Case No: 3YL75604

IN THE COUNTY COURT sitting at Norwich

The Law Courts
Bishopgate
Norwich
NR3 1UR

Date: 10/08/2015

Before:

HER HONOUR JUDGE GORDON-SAKER

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Between :

Philip John Impey (in his personal capacity and in his capacity as the personal representative of the late Gillian Impey)	**Claimant**
- and -	
Lloyds TSB Bank plc	**Defendant**

- -

Mr Peter Dodge for the **Claimant**
Miss OliviaChaffin-Laird for the **Defendant**

Hearing dates: 3, 4 and 5 August 2015
Judgment handed down on 21st August 2015

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HER HONOUR JUDGE GORDON-SAKER

Her Honour Judge Gordon-Saker:

1. This is a claim brought by Philip Impey on behalf of himself and his late wife, Gillian Impey, as her executor against Lloyds TSB Bank for damages arising out of the alleged negligent advice regarding the selling of investments products in or around August to December 2005. The claim was issued on 5th June 2013, the papers having been sent to the court on 30th May. There have been various case management orders and it now comes before me for trial. I should say that at times where the claimant or claimants are referred to, that means Mr and Mrs Impey unless it is obvious that only one of them is being referred to.

2. The case is fully pleaded in a Further Amended Particulars of Claim dated 11th March 2015 and an Amended Defence dated 27th April 2015. The Reply to the Defence deals mainly with limitation as that is one of the issues in the case. I have a note of the judgment of HH Judge Yelton in relation to limitation and I will deal with the remaining issue in relation to limitation.

3. I have a helpful case summary and skeleton arguments and the bundle consists of 4 lever arch files. I read the core bundles and was referred to the other bundles where necessary although most of the materials in bundles 3 and 4 were duplications. In addition, I was referred to a number of authorities and I have considered them in addition to the written evidence and the oral evidence of Mr Impey on behalf of the claimants and of Mrs Mills on behalf of the defendants.

4. The core facts are that in 2005 Mr and Mrs Impey had about £540,000 to invest as a result of Mr Impey selling his taxi business and the claimants having some savings and selling their house in Cambridge. The defendants contacted them to offer advice on investments and they were advised by Marie Mills, an employee of the defendants. The defendants at various times, as is apparent from their records, phoned the claimants over the years to offer them advice and on this occasion they took up the offer.

5. Following the defendants' advice, through Mrs Mills, the claimants each invested in an ISA and an investment bond on 7th December 2005. At the end of November 2008 they surrendered the investments and made a loss. The case summary says that it is common ground that, allowing for withdrawals, the claimants made a capital loss of £34,672.62. The claimants' expert has calculated the positive returns they could have made by investing differently; the defendants' expert does not deal with quantum. The defendants put the claimant to proof of quantum. The defence overall was robust.

6. The claimants' case is that the advice to purchase the particular investments was negligent in that the investments were too risky. As a result of the Limitation Act, they cannot rely on misrepresentation or breach of contract. The claim is therefore made in negligence and there is no issue that the defendants owed the claimants a duty to exercise reasonable care and skill in giving financial advice. Both sides and their experts have approached the case on the basis that a failure to comply with the Financial Services Authority's Conduct of Business Rules for the relevant time would amount to a breach of that duty. Permission was not given for the experts to be called to give evidence but I have regard to their reports and the submissions made in relation to them. The main factual issues are the level of risk the claimants

were willing to accept when investing their money, the defendants' assessment of that risk and whether their advice on investments was suitable for the claimants. I therefore deal with the facts first.

7. The witness statements of Mr Impey and Mrs Mills were adopted as their evidence in chief. They were both cross examined for a long time and the documents scrutinised at some length. I only set out here the oral evidence relevant to the findings I need to make. I think they were both doing their best to remember the details of what happened 10 years ago and I think they were both honest, although at times I felt there was some wishful thinking and use of hindsight in their answers, particularly those of Mrs Mills.

8. It is said that Mrs Impey should have been given separate advice or been asked the questions separately at the fact finding stage. From what I have heard about the claimants, they regarded themselves as a team and had the same approach to risk and they were clear that they wanted to deal with everything together so I do not find Mrs Mills erred in her approach to filling in the forms for both of them together with the same attitude to risk. That does not meant that her advice should have been the same for both of them.

9. Mr Impey retired early from being a taxi driver following Mrs Impey having a brain haemorrhage. He sold his taxi business, they sold their house in Cambridge and moved to a bungalow in Hundon where he still lives. Sadly, Mrs Impey died in August 2011. He was 61 and she was 69 when they purchased the investments. They were not knowledgeable about investments or used to studying the small print or finer details of financial matters although they had some shares which Mr Impey had received on privatisations and Mrs Impey had inherited a sizeable number of shares in Barclays Bank.

10. I reject the suggestion made by the defendants that because Mr Impey ran a taxi business, that made him an experienced man of business. They were not experienced investors with *substantial experience, contacts and interest in their financial affairs*. Even allowing for the fact that 10 years ago Mr Impey may have been more sprightly, he plainly was not an experienced investor. They kept the Barclays shares for sentimental reasons; at times in cross examination he struggled with the questions; his knowledge extended no further than "shares go down as well as up". His worries about the bank's private banking department showed how cautious he was. He said they "put some shares into a portfolio for them and started adding others. The portfolio had gone down a bit, the charges had been high, he could not really see the benefit, and they had closed that account."

11. Mr Impey mentioned that he had asked the Co-op and his accountant about investment but all he had done was have a very brief conversation with the man who came to collect his car insurance premium. The defendants knew this background. Mrs Mills also spent time talking to Mr and Mrs Impey. In cross examination, she said she did not think many people understood the difference between an investment bond and a fixed interest security and that Mr Impey did not look as though he did. It would have been as clear to her as it was to me that they were not experienced investors and their knowledge was limited. They relied heavily on her expertise.

12. Mrs Mills worked for the defendants for many years and was at the relevant time a Senior Financial Planning Manager licensed by Scottish Widows. She was permitted to offer investment advice to customers who had between £100,000 and £250,000 in cash and investable assets and to offer advice on inheritance tax planning issues. The claimants knew and accepted that she was a tied agent. Mrs Mills met the claimants in February 2005 and obtained background information. The next meeting was on 9th August. She saw them at their home "to conduct an initial fact find…". She also refers to her approach at "the First Meeting" which is what she intended the 9th August to be (paragraph 34). Her statement describes a process she "would go through". That is relevant because she is not likely to remember the exact details of each client although she had a reasonable recollection of the claimants. She completed a "Risk assessment" form. She says she would have gone through a Scottish Widows booklet which she called her *bible.* It is the Investment Guide for 2005/2006 and is entitled "Prepare today. Because tomorrow does come." I have those documents in the bundle. She estimates that the meeting would have lasted an hour and a half.

13. Mrs Mills referred to the papers being on the table and to them having a cup of tea so this was not a structured meeting at which each participant had a copy of the booklet. In her first statement, Mrs Mills does not say she left them a copy of the Investment Guide. She says she would have "undertaken to review the information they provided and revert to them in due course with a Financial Review setting out their current situation, aims and objectives, and her recommendations to them." Her second statement says they were provided with the Investment Guide during their meetings with her and that she gave them a copy for their records. I cannot accept paragraph 8 of her 2nd statement as being an accurate recollection; she is saying with hindsight what she likes to think she *would have done*. She says in that statement more of what she "would have said" in the August meeting.

14. In my judgment, Mr Impey's recollection of the August meeting was good. He recalled for example that Mrs Mills said she could only deal with Lloyds and Scottish Widows. She gave him a business card; he does not remember her coming with documents. He does not recall her going through an Investment Guide. He doubts he would properly have understood it even if it had been sent to him; I agree with him. She did a financial review of all of their assets. Mr Impey did not simply deny everything put to him. He looked at the documents, considered the questions and then gave his answers.

15. Counsel for the defendants put to Mr Impey a number of times in different ways that he had the Investment Guide and knew what it said about the investment ranges from Secure through to Specialist. He was clear that he had not. He was asked about page 23 where it says they define the short-term as up to 5 years. He did not recall that and he couldn't remember her going through the coloured pictures on page 25 of the booklet or the levels of risk or the boxes on page 23. They talked about the level of risk but not these specifics. Mr Impey did not know the defendants' definition of cautious or balanced or that "short term" investments meant up to 5 years. Had he known that his answers to the questions on the Risk Assessment Form would have been different. Short term to him meant 1 year or an absolute maximum of 2 years.

16. Page 523 is the completed risk assessment form. Mr Impey did not recall the document being on the table, he did not recall Mrs Mills going through the questions

to decide what category of risk they would fall in. Mrs Mills' form comes out as balanced and it was suggested she then went through what balanced, cautious and progressive meant. Mr Impey doubts that was ever done. He was clear that there was no way they would put half of their assets in a risky situation. He considers the investments made risky. He agreed he said he was willing to accept short term ups and downs, nothing is always up.

17. Mr Impey recalled matters such as Mrs Mills only being able to recommend Scottish Widows products and he agreed there was a discussion about the limit of the investment size she was able to advise on but he remained steadfast that she had not gone through the investment guide. In my judgment, his recollection was good and he was honest when he said he said what he had and had not received. I accept his evidence.

18. My conclusions are that August was the "First Meeting", the claimants should have been sent the Financial Review not long after, then there would be a further meeting to go through the advice. But there was a delay caused by internal processes in the bank. I am afraid their record keeping leaves something to be desired but essentially what happened was that the claimants trusted Mrs Mills and wanted her rather than the wealth management team to advise them but she had to get approval for this as the amounts involved were beyond her limit and her work and advice were meant to be checked.

19. The statement of Adrian Peacock, Mrs Mills' superviser, provides no detail as to why it took until December to approve the financial report before it was sent out or what checks he carried out. The financial report (Your financial review) is dated 11th August. I now know that the claimants had very little time to consider the Financial Review before they bought the investments.

20. Moving on to December, Mr Impey said he had received the "Your financial review" (page 500) but not the Key facts document (para 63 of his statement). I suggested that counsel put that document to him if she said he received it so that he could look at it. She chose not to.

21. Mrs Mills says that the Financial Review was sent to the claimants under cover of a letter dated 18th November. But despite the date on the letter, it was not sent until Saturday 3rd December at the earliest. The defendants rely on the fact that that letter had a number of enclosures. They were listed at the bottom of the letter in very small print and Mrs Mills accepted in cross examination that was a checklist for the person putting everything in the envelope rather than it being pointed out to the claimants that they ought to read them. If that had been clearly spelt out, the claimants might have been alerted to the fact that they were missing documents.

22. Mr Impey does not remember being sent any illustrations or key features with the "18th November 2005" letter and, having heard how that letter came to be sent eventually, I am not satisfied that he was sent the listed enclosures. Even if they were sent, the claimants were not told the importance of reading them nor would they have had sufficient time to do so before they purchased the investments. The defendants accept that that letter went through various drafts and it is not clear which version of the "18th November" letter was the one actually sent to the claimants or when. The versions at pages 525 and 529 of the bundle refer to different enclosures

and the defendants have not satisfied me which enclosures, if any, were sent to the claimants. They cannot rely, in my judgment, on the contents of those documents if they cannot even show that they were sent to the claimants.

23. The Second Meeting was on 7th December. Mrs Mills refers in paragraphs 50 to 60 of her statement to what she *would have done* in the second meeting. I am afraid that I cannot accept that she was as thorough as she thinks she was. Mr Impey's recollection was that this was a short meeting and there was nothing in Mrs Mills' evidence to show otherwise; she said what she would usually do at a second meeting. Had she gone through any of the documents she thinks she did, Mr Impey would have remembered. Mrs Mills follow up letter dated 7th December only refers to the "Your Financial Review" and no other documents having been considered. The variation paragraph says "You now prefer not to wait" for the regular withdrawals from the bond; she does not say why she thought they had been prepared to wait. "The possible disadvantage" still looked positive. I note she also says she has *received their completed paperwork* as if they have posted it to her rather than her filling it in and getting them to sign it whilst she was there, which is what actually happened.

24. That 7th December letter also referred to "Regular Reviews" and arranging "a formal review date" so it was plainly contemplated that there would be ongoing reviews. I note that the defendants' records (page 718) refer to the claimants being "due for annual review" in November 2006. When she was asked about it in her evidence, Mrs Mills said the annual review would depend on what the customer wanted. She can't remember if that was a phone call. She did not say there was not to be an annual review.

25. Of the 7th December, Mr Impey said they signed the application forms for them to invest in the bonds and the ISAs, he couldn't remember what else Mrs Mills had with her. She said *this is what I recommend for you and everything will be fine.* He was clear it was not a long meeting. He said the ISA application form was completed by Mrs Mills and he simply signed it at the end, Mrs Mills even ticked the boxes on the last page confirming they had read the key features. It seems to me that the form should be given to the customer for him to read it, tick the boxes and then sign it. He was not told to read it or to read the key facts before he signed it. He also said she did not go through page 591 about the charges. Mrs Impey did the same as him, she too signed a completed form with the boxes ticked by Mrs Mills. Mr Impey said if he had been told it would cost £420 to set up a £7,000 ISA he would have walked away. Mr Impey did not recall Mrs Mills discussing the key features of the ISA with them. Nor did he recall her saying they might not get all of their money back. Mr Impey also did not recall the terms and conditions for the ISA. I am not surprised, they extend to 15 pages and are quite complex.

26. Moving on to the bonds at pages 620 and 655, again he said Mrs Mills filled them in. He said he wanted to start drawing monies in January 2006. He does not recall being advised not to do that, he thought that was what you did when you set it up. That misunderstanding should have alerted Mrs Mills to the fact that the claimants did not understand the investments.

27. Page 663 is the key features of the flexible investment bond. They say "The value can go up and down, you may get back less if, for example, you cash in all or part of

your bond within 5 years". He does not recall Mrs Mills taking him through that document. He said that Mrs Mills recommended these for them and they accepted her advice. He trusted Mrs Mills.

28. Page 501 (or page 1 of the "Your financial review") was put to Mr Impey. In the Aims and Objectives, their situation was summarised. Page 2 refers to Mrs Mills' recommendation of a balanced approach and she gives the bank's view of "balanced" as carrying "a risk of loss to capital but having the potential for capital growth and/or income over the medium term. Typically they do not have any guarantees and will fluctuate in capital value". That definition mirrors that in the bank's investment guide. The difficulty for the defendants is that Mr Impey was not given the Investment Guide so he would only have been able to consider "balanced" in isolation rather than in comparison to "cautious". The size of the possible fluctuations is not made clear. The risks of the recommendations are not clear. The recommendations sections of the "Review" do not mention the possibility of the recommended investments going down.

29. Mr Impey was asked a great deal about his attitude to risk. He said he was very cautious, he knew there was no sure fire guarantee he would make a shed full of money. He acknowledged there was a general risk of investments going down. He wanted his money to be safe. He knew it could not be 100% safe. He was aware of the possibility of just putting the money in a high interest account and of an investment which provides higher interest and some security but can go down. He said he knew of the possibilities but he was a cautious investor. Counsel suggested that as he was cautious, he would have decided which option to proceed with and Mr Impey rightly pointed out that Mrs Mills had not given them any other options. One of the difficulties in the defendants' case was that they assessed the claimants' attitude to risk based on their criteria of which the claimants were unaware but it was somehow up to them to say they had been assessed wrongly.

30. In evidence, Mrs Mills said that on 7th December 2005 she believes she was there for a considerable amount of time. She said she recalls going through the documentation before completing the application forms, *hand on her heart* she would have gone through the documents as the COB Rules require. She had a procedure which she followed in every case. She said she never gives a recommendation at the first meeting, they complete the fact find and the risk assessment and ascertain how much they wish to invest, then go away. She would have had to think about tax allowances and calculations would have needed to be done. Then the report was sent out and the time between then and the second meeting depended on how much time the customer wanted. Her evidence on the whole was about her usual practice. But no advice was given until the Financial Review was sent out and the claimants would have had very little time to consider the review.

31. The documents allegedly sent to the claimants with the wrongly dated 18th November letter ran to several pages and were complex. There was no index, no suggestion they take time to read them, they were just listed in the small print at the end. Mrs Mills said the letter has a digital signature so she did not sign it. She can't say what was enclosed. I am not satisfied they were sent with the letter; the redrafts that went through and the lack of a system leave a lot to be desired; the system was not adequate. Page 2 of the defendants' "SW sold by new business" logs (page 540) shows that at the earliest that 18th November letter was sent out on Saturday 3rd

December although I think that means sent out to Mrs Mills because the next entry on page 540 is that the enclosures were wrong so it is more likely to have been sent out to the claimants on 5th December.

32. If that letter did contain the enclosures, there was nothing to tell the claimants it was important they read them. They would have taken hours to read. The Financial Review which is the only document I am satisfied the claimants received does not, in my judgment, make plain to the claimants the risk assessment, the risks in the bond, the underlying investments, the charges or the fact that short term is up to 5 years. They had little time to consider that.

33. I am not satisfied that Mrs Mills went through all of these documents at the 7th December meeting. Her recollection is based on good practice, not the facts of this case. Mr Impey said it was a short meeting, I accept his evidence. For Mrs Mills to have gone through the review and all of the matters she thought she did would have taken a very long time. Yet she did not even give them the time to read what they were signing; she ticked all the boxes. I do not consider that exercising reasonable skill and care.

34. Mrs Mills was asked about the Risk Assessment form. She agreed that in a vacuum if you just used this form, and asked the questions the form would not have been good enough but if you have a discussion about their types of investments, then it makes sense. She found this form useful and reliable, it leads into a discussion about whether they want balanced or cautious investments. But as her evidence went on it was clear that the form came out as "balanced" and was not revisited, so "balanced" was used as the basis of her recommendation and by Mr Peacock checking her work.

35. The deficiencies in the form were put to her. One or 2 examples show how unreliable it was. On the capacity for risk question she said the first question on the time frame for the investment is to do with inheritance planning. I can't see what that has to do with capacity for risk. She agreed that the 10 years showed they wanted the money to hold good into their retirement and they did not want to chop and change yearly yet the form scored them as having a higher capacity for risk.

36. Asked about Q3(b), "I am nervous about the stock market falling in the short term" means you are nervous about a fall, in the bank's definition, within 5 years. The claimants did not know that. This was not a very scientific form and it was not straightforward for the person answering the questions. On the capacity for risk section, anyone under 75 is automatically not in the secure category. Mrs Mills was asked a number of questions about her categorisation of risk but the end result was that once the claimants were put in the balanced category, they stayed there. From everything Mr Impey said the claimants should have been placed in the cautious category. She tried to say that the form was a tool but in reality it became the fixed point from which her advice followed. The failings in the system did not help.

37. Mrs Mills accepted that the 18th November letter does not suggest any preparation for the 7th December meeting. It was suggested that the onus was on the Impeys to say they wanted to revisit the classification, she used the word opportunity. I think onus was the better description. It is quite a burden to revisit a classification if you don't know it's incorrect.

38. When she was asked about the 7th December meeting, Mrs Mills said that when she went through the recommendation with them, if they had been unhappy she could have changed the recommendation. For the claimants to gainsay her recommendation, it was put that they would have to know something about the fund which might make it unsuitable? She said that would have been at the stage when they were put in the balanced category. But at that stage, they knew nothing of the funds she was going to propose. It was clear from her answers that once they were allocated to "balanced" it was almost impossible to get any advice other than to invest in the fund recommended by Mrs Mills as being the fund for "balanced" investors. She said a discussion about risk was part of the recommendation meeting but I can't see where that took place. The August meeting was to gather the information and the December meeting was to sign the forms. There was never a chance to revisit the decision to put them in the balanced risk category. If, as I find, it was not made clear to them what balanced meant, the claimants would not have asked to revisit it.

39. Mrs Mills was asked about her recommendations. They were for bonds and ISAs but the underlying investment was the area of risk. She was asked about the COB Rules (Page 267) 5.4.3 – a firm must not make a personal recommendation of a transaction (as she agreed this was) unless it has taken reasonable steps to ensure that the private customer understands the nature of the risk involved. She said she had looked at the elements of risk at the first meeting and that at the December meeting she went through the documentation. But she had only looked at risk in a general way. She had not told them in August about this bond or about the risks, she had been gathering the information then. She did not advise them of the risks in the bond.

40. Page 503 (page 3 of the Review) is the possible disadvantages of the ISA but in relation to the bond – the discovery solution portfolio fund – the risks are not mentioned. She agreed that this does not give any quantification of the risk involved. She agreed there was nothing in the YFR about the level of risk. She was then asked about page 456 which is the Discovery solutions factsheet. It says at the top that it was intended for individuals who are familiar with investment terminology. She agreed that this document was not aimed at Mr and Mrs Impey. Mrs Mills did not know about the underlying charges so plainly the Claimants could not have known about them. Mrs Mills agreed that 40% of the fund was in equities and it was a new fund with no track record. Nothing was said to the claimants about this being subject to volatility, rather than just gentle ups and downs. Mrs Mills agreed that YFR did not explain that cash withdrawals would erode capital.

41. The more Mrs Mills was asked, the more apparent it was that the claimants would not have grasped this. I have seen Mr Impey, he takes things slowly. If she had gone through the fact sheets and tried to explain this to the claimants, it would have taken hours. It would have been hard work and she would have remembered details.

42. The defendants owed the claimants a duty to use reasonable skill and care. Both parties have, rightly in my judgment, addressed that duty and any breaches of it by reference to the Conduct of Business Rules for the relevant time. There is a copy in the bundle. The experts have considered the Rules in the context of the facts in the written evidence. It will be apparent that I prefer the evidence of Mr Impey. He was remembering his own situation and what was said. Mrs Mills was "remembering"

what she would have done. She was also working on the basis that the defendants had sent the claimants in good time for the meeting all the necessary paperwork. There was never a proper explanation of the category they were put in, nor a chance to revisit it; the claimants did not know the implications of the categorisation so they could not query it. But the defendants should have considered all of the information, not just the risk assessment form.

The expert evidence

43. It is against that background that I turn to the evidence of the experts. I have read their reports and joint report. Permission was not given for them to give oral evidence. I begin with the Claimant's expert.

44. Mr Goodyer, on behalf of the claimants, has long experience in the financial services industry, including as an IFA and an investment performance analyst. His report is focussed and based on his experience. He acknowledges there are different methods and he analyses the facts ascertained by Mrs Mills and the advice and documentation she provided to Mr and Mrs Impey. He was concerned that the answers given by Mr and Mrs Impey to the questions on the "Risk Assessment" form (page 90 of the bundle) were the same; I have dealt with that. Mr and Mrs Impey saw themselves very much as a team and she was not marginalised, indeed their inheritance planning was going to consider Mrs Impey's nieces and nephews specifically. I am satisfied that even if they had been offered separate advice, they would have said they preferred to do it all together. They would have given the same answers and been in the same bracket. However, given the age difference and Mrs Mills' health, I accept the assessment of Mr Goodyer that Mr Impey would have been sold the Defensive Solution Fund and Mrs Impey cash investments.

45. Mr Goodyer says of the "Risk Assessment" form that it should never be used as a fixed determination of risk profile and therefore of investment fund or asset class. There should always be an element of flexibility for the adviser to lower, or on occasions raise, the risk profile of the client should individual circumstances dictate. That is plainly right or there would be no point in meeting face to face in the customer's home and *fact finding*. Mr Goodyer was rightly concerned, in my judgment, about the wide brackets in the questions about the age range and investment time frames and over reliance on the scores produced by the answers. Too much emphasis was placed on the forms which are fairly broad-brush and not enough emphasis on an analysis of the claimants' situation or level of understanding of financial matters. The COB Rules which I will come on to say the firm should have regard to the customer's knowledge of the designated investment business. It will be apparent from my assessment of the oral evidence that the claimants had little knowledge and that they were not provided with the information in a way they could have used to explain to them the category they were in and its implications.

46. Mr Goodyer also points out that the Defendants say they sent 22 different documents to the claimants and that there are conflicts within them. He points out, for example, that the defendants in one brochure define short term as up to 5 years whereas the initial "Risk Assessment" questionnaire does not even have *up to 5 years* as a question. He says that most financial advisers would normally consider short term to mean 1 to 3 years and he rightly points out that it also depends on the age of the

customer. Mr Impey would have considered it to be 1 to 2 years in 2005. Had the correct information been put to the claimants, their answers would have resulted in a score placing them in the "cautious" bracket. Mr Goodyer rightly points out that the facts are for the court to decide on but that if I accept the claimant's evidence as I have, then in his expert opinion, the defendants are in breach of the Conduct of Business Rules for the relevant time. From what Mr Impey said, he should have been in the cautious bracket.

47. Mr Goodyer's opinion is that the questionnaire was not fit for purpose, it is unreliable so the claimants were incorrectly assessed. I agree.

48. Rule 2.1.3R says "When a firm communicates information to a customer, the firm must take reasonable steps to communicate in a way which is clear, fair and not misleading." I am satisfied that it was not made clear to the claimants that short term meant *up to 5 years*. Further, if they received all the information the defendants say they did, they would have been swamped by brochures in which the rosy outcomes, and not the risks, are highlighted in colour boxes. That is not taking reasonable steps to communicate in a way which is clear, fair and not misleading.

49. Mr Goodyer at page 155 sets out the relevant COB Rules and says that IF the claimants account is correct, the defendant breached a number of the Rules and was negligent. Further he says that if Mrs Mills' account is correct, they also breached the Rules. He has doubts about the use of the investment bond wrapper because of the charges, the tax efficiency and the penalties if the bond is cancelled during the first 5 years. That was not set out clearly for the claimants.

50. Moving on, Rules 5.2.5R and 5.2.9R required the defendants to take reasonable steps to ensure that it is in possession of sufficient personal and financial information about that customer relevant to the services that the firm agreed to provide and to make and retain a record of [that]. On pages 160 and 161, Mr Goodyer points out the deficiencies in the fact find, but more importantly he sets out Rule 5.3.5R which says that the firm must take reasonable steps to ensure that … the advice on investments or transactions is suitable for the client. That includes advising on the range of packaged products. If the risk assessment is wrong, the advice is not likely to be suitable.

51. In my judgment, that is right. The claimants needed to be told the options. Mr Goodyer correctly identified the downsides of the bond that was recommended and gave the reasons why it was not suitable. Later on in his report he says what type of investment was suitable and the claimants were not told of those options. Having seen and heard Mr Impey and formed my impression of him and the level of risk he was willing to take, I find they would not have chosen the bond if they had been in possession of the range of options or if they had understood the charges, the tax implications or penalties, or been able to compare the risks.

52. The defendants cannot simply say they sent the claimants all the documents and booklets because they sent too many for Mr and Mrs Impey to cope with. In his replies to the additional questions, Mr Goodyer points out that there was more than one draft of the covering letter sending out documents to the claimants so it is difficult to know what they were actually sent. One draft refers to 49 items and one

to 40. I have already dealt with that and how little time they had to digest the Financial Review.

53. The duty to give advice is not discharged simply by sending them all of that in any event. The defendants were making recommendations and the duty under COB 2.1.3R, 5.2.5R and 5.3.5R was to take reasonable steps to communicate in a way which is clear, fair and not misleading, to ensure the investment was suitable and was the most suitable from the range. That includes accurately assessing their attitude to risk. Those duties are not, in my judgment, discharged by sending all the booklets and key features without further explanation.

54. Mr Meacock on behalf of the defendants (page 380) also has considerable experience of financial planning and as an IFA. He says that the appropriate level of risk was low to medium or moderately cautious and that the ISAs and bonds were suitable for the claimants. He said that the defendants' compliance with the COB rules was consistent with what would have been expected of any reasonably competent financial adviser, that the fact finding was thorough and the recommendations suitable in relation to Mr and Mrs Impey's capacity for risk and their needs and circumstances, that the product features, suitability and risks were fully disclosed, and that the COB rules were satisfied. It will be apparent that I disagree.

55. Mr Meacock said the defendants' risk assessment form was more advanced than others at the time and he provided a sample risk assessment form from Sesame Network for comparison. There are a number of difficulties with his opinion. The form is only as good as the adviser completing it, the Sesame form provides a greater explanation of the implications of each answer so their questions are not being asked in a general way and the Sesame form also has a space for the "Reasons for selecting a particular investor file" and for "notes". He was not concerned about the contradiction in some of the responses the claimants gave whereas Mrs Mills said the purpose of there being 10 questions and some overlap between the questions was to show inconsistencies. Mr Meacock's report relies heavily on his good opinion of the quality of the defendants' risk assessment form and the reliability of the responses which I do not share.

56. In his responses to the supplementary questions, Mr Meacock said that the risk assessment, however advanced, provides a guide rather than a definitive result whereas the defendants have relied on the form. He also said that the claimants had a month to consider the results of the risk assessment and the "Your financial review" before they bought the investments. I know that was not correct. They had 2 days at most.

57. In categorising the claimants' attitude to risk at the upper end of cautious and the lower end of balanced, Mr Meacock took into account other information provided whereas the defendants relied heavily on the form. Mr Meacock also says that the risk warnings were included in some of the documents sent to the claimants but it was quite clear from the evidence I heard that the claimants would not have been able to consider all of that before they signed up for the bond and the ISAs even if they received it. He concludes that it is clear that Mr Impey understood that the recommended investments involved risk and he must have accepted that some element of risk was consistent with his needs. He had not had the benefit of seeing

Mr Impey and hearing his evidence as I have. His conclusion was incorrect. His opinion was that the outcome overall was a highly cautious investment approach, that the ISA was highly appropriate and that the Discovery bond had a low to medium or moderately cautious risk profile and was consistent with the claimants' capacity and appetite for risk as he assessed it. I disagree.

58. Mr Meacock does not set out in his report how he reaches the conclusions in section 5.5.1. His conclusion at paragraph 5.5.2 is based on incorrect facts. The claimants did not get any recommendations in August, they did not receive the "Your Financial Review" until a day or 2 before the 7th December when they signed the forms and they had not had advice from the Co-op.

59. I would add that Mr Meacock supports the defendants' case that the Discovery bond combined with a discretionary will trust would mitigate inheritance tax. But I am not told whether other products available would have done so because the claimants were not given other investment options or any other advice about inheritance tax planning for comparison.

60. Mr Meacock avoided a detailed analysis of the COB Rules and his conclusions were rather broad brush. In the joint report, Mr Meacock is also rather broad brush and he says at the end that "the risk warnings provided by the defendant by way of Mrs Mills' Financial Review Report, the product illustration and the key features document satisfied the requirements of disclosure expected of any reasonably competent financial adviser." It will be apparent I disagree. Mr Goodyer, in contrast, points out how little was said in the "financial review" itself on which the defendants rely.

61. In his answer to the supplementary questions, Mr Meacock does not regard the "Investment guide" as of much relevance and he said it was not a shortcoming or negligent for the adviser not to give it to the claimants. Mrs Mills, in comparison, referred to it as her bible and placed great reliance on the fact that she had used it in her discussions and she thought the claimants had had a copy. In the joint report of the experts, Mr Meacock relies on the Investment Guide's definition of short term as being up to 5 years so that failing to give it to a customer becomes more relevant. He can't both rely on it and say it does not matter if they did not have it.

62. I cannot see how Mr Meacock reaches the conclusion that attempting to arrange one annual review (para 5.5.5) fulfils the duty to hold annual reviews. From the evidence I have, I find that there was a duty to hold annual reviews and it was breached. They did not comply with COB rule 5.2.6. That is of less significance given my decision on limitation.

63. It will be apparent that I prefer the opinion of Mr Goodyer. Mr Meacock relies heavily on the defendants' evidence and timeline which were incorrect and he does not analyse the COB rules carefully.

64. The claimants were not experienced investors, they relied on the defendant's employee, she did not provide them with all the information on which they could make an informed decision, they were wrongly assessed as balanced investors, and the investments and charges were not properly explained to them. The defendants were negligent. If the claimants had been placed in the cautious category and been

given the range of options with accurate information about the risks, the charges, the pros and cons, I am satisfied they would not have bought these investments.

The limitation period

65. The defendants ask me to say that the limitation period applies. There were written and oral submissions in relation to Section 14A of the Limitation Act 1980. I also have HH Judge Yelton's judgment. His decision was not appealed and it is agreed that I can only revisit it if I find the facts to be different, having heard the oral evidence.

66. Mr Impey says he knew the investments were not risk free. In his statement he said that he was "aware that the investments were not risk free, … that shares could go down as well as up, but he did not know that they were exposed to more risk than they should have been. They fully trusted the advice of the defendant" He rang Mrs Mills in Spring 2008 and she reassured him that it was down to the general market and would come right. Mrs Mills accepts that they had that conversation, although the exact words used differ between them. Mr Impey was worried about further losses so he surrendered the investments. *He did not attribute the loss to the advice received from Mrs Mills. In mid to late 2012, he read in the press about the mis-selling of investments* and he decided to seek legal advice. The claimants had remained customers of the bank and I agree with Mr Impey that they would not have done that if they thought the bank's advice was wrong.

67. Mr Impey sets the story out in some detail in his statement. I will not repeat it here because his written evidence was before Judge Yelton when he made his decision on limitation last August. Judge Yelton was referred to a number of authorities and held that Mr Impey could bring himself within Section 14A of the Limitation Act because, *although he knew the investments had lost value, he did not know that that was because of any initial failure by the defendant to advise him properly.* In relation to Mrs Impey, there was nothing in the oral evidence to change the findings of Judge Yelton so his decision in relation to her stands. She did not have the required knowledge before she died.

68. In his oral evidence, Mr Impey said he rang Mrs Mills in the Spring of 2008 on her mobile phone and spoke to her. He had a concern and she told him to *hang on in there*. He thought she was still his investment adviser. He thought if he had concerns he needed to contact her. The figures were put to him. Bundle 3, page 888 gives the value of the ISA on 20th March 2006 as being £7,025.26. He thinks he got 6 monthly updates on how it was performing. Page 894 shows that on 18th September 2006 it was £6,880.28 so it had gone down. Page 900 shows that on 19th March 2007 it was £7,051.62 then page 906 shows that on 17th September 2007 it was £6,979.13 then page 912 shows that on 17th March 2008 it was £6,463.77. That prompted him to get concerned. Page 918 shows on 22 September it was down to £6,146.12.

69. The bond performance was also looked at. Page 782 shows the bond value at 13th August 2006. It was £184,490. On 13th August 2007 (page 783) it was £186,652 then on then on 12th August 2008 it was £175,529.

70. He agreed it was clear that they had gone down. Mrs Mills said hang in there, its the market. It was put to him that it was obvious it was not doing what he expected as the value was going down, he agreed. That was why he contacted Marie Mills. He said he wanted to cash them in, they said hang in there, but it was not what he wanted. They both fell below what he wanted so something had gone amiss. They had gone down which is not what he wanted. It was put that he knew the bank had got it wrong then, he said Yes.

71. The defendants rely on that evidence as showing Mr Impey had the required knowledge in 2008. I don't accept that. Mr Impey had complete faith in Mrs Mills and she told him nothing was wrong and he accepted it until he read the newspaper article in 2012.

72. Mrs Mills was asked about the phone call in 2008. She remembers a phone call from Mr Impey at some stage saying he was unhappy. She said she did remind him it was for a 10 year term but she did not use the words "hang in there." She did not give him advice about being in the wrong product or mis-selling etc. Whatever the words used, Mrs Mills reassured Mr Impey and she said nothing to alert him to any possible mistakes by the bank, she did the opposite.

73. Like Judge Yelton, I was referred to *Haward v Fawcetts* and to *Hallam-Eames v Merrett Syndicates*. At the point in 2008 when Mr Impey thought he knew the bank had got it wrong, they reassured him through Mrs Mills that they had not. Mr Impey, in my judgment, remains within Section 14A using the tests of Lords Nicholls, Walker and Mance, because although he knew the investments had lost value, he **still** did not know that that was because of any initial failure by the defendant to advise him properly.

Quantum

74. I do not find quantum difficult. The defendants' expert did not address it, the defendants made no submissions, they simply put the claimants to proof.

75. Mr Goodyer has advised on quantum. Mr Goodyer considered other products available from Lloyds TSB and on the open market and sets out his reasoning in his report. This is on pages 26 and 27. The claimants knew that Mrs Mills could only sell them Lloyds products and my assessment of Mr Impey is that they would not have looked elsewhere as they had such faith in Mrs Mills. They knew and accepted the limited range of products she could sell. In my judgment, they would have bought the Defensive Solution fund and cash only/no loss investments respectively. The quantum for Mr Impey is therefore £15,540 (the mid range) and for Mrs Impey is £30,098.50. The quantum is calculated from December 2005 to November 2008. They are entitled to interest.

76. Subject to any further submissions, costs should follow the event. Judgment was handed down on Friday 21st August. If there are any further submissions, the matter will be listed on 27th August at 10am. the hearing can be by telephone.

Liza Gordon-Saker

21st August 2015