff was induced to buy shares by fraudulent misrepresentation. It is common ground, however, that the same principles apply to claims based on negligent misrepresentation or other negligent advice.

181. In Smith New Court Lord Browne-Wilkinson, with whose speech three of the other four law lords agreed, said (at 266C-G):

> "In many cases, even in deceit, it will be appropriate to value the asset acquired as at the transaction date if that truly reflects the value of what the plaintiff has obtained. Thus, if the asset acquired is a readily marketable asset and there is no special feature (such as a continuing misrepresentation or the purchaser being locked into a business that he has acquired) the transaction date rule may well produce a fair result. The plaintiff has acquired the asset and what he does with it thereafter is entirely up to him, freed from any continuing adverse impact of the defendant's wrongful act. ... But in cases where property has been acquired in reliance on a fraudulent misrepresentation there are likely to be many cases where the general rule has to be departed from in order to give adequate compensation for the wrong done to the plaintiff, in particular where the fraud continues to influence the conduct of the plaintiff after the transaction is complete or where the result of the transaction induced by fraud is to lock the plaintiff into continuing to hold the asset acquired." (emphasis added)

182. A little later in his speech, in summarising the applicable principles of law, Lord Browne-Wilkinson stated (at 267B):

> "as a general rule, the benefits received by [the claimant] include the market value of the property acquired as at the date of acquisition; but such general rule is not to be inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered."

183. Lord Steyn in his concurring speech likewise confirmed the normal method of calculating the plaintiff's loss as being "the price paid less the real value of the subject matter of the sale" and that in selecting a valuation date "generally the date of the transaction would be a practical and just date to adopt". However, he considered that this valuation method is only a means of trying to give effect to the basic compensatory rule and may not always be appropriate. He said (at 284A-D):

> "If that method is inapposite, the court is entitled simply to assess the loss flowing directly from the transaction without any reference to the date of transaction or indeed any particular date. Such a course will be appropriate whenever the overriding compensatory rule requires it."

184. As is apparent from the passages quoted above from the speech of Lord Browne-Wilkinson, the general rule that the asset acquired by the claimant is to be valued at the date of acquisition assumes that the asset is a readily marketable one. The significance of a reasonably efficient market is that it enables an asset to be disposed of at a price which reflects the value of the asset and without incurring heavy transaction costs. If such a market is not available at the date of acquisition or at any other particular date, then (in the absence of evidence of some specific offer or opportunity available to the claimant) it is unlikely to be fair to value the asset at that date. That is because to do so would not result in the claimant receiving full compensation for the wrong suffered.

185. The principle which I derive from the Smith New Court case is that the appropriate date at which to assess the claimant's loss will generally be the earliest date at which:

i) the claimant was aware of the facts giving rise to the claim;

ii) the claimant could readily have sold the property acquired as a result of the defendant's wrong at a price which fairly reflected the value of the property; and

iii) it would not have been unreasonable for the claimant to sell the property (referred to by Lord Browne-Wilkinson as being "locked into" the investment).

186. Where these conditions are satisfied and the claimant did not in fact sell the property at the relevant date, this can be seen as the claimant's free choice and any subsequent gain or loss can properly be regarded as a consequence of the claimant's trading decision to retain the property rather than the defendant's wrong.

187. In the present case Credit Suisse contends that a valuation date of October – December 2006 is appropriate, on the basis that Gestmin was by then aware of the facts giving rise to the claim and, in the opinion of Dr Fitzgerald, could have sold a substantial proportion of its shares in the market over that three month period at a price at or above the purchase price of €10 per share. Alternatively, Credit Suisse proposes October 2007, being the date of the first tender offer.

188. Dr Fitzgerald's opinion that Gestmin would have stood a "good chance" of selling a substantial proportion of its shares (he declined to say all) by selling them in small parcels over a period of three months from October to December 2006 was based on reports published by Bloomberg of the monthly trading volumes of shares in QWIL. Those reports indicate that the total volumes traded were: 524,925 shares in October, 3.05 million shares in November, and 329,876 shares in December 2006. However, there is other evidence about trading volumes which is at odds with the information reported by Bloomberg. This includes the Credit Suisse presentation dated 25 September 2006, referred to at paragraphs 101-102 above, which refers to an average daily volume of 3,000 shares. Assuming 20 odd trading days per month, over three months this would equate to a total market volume of around 180,000 shares, which is only about 15% of Gestmin's shareholding. There is also evidence that in October 2006 Gestmin tried to sell its QWIL shares in small tranches of 5,000, albeit seemingly with a limit of €10.70 on the price, and had no success apart from one sale of 3,915 shares. A liquidity table sent by Credit Suisse to Gestmin on 18 December 2006 describes QWIL shares as traded "daily – but with very low volume".

189. There is ample further evidence that the QWIL shares had very low liquidity. One reason for that was no doubt that a substantial proportion of the shares were held by other Cheyne funds; and Dr Fitzgerald agreed that a possible explanation for the discrepancy in the information about trading volumes is that the volumes shown on Bloomberg would have included cross-trades with other Cheyne funds (executed either by Cheyne itself or by clients) which were not genuine market transactions. Other evidence indicates that there was a wide bid-ask spread in the QWIL share price which meant that even small tranches of shares could not be sold without a significant transaction cost. The unsuccessful buyback program and subsequent tender offers

were introduced because of the lack of liquidity in the shares. However, the terms of the tender offers made it difficult to determine whether they represented fair value and Gestmin could not in any event have divested itself of its full shareholding through the tender offers. In those circumstances the dates of the tender offers are not appropriate dates at which to value Gestmin's holding, nor do the tender offers demonstrate that Gestmin's shareholding in QWIL was a readily marketable asset; rather the opposite.

190. I have no doubt that Gestmin could have sold many more of its shares in QWIL than it did, and indeed could probably have sold all them over time if it had been willing to accept lower prices. However, as indicated above, the relevant question in my view is whether there was a time at which Gestmin could have sold the shares at a price which fairly reflected their value. Looking at the evidence as a whole, I think it clear that Gestmin could not at any time have sold its (very large) shareholding in QWIL other than with difficulty and a significant loss of value. I conclude that it would not be appropriate to assess Gestmin's loss suffered from purchasing the shares at either of the dates contended for by Credit Suisse or at any other historic date. The loss should therefore be assessed at the time of trial.

Calculation of loss

191. The experts produced very similar calculations of Gestmin's loss on its investment in QWIL as at 30 September 2013 after giving credit for dividends received and a small profit made on the 13,915 shares sold in 2006. The amount calculated by Dr Fitzgerald, which is slightly more favourable to Gestmin than that calculated by its own expert, is €2,872,277 – and I assess Gestmin's loss in this sum.

Alternative use

192. Gestmin also claims damages for profits which it would allegedly have made if the money used to purchase the QWIL shares had instead been invested in a "low-risk, liquid investment in accordance with Gestmin's investment objectives" (see paragraph 49 of the particulars of claim).

193. The problem with this claim is that, assuming the premise to be true and that the money would otherwise have been invested in a low-risk, liquid investment, it is clear that any such investment would have been sold when instructions were given in November 2006 to liquidate Gestmin's portfolio. It appears that the money would then have been used along with Gestmin's other assets to fund direct investments in industry. There is no evidence dealing with this, however, or indicating the likely level of return from any such investment.

194. In submissions Gestmin invited the court to award damages based on a calculation performed by Dr Wormley of the profit that would have been made from investing in a portfolio of financial investments which performed in line with a "portfolio mix of the major benchmark indices used by investors around the world". The benchmark indices used by Dr Wormley reflected a portfolio invested in a mix of shares in different world stock markets, bonds, hedge funds, commodities and US property. On Dr Wormley's calculation, as of 31 March 2013 the value of Gestmin's investment would have grown to €15,935,848.

195. This case suffers from the fundamental flaws that: (i) it is not pleaded; and (ii) there is no evidence to suggest that the money would have been invested in financial assets of the kind considered by Dr Wormley – indeed, as I have mentioned, the evidence indicates that in fact the money would not (or not for long) have been invested in financial assets at all.

196. In circumstances where Gestmin has not adduced any evidence of how the money invested in QWIL shares would otherwise have been used and the probable return from such use, it has failed to prove a claim for damages for loss of profits from any alternative use. Had Gestmin succeeded on liability, it would therefore have been confined in compensation for loss of use of its money to a claim for interest under section 35A of the Senior Courts Act 1985.

F. DECISION

197. In the result, Gestmin's claim fails and must be dismissed.