OUTER HOUSE, COURT OF SESSION

[2008] CSOH 144

CA52/07

OPINION OF LORD GLENNIE

in the cause

CHRYSALIS SCOTLAND LIMITED

Pursuers;

against

CLYDESDALE BANK INSURANCE BROKERS LIMITED

Defenders:

Pursuers: C McNeil QC; Maclay Murray & Spens

Defenders: A Young QC; Dundas & Wilson

14 October 2008

Introduction

[1] This is a claim for damages for professional negligence arising out of investment advice given to the pursuers by Graeme Lind, a Financial Planning Manager employed by the defenders, in June and July 2000, on the basis of which advice they invested £1 million in a Clerical Medical Premier Offshore With Profits Bond ("the Bond"). The pursuers contend that, through Mr Lind, the defenders failed to exercise reasonable skill and care in the investment advice which they gave. They contend that in advising the pursuers to invest such a sum in the Bond, the defenders failed properly to take account of the pursuers' investment needs and, in particular, the level of risk to which they were prepared for their funds to be exposed and the length of time for which they wished the money to be invested. More specifically, the pursuers contend that the defenders failed to advise them of the possibility of a Market Value Adjustment ("MVA") being applied were the Bond to be cashed earlier than 2012. The nature of an MVA (sometimes referred to as a Market Value Reduction or "MVR"), and its potential effect upon such a Bond, is discussed in paras.[40] to [45] below. The pursuers say that had the proper advice been given, and had they been advised of the possibility of an MVA being applied on encashing the bond earlier than 2012, they would not have invested that sum in the Bond but would instead have placed the money on deposit. They claim damages by reference to the difference between the amount realised on encashment of the bond in January 2006 and the sum which they would have obtained at that date had they placed the sum on deposit. The sum claimed is £251,586.27 plus interest.

[2] No issue of law arises on the question of liability. It is accepted on behalf of the defenders that a financial advisor in the position of Mr Lind, when advising clients such as the pursuers, had a duty to mention the existence of MVAs and the possibility that an MVA might be applied to the particular investment. It is accepted that such a financial advisor could not rely solely on providing the life company's printed literature to the client; that he was required to discuss MVAs with the client and confirm those discussions in writing; and that he was also required to explain what an MVA was, how it might apply and the possibility of it applying in the future in adverse market conditions. Although the experts called by the parties agreed with Mr Lind that a financial advisor could give little meaningful advice to the client as to the actual likelihood of an MVA being applied on a policy in the future, that duty went as far as to require the financial advisor to explain that the MVA might apply in adverse market

conditions. Further, it was agreed between the parties that it was not enough simply to mention these points; the advice given had to be effective advice, that is to say advice which was brought home to the client and, so far as the financial advisor was able to judge, understood by the client.

[3] The issue in the present case is whether, in the course of meetings leading to the pursuers making the investment, Mr Lind did give such advice to the pursuers. That is a question of fact to be determined upon an assessment of the evidence given by Mr and Mrs Robinson for the pursuers and Mr Lind and Ms MacKinnon for the defenders.

The Facts

[4] I should say at once that this is not a case where I have formed any adverse impressions as to the credibility of any of the witnesses. They were all, in my opinion, doing their best to assist the court. The factual questions have to be determined by an assessment of the reliability of the witnesses in giving their evidence. Whilst there are always difficulties in assessing reliability, the difficulties were made more acute in the present case by the fact that the witnesses were speaking to events which had occurred nearly 8 years before they gave their evidence. Although there were some contemporaneous notes of the relevant meetings between the parties, questions were raised as to their accuracy. I shall consider this in more detail when I come to discuss the evidence.

[5] I propose to begin my consideration of the facts by looking at the evidence given by Mr and Mrs Robinson. Their family circumstances are relevant. They were married in January 1976 and have three daughters. In June 2000 those daughters would have been aged about 13, 18 and 20. Mr Robinson has spent most of his career in the hospitality business, both in the hotel trade and in developing an outside catering business. He started his own catering company and, after some 16 years during which he built it up to become, in his words, a "market leader", sold it in 1996 to a French company. With the proceeds of sale he took a stake in Heart of Midlothian Football Club ("Hearts"), of which he became Chief Executive in 1997. This was a turbulent period during the life of the club and Mr Robinson found it stressful. In 2000 he came to the view that another five years in that post would be enough for him. He had invested a considerable sum of money in Hearts and realised that involvement with a football club was, as he put it, "high risk".

[6] The pursuers ("Chrysalis") were incorporated in about 1992 for the purpose of holding and investing funds accrued by Mr Robinson through his business interests. Mr and Mrs Robinson own all the shares in Chrysalis and are directors of the company. Chrysalis became the holding company for the catering business. When that catering business was sold in 1996, the proceeds of sale went to Chrysalis. Between 1996 and 1999 Chrysalis invested a substantial sum on the money markets, earning interest fixed by reference to the bank rate from time to time. This was a safe investment which satisfied Mr Robinson at the time. Mr Robinson said in evidence, and I accept this evidence, that he and his wife had formed the view that they wanted to make sure that at least £1,000,000 was ring fenced so as to be available for educating his children and maintaining a reasonable lifestyle.

[7] Mr Robinson had banked at the Clydesdale Bank for some 35 years, in the course of which he had built up a working relationship with the regional manager. In about 1999 he was encouraged to speak to the defenders, an associated company of the Bank, about better ways of investing his money. A meeting was arranged with Stewart Siegal of the defenders, as a result of which Mr Robinson decided to remove the £1,000,000 from the money market and invest it in an AIG bond, a quarterly bond divided into four funds, with limits on the amount by which the capital could increase or reduce each quarter. It is apparent, however, that Mr Robinson became dissatisfied with the performance of the bond. Some funds performed well, others less well, and he thought that it was not performing any better than when his money had been on deposit.

[8] Mr Siegal left the defenders' employment in about the spring of 2000. In May or June 2000, Mr Lind contacted Mr Robinson, introducing himself as Stewart Siegal's successor. Mr Robinson told Mr Lind that he thought that the AIG bond was not performing well and was considering whether or not to continue it. He asked for advice. Mr Lind suggested the possibility of making a change and Mr Robinson indicated that he would consider this before the next quarterly review.

[9] Mr Lind and Mr Robinson met at Mr Robinson's office at Tynecastle Stadium on 6 June 2000. The meeting was arranged by Mr Lind. It lasted about an hour. Mr Robinson recalled that Mr Lind appeared to be somewhat "star struck" at meeting the Chief Executive of a Premier League football club and kept chatting about football. A file note of the meeting prepared by Mr Lind (7/10 of process) describes the background to the meeting. It had been arranged by Mr Lind so that he could introduce himself to Mr Robinson as the Financial Planning Manager who would be looking after this file following Mr Siegal's resignation and discuss the investment. The third paragraph of the file note reads as follows:

"At our meeting Chris [i.e. Mr Robinson] confirmed that he was less than happy with the performance of the bond and the fact that although guarantees were in place the bond was not moving up and in fact was falling in value. I explained the nature of the contract and the fact that the value had fallen recently. This was I explained due to stock market volatility. The only funds which could be guaranteed not to fall in value were the 100% funds which provide less opportunity for capital growth."

Mr Robinson agreed that this reflected the discussion. He did not agree, however, that the fourth paragraph accurately represented what had been discussed. This paragraph reads as follows:

"We discussed other investment options outwith the AIG bond and in particular the option to move to some form of With Profits environment which would provide the opportunity for regular and steady growth although stock market based. We discussed the potential downsides to moving to a different fund/product provider i.e. potential of underperformance of new fund vs old fund, established costs and both the encashment penalties of the existing investments and any new investment made."

Mr Robinson took issue with the suggestion that there was any discussion about moving to some form of "With Profits environment". He said he would not have known what that was. He also said that there was no discussion about moving to a different provider or the "potential downsides" such as under performance and encashment penalties. The meeting ended, according to Mr Robinson (and consistent with the last paragraph of the file note), with a decision to maintain the position "as is" until the new quarter and that Mr Lind would phone Mr Robinson before the new "lock in" date to discuss performance and future options.

[10] There were two telephone conversations between Mr Lind and Mr Robinson on 6 or 7 July 2000. A file note (7/11) refers to a conversation "on 7 July 2000", but it seems clear that at least one (and probably both) of the conversations took place on the previous day. Mr Robinson was at his holiday home in Portugal at the time. Mr Lind telephoned him to discuss his investment. He reported that since the last quarter the value had fallen by another £30,000 or so. Mr Robinson was, to quote Mr Lind's file note, "understandably less than impressed" with this. The file note records that Mr Lind suggested moving to different funds within the AIG bond and that Mr Robinson agreed to proceed on this basis. Mr Lind faxed AIG with instructions to move to different funds within the bond. At the bottom of the fax there is a note that the surrender penalty, i.e. the penalty if the bond was surrendered, was £48,476.34. Shortly thereafter, Mr Robinson telephoned Mr Lind, having discussed the position with his wife and having decided that moving from one fund to another was not really doing much to improve the situation. He told Mr Lind that he had decided that he wanted to encash the bond fully. He knew, or was told about, the surrender penalty of about £48,000. Mr Lind immediately faxed AIG, asking them to disregard his earlier fax and stating that Chrysalis now wished to encash the bond. Mr Robinson confirmed the accuracy of the file note thus far. As agreed with Mr Lind, Mr Robinson also sent a fax to AIG confirming the instructions to break the bond. Mr Lind's two faxes are undated, but Mr Robinson's is dated 6 July 2000. That is why, as I have said, it is clear that the conversations took place on 6, not 7, July.

[11] In the fourth paragraph of his file note, Mr Lind records the second conversation as having been not only about encashing the bond but also looking "towards alternative investment options". He records confirming not only that the surrender penalty for the AIG bond would be £48,476 but also that, in order to provide as competitive a deal as possible, "commission would be foregone of 5% of any new investment made". Mr Robinson denied that anything was said during that conversation about alternative investment options. In his evidence he said that he had decided at that point to put the money back on deposit.

[12] When considering the reliability of the different accounts given of the meetings and conversations in June and July 2000, I shall in due course have to consider the reliability of Mr Lind's file notes. I have already noted that the date ascribed to the telephone conversation in the file note at 7/11 must be wrong - the conversations must have taken place on 6 July, not 7 July. I should also note that in the fifth paragraph of that same file note Mr Lind says this:

"In the meantime I called Clerical medical international and asked that they provide an illustration based on a £1 million contribution. As agreed with Calum Brewster [a manager of the defenders in Perth and Edinburgh] commission of 5% is to be used to enhance the policy from outset."

The inference from this paragraph, and in particular from the phrase "in the meantime", is that Mr Lind contacted Clerical Medical after his telephone conversations with Mr Lind on 6 July, or at least after the first of them. This is not what happened. Mr Lind in fact contacted Clerical Medical some days before those conversations with Mr Robinson. At 6/1 of process is a letter from Clerical Medical to Mr Lind dated 3 July 2000, referring to previous conversations and setting out the terms they were prepared to offer for an investment of £1 million into their Offshore With Profits Fund. It is apparent that Mr Lind's first enquiry of Clerical Medical must have been made before that letter. At 7/15 of process is an illustration provided by Clerical Medical dated 7 July 2000, which was probably received by Mr Lind after his telephone conversations with Mr Robinson. But the point is that the contact with Clerical Medical asking them to provide an illustration was made well before the telephone conversations with Mr Robinson. To this extent the file note is inaccurate. It is not suggested that any of the file notes were fabricated for the purpose of the litigation but nor is it suggested that they were always written as soon as the meeting or conversation ended. The fifth paragraph of the file note relating to the conversations of 6 July 2000 indicates that that file note not only went beyond what was in fact discussed with Mr Robinson but also was inaccurate about one particular aspect of the chronology. In the context of simply wishing to record what conversations took place and what information was received, the file notes no doubt serve a useful purpose; but this inaccuracy is a warning that I should be cautious about relying upon them as a record of precisely what was said on what occasion.

[13] The letter from Clerical Medical of 3 July 2000 sent to Mr Lind (6/1 of process) gave details of the Clerical Medical International (CMI) Premier Bond. It is worth setting out some of the details given by Clerical Medical in terms of bonuses establishment charges, exit penalties and the application of an MVA since they help to explain some of the evidence about the subsequent discussions. The letter said this:

"The current reversionary bonus rate is 5.5%. The establishment charge is 1.44% for each of the first 5 years. There are exit penalties during years 1, 2, 3, 4 and 5 of 9%, 7.5%, 6%, 4.5% and 3 % respectively, if an amount in excess of the 10% maximum penalty-free withdrawal limit is enchased. It should also be pointed out that a MVA could be applied in exceptional circumstances although we do guarantee that this will not happen in the case of regular withdrawals, or amounts of less than and up to £25,000, or, on death, or, on the MVA-free date which can be set 12 years or more after the investment is made."

[14] Mr Lind met Mr Robinson again the following week when the latter had returned from holiday. The meeting took place at Tynecastle on 11 July and, according to Mr Robinson, lasted about half an hour. Mr Robinson explained that he had offered Mr Lind the chance to come and show what he had to offer. Mr Lind was persuasive about the Clerical Medical Premier Bond. Mr Robinson said that he told Mr Lind that he would only look at the product if his capital was guaranteed. The income did not have to be huge - bank rates were doing well and his priority was to ensure that his capital was safe. According to Mr Robinson, Mr Lind explained that it was an offshore bond and confirmed that the capital element would not reduce. Being an offshore bond, the growth in the fund would only be taxed when it was brought back to the UK.

[15] Mr Lind's file note of the meeting is at 7/16 of process. It states that the purpose of the meeting was to discuss Mr Robinson's ongoing investment options following the surrender of the AIG bond. It refers to "a lack of time at the meeting", as a result of which they were unable to complete a customer information form "although Chris confirmed that the circumstances were pretty much the same as previously". According to the file note, Mr

Robinson "confirmed that the money was available for investment in the company's name and he was happy to view it over at least a 5 year period". The file note records that Mr Lind told Mr Robinson that a CIF (a customer information form) would have to be completed before any business was transacted "in order that we could be sure of the suitability of the advice." It notes that a "terms of business letter" was provided for Mr Robinson's records.

[16] Mr Robinson accepted most of this as accurate. However, he said that no terms of business letter was given to him on that occasion. He also joined issue with the notion that the investment was to be for "at least" a 5 year period. He was clear that he wanted to be able to realise the money after 5 years.

[17] The file note goes on to note that there was discussion about "the With Profits concept via the CMI Premier Bond". Mr Lind suggested that, since Mrs Robinson was a co-director of the company, any investment should be done on a "joint life last survivor" basis. It notes that a quotation was provided, as well as a KFD (Key Features Document) and further product information from Clerical Medical. Mr Robinson accepts that a quotation - or rather, the illustration at 7/15 of process - was provided, but he denies that a KFD or other product information was given to him. There was then, according to the file note, some discussion about the main attraction of the With Profits bond, that being "steady long term growth within a low risk environment". There was mention of the fact that Clerical Medical would give up their 5% commission, so that the initial allocation would be 105.5%. Mr Lind discussed bonus rates and emphasised that they were not guaranteed.

[18] The controversial part of the file note is in the fourth paragraph, which reads as follows:

"I explained the nature of a market value adjustment which could apply and the optional MVA free date of 12 years. The encashment penalties were also explained in detail and the fact that 10% of the investment may be withdrawn in any 1 policy year without early encashment penalties applying."

Mr Robinson accepted that there was explanation of the early encashment penalties, but said that there was no discussion at all about MVAs.

[19] According to the file note, and this is confirmed by Mr Robinson, Mr Robinson was happy with the concept (albeit that there is a dispute as to precisely what was explained) and suggested that Mr Lind should call him in the next week to arrange a time to discuss matters further and complete the relevant paperwork if required.

[20] In his evidence in chief and under reference to his account of this meeting, Mr Robinson expanded upon his approach to funds being locked in for any particular period. He said that he and his wife had discussed their financial position and their future plans. The children would be going to university. His job was pressurised. They had agreed that within five years he would exit Hearts. He would need to find a purchaser for his stake in Hearts. He was thinking of getting back into catering. He might need money for a business start up or for the purchase of property in towns where his children were going to university. He was 49 years old. He was not thinking about a 12 year investment. There was no way in which he would have been interested in the bond if it had been explained to him that an MVA might be applied or if 12 years had been mentioned. The bond was attractive because of its initial bonus. He said that Mr Lind had called this a "guaranteed bond" and had said that he would not be surprised if it went up to £2 million over 5 years, a comment which Mr Robinson says that he took with a pinch of salt. The encashment option of up to 10% per annum without penalty was attractive, and might free up cash for buying a flat for children at university. Mr Lind had warned him about the establishment costs - that registered clearly with him - and he accepted that he was attracted by the fact that even within the 5 year period there was sufficient flexibility to take money out for investing for the children.

[21] As I have already said, Mr Robinson accepted that an illustration, rather than a quotation, had been shown to him at the meeting of 11 July 2000. This was the illustration dated 7 July 2000 (7/15). Page 3 of that illustration contained the figures he had been shown at the meeting. Mr Lind had referred to these figures as "pessimistic". There was no mention in the illustration of an MVA.

[22] The last meeting in the sequence took place on 28 July 2000 at Mr and Mrs Robinson's home. This was the first time that Mr Lind had met Mrs Robinson. Mr and Mrs Robinson were both directors of the company. The

meeting was arranged for 9 am. According to Mr Robinson, Mr Lind arrived late and the meeting lasted for only about half an hour. Mr and Mrs Robinson both had to be away by 10. Mrs Robinson did not recall him being as late as that. According to her evidence, the meeting lasted for about 30 to 40 minutes. At one point in her cross-examination she was pressed into agreeing that it may have lasted 45 minutes, one hour at most, but, having regard to the other time constraints to which I have referred, I do not think that it can have been that long. Mr Lind thought it lasted about half an hour, or possibly 40 minutes. There is not much between the witnesses on this point. Whilst the approximate length of the meeting is of some importance, its precise duration is not. I will proceed on the basis that the meeting lasted for 30-40 minutes.

[23] Before setting out what Mr Robinson says was discussed at the meeting, I should first quote the file note (7/19 of process):

"Chris had called me to say that he thought they would proceed with my recommendations although a suitable time needed to be arranged when his wife Liz was available. I confirmed that I had completed my formal recommendations although I would require to ensure via the completion of a Customer Information Form that the advice being provided was suitable.

I was introduced by Chris to his wife Liz and a CIF was completed. As per our previous discussions, their circumstances were pretty much as before although Chris's worth in Hearts was reckoned to be considerably more than before. We discussed other areas of financial planning although Chris and Liz's only real interest was to discuss the company investment.

I explained again the concept of With Profits Investment as well as the product terms for the benefit of Liz. The commission give up and special terms offered were confirmed as well as the statutory 14 days cooling off period. Both were happy to proceed and asked that I complete the paperwork on their behalf."

The paperwork completed at the meeting included the following: a Client Information Form (CIF) completed by Mr Lind and signed by Mr and Mrs Robinson; a "Confirmation of Agreement - File Note" signed by Mr and Mrs Robinson and Mr Lind; a CMI Premier Bond Application Form completed by Mr Lind and signed by himself and Mr and Mrs Robinson; and a CMI Premier Bond Supplementary Corporate Application Form signed by Mr and Mrs Robinson.

[24] Mr Robinson said that at the meeting they went through the features of the bond, particularly the enhancement at the beginning and the ability to take out 10% per annum. His wife was pleased with this. He said that the Customer Information Form was completed at the meeting at speed, though it was clear that some of it had been filled in in advance. He commented, and this is consistent with the second paragraph of the file note, that Mr Lind seemed to be trying to see if he could do other deals with them.

[25] On page 12 of the Customer Information Form (7/20) there is a section headed "Attitude to Risk" asking the investor to indicate on a scale of 1 to 10 what level of risk he is prepared to accept under each of the main financial planning areas. All the boxes indicating particular financial planning areas are left blank except for that applicable to "Investment" where the figure 4 has been inserted. There is a key underneath that explaining the "level of risk" indicated by each number. By the number 4 there is the following explanation:

"Low risk - some fluctuations in capital value in real terms".

The type of investment associated with this category includes Index Linked Gilts, Gilt Edged Stocks, Fixed Interest Stocks/Corporate Bond PEPs, Currency Funds, Distribution Bonds and With Profits. To get a further indication of what is meant by level 4, it is useful to refer to the level of risk either side of it. Level 5 is described as "moderately secure but long term expectation of preservation in value" and refers to investment in managed funds and property funds. Level 3 is described as "very low capital risk - no fluctuation in capital values" and refers to bank accounts over £20,000, building society deposits over £20,000, offshore banking accounts and short dated cash (money funds).

[26] The Confirmation of Agreement - File Note (7/21) contains a tick in the box asking whether the business transacted matches the recommendations. In the box headed "If not, what was agreed and why?" there is the following text:

"Report + Recommendations explained in detail. Commission give up of 5% explained + confirmed. Quotation + cooling off notice also explained. Mr and Mrs Robinson happy to proceed."

The reference to "Report + Recommendations" is a reference to a document bearing a cover sheet describing itself as "Financial Planning Report and Recommendations" (7/18). It took the form of a letter to Mr Robinson at his home address dated 27 July 2000 and headed "Investment Advice". The letter is 8 pages long and has a 3 page appendix attached to it.

[27] There is a dispute as to whether this was handed over to Mr and Mrs Robinson at the meeting. Mr Lind is adamant that it was but Mr and Mrs Robinson dispute this. The letter begins in this way:

"I refer to our recent discussions and write to confirm my recommendations concerning the reinvestment of the proceeds of your AIG Guaranteed Stock market Bond."

It then goes on to say:

"You wish to look to re-invest approximately £1,000,000 over the medium to long term (i.e. 5 years plus) with a view to obtaining better returns than those currently available from Bank Deposits."

On the second page, under the heading "Circumstances", the letter states:

"You confirmed that you would be happy for any new investment made to be for at least a 5 year period. Encashment penalties would apply if the policy proceeds were to be withdrawn within a 5 year period of investment."

On the next page, under the same heading, the letter continues in this way:

"Due to a lack of time at our meeting of 11 July 2000 no Customer Information Form was completed. During our meeting, however, you confirmed that your circumstances had not changed since the initial recommendations had been made and that you would be happy to consider any further investment for at least a 5 year period. I provided you with an up to date Terms of Business letter. A Business Card had been provided at our previous meeting. A Customer Information Form will require to be provided at our next meeting."

Under the heading "Risk Profile" there is a reference to Mr Robinson's attitude to risk as being Level 4. There is then some discussion in the document of "Alternatives", the "Traditional Investment Approach", how a company can "benefit from stock market performance", share portfolio, unit trusts, "'Onshore' Insurance Bonds", the "Offshore Advantage" and finally, on page 6, "Recommendations". So far as relevant this last section contains the following:

"I confirm therefore that I recommend that you effect an offshore With Profits Premier Bond with Clerical Medical International (CMI) for the investment of £1,000,000.

The aim of the suggested investment is to provide a better investment return than that currently available from deposit based investments. This is importantly achieved within a 'low risk' environment'.

As Mr Robinson is a co-director in Chrysalis Scotland (LGD) I would recommend that the Bond be effected in the Company's name with both you and Mrs Robinson as the lives assured. The policy benefits should be written on a second death basis for maximum flexibility.

.....

There is always the chance that the new investments selected may underperform when compared to the AIG Life Investment. It is my belief that the fund is much better suited, given your cautious attitude to risk, to provide you with a steady rate of return which allows you to benefit from the benefits of stock market investment within a low risk environment.....

....

All companies reserve the right to apply a market adjustment factor in adverse stock market conditions, which can reduce the value of with profits units if it is decided to encash the plan at this time. This will not apply on death, or to most existing regular income withdrawals of up to 10% per annum. The application of the market value adjustor is designed to protect the interests of those investors who wish to remain within the fund."

On page 7 the letter discusses some aspects of the particular Clerical Medical Bond and says this:

"At the end of 10 years, if the funds remain invested, a loyalty bonus of a further 1% will be added. There is a guarantee that no Market Value Adjustment will be made on the 12th anniversary of the investment."

In the Appendix there is again a reference to a "Market Adjustment Factor" which may be applied in "adverse stock market conditions". There is no reference here to the time at which there is a guarantee that no MVA will be applied.

[28] Mr Robinson said that this letter was never shown to him at the meeting. Indeed, he made the point that it would have taken a good half hour or so to go through that document. The meeting itself lasted no more than 30-40 minutes. Mr Robinson said that if he had seen this, with its reference to 12 years and a guarantee that no MVA would be applied on the 12th anniversary of the policy, it would have rung alarm bells. Further, at the top of page 7 the letter referred to a "diversified portfolio of investments". To him this would have sounded a bit like the previous investment with AIG and would have caused him concern. He said that there was no discussion of this at the meeting. He did not see this document until many years later. Although the Confirmation of Agreement - File Note stated that "Report + Recommendations" had been explained in detail, Mr Robinson says that he took this to refer to the Illustration which had already been provided (7/15). He was happy to proceed on the basis of what had been explained to him by Mr Lind.

[29] There was some discussion in evidence as to what documents were left with Mr and Mrs Robinson at the meeting. I shall return to this point in due course.

[30] Mrs Robinson's account of the events leading up to that meeting was based both on her discussions with Mr Robinson about what they wanted to achieve and upon what he told her of his conversations with Mr Lind. She was able to confirm those parts of his evidence.

[31] Mrs Robinson was able to give direct evidence of the meeting of 28 July 2000. It was the first time she had met Mr Lind. The meeting took place in the kitchen and was very relaxed. She understood it to be a "rubber-stamping job". Mr Lind had already had two meetings with her husband and, as far as she was concerned from what he had told her, the new bond sounded right for them. She and Mr Robinson had already discussed it and the meeting was "something of a formality". Her recollection was that no other documents were looked at at the meeting apart from the Customer Information Form and the Confirmation of Agreement - File Note. Mr Lind's attitude to why he was there seemed to her to amount to this: "I am here because I have to say that I have spoken to you and I need your signature". Such an attitude would have been understandable; the policy was on their joint lives and she was a director of the company. She recalled some discussion about the With Profits element, but thought that most of the discussion had taken place earlier between her husband and Mr Lind. Nothing was gone into in any great detail at the meeting. Mr Lind did not go through or explain any documents or give any advice about the advisability of entering into the bond. She was "absolutely certain" that Mr Lind did not go through the Report and Recommendations set out in the letter of 27 July 2000 (7/18). She said that when she signed the Confirmation of Agreement - File Note, she was not sure that she had applied her mind to what was meant by

"Report + Recommendations explained in detail". As to the Report and Recommendations document itself, she said that she would have regarded the reference to the investment being for "at least 5 years", and there being penalties if it was ended before that, as being in accordance with her understanding. But her view was that the money would definitely be needed after 5 years. They did not have definite plans, she said, but they were going to reassess the position after 5 years. They might then decide to leave it in for another year or so and do something after that; but they needed to know that after 5 years the money was available. She was not aware of the loyalty bonus after 10 years: she said that she was not thinking about 10 years anyway, so it never crossed her mind.

[32] Mrs Robinson was asked specifically about the reference in the Report and Recommendations to the MVA. She was certain it had not been mentioned: if it had been, "I would have had to have it explained to me", she said. If she had seen the reference to an MVA free window after 12 years, she would have said "stop right there, why are you thinking of the twelfth anniversary". They were not thinking of 12 years - they were already 2 years behind schedule by reason of cashing in their 5 year AIG bond after 2 years and starting again with Clerical Medical. If it had been explained, and she had been told it would be 12 years before there was a guarantee that withdrawals would not be subject to an MVA, she would have said that they could not go ahead. If she had been told that it was extremely unlikely that an MVA would be applied, but that if one was applied it could be in any amount, she would have said "forget it".

[33] Graeme Lind was about 31 at the time of these various meetings. He had studied Business Studies at Stirling University and started training to be an accountant in 1990 before he soon realised that that was not for him. Having dabbled briefly in insurance, he moved into the Financial Services sector in 1993. He obtained a certificate in Financial Planning in 1993/4 and joined the defenders in 1997. He stayed with them for about seven years and left at about the end of 2003 for reasons entirely unconnected with the present dispute which had not surfaced by them. In 2000 he was employed by the defenders as a Financial Planning Manager. There were only two Financial Planning Managers in the defenders' Edinburgh office and Mr Lind was the most senior of the team. When Stewart Siegal left, Mr Lind was asked to contact Mr Robinson because of Mr Robinson's concern about the performance of his AIG bond. He telephoned and arranged a meeting at Tynecastle. That was the meeting of 6 June 2000 to which I have already referred.

[34] Mr Lind's recollection of the meetings and telephone conversations was largely dependent on (a) his file notes and (b) his recollection of his usual practice. I did not find this surprising. It is therefore sufficient, as a summary of his evidence, to refer to what I have already said about his file notes. That is not to say that he pretended to having no actual recollection of what had taken place. Some things in his file notes he claimed to remember clearly, such as having had a discussion about investment into a With Profits bond at the meeting of 6 June 2000. I did not find it surprising that he should have, or at least believe he had, some actual recollection of events because, although he would have had thousands of meetings of a similar kind over the period of his employment with the defenders, he would not have had many high profile clients such as Mr Robinson.

[35] Referring to his file note of the meeting of 11 July 2000 (7/16) Mr Lind placed emphasis on the fact that the investment was to be for at least a 5 year period. That meant a minimum of 5 years. It was a medium term investment. His view was that if the money was not available for at least 5 years, it should not be put into an asset backed investment. One of the attractions of the Bond was the large initial enhancement. That would not have been available for an investment for shorter than 5 years. As to whether Mr Robinson was given a terms of business letter at this meeting, Mr Lind accepted that he would already have had one from Stewart Siegal, but thought that "as a matter of practice" he would have handed one out again. He confirmed that the "quotation" referred to in the file note was the illustration (7/15) obtained from Clerical Medical. He believed that he handed over the KFD at the meeting. The company would send out two copies of the quote and the KFD and they would be together in a folder. He said that he would also have handed over the Clerical Medical brochure at this meeting, along with the illustration and the KFD. The third paragraph of the file note summarises the main aspects of the Bond. Mr Lind said that he did not specifically recall this, "but this was part of what was always discussed."

[36] As I have already noted, the controversial part of this file note lies in the fourth paragraph, with its mention of MVAs and the MVA free date of 12 years. Mr Lind explained that he had narrated it in his file note because it was a specific MVA. He could not say that Clerical Medical had never applied an MVA before, but it was extremely rare. He said that he had thought that Mr Robinson had understood what he had explained. But, he said, it was 8 years ago and he accepted (in his evidence in chief) that he could not remember specifically what was discussed. He did not recall Mr Robinson talking about simply putting the money on deposit. He thought that the discussions about the MVA would have taken up about 5 minutes of the meetings - the points about the MVA were mentioned but they would not have spent any time on them.

[37] Referring to the meeting with Mr and Mrs Robinson on 28 July 2000, and his file note (7/19), Mr Lind said that the Report and Recommendations was handed over and discussed, and they linked it back in to the illustration and the KFD. He had prepared the Report and Recommendations. It had been approved within the company. Sometimes it would be posted to the client and on other occasions it would be handed over at a meeting. Here it was handed over. At one point he recalled going through it at the meeting and leaving a copy with the Robinsons. Later he said that he remembered the Report being there but he could not remember going into details. He explained that he made sure everything was done properly because he was aware that Mr Robinson was a high profile figure and a longstanding customer of the bank.

[38] Asked about the involvement of Mrs Robinson at the meeting, Mr Lind said that he would have mentioned the points, including penalties, the terminal bonus and the MVA. He did not recall if he mentioned 12 years to her, but he was certain that he mentioned the MVA because that was part of what was normally discussed. His standard practice would be to mention the 12 year free date, but he would not have laid any stress on it because it was so unlikely that MVAs would be applied. He was not concerned about the mismatch between the 5 years minimum investment period and the MVA free date of 12 years, because MVAs had not been applied.

[39] As I have indicated earlier, there is some dispute as to whether the Key Features Document (KFD) was given to Mr Robinson at any of the meetings prior to him taking out the policy. The file note of the meeting of 11 July (7/16) notes that a KFD was provided to Mr Robinson at that meeting. The Confirmation of Agreement - File Note of 28 July 2000 contains an acknowledgement signed by Mr and Mrs Robinson of receipt of the KFD, presumably at the meeting of that date. In the course of correspondence between solicitors as part of the preparation leading up to the proof, those acting for the pursuers in one letter (7/78) said that the KFD was amongst the documentation sent directly by Clerical Medical to the pursuers after they purchased the bond; but in another letter (7/82) they said that the KFD was amongst a number of documents received at the meeting at Mr Robinson's house on 28 July 2000. It seems to me that there is genuine confusion over this. Mr Lind did not suggest that the KFD had been handed over at the meeting of 28 July 2000. A joint minute signed by both parties in respect of the usual practice of Clerical Medical did not support the idea that they would have sent the KFD with other documentation after the policy was taken out, and the evidence from Miss MacKinnon, who dealt with documentary matters within the defenders, was that she would not have added any further documents to those sent by Clerical Medical. Mr Robinson referred to a green folder of documents, but this was not identified at the proof. It seems to me on balance that the KFD is likely to have been left with Mr Robinson by Mr Lind at the meeting of 11 July 2000. The point is however of limited significance. It was accepted by the defenders that it would not be sufficient simply to rely upon leaving written material with Mr Robinson. In so far as the point goes to reliability, it does no more than suggest that the reference in the file note at 7/16 to the KFD having been provided at the meeting of 11 July 2000 is probably correct. But that is as far as it goes. The file note itself does not suggest that there was any reference to it at that meeting and the document could well simply have been filed away by Mr Robinson without further attention being paid to it.

[40] The importance of the KFD and the other documents for the present litigation is in their description of how the MVA might apply to the Bond. The KFD (7/90) seeks, as its name suggests, to summarise the key features of the CMI premier bond. It describes the Bond as a "single premium, whole of life, unitised life assurance policy available to UK residents but with the advantage of offshore status." After setting out its aims, that is to offer a broad range of funds in terms of risk and opportunity, to provide capital growth and to allow withdrawal of part or

all of the investment when the investor wants to, and having stated the investor's commitment, including his recognition that the bond is a "medium to long term" investment, the KFD identifies various "risk factors". These include the following:

§ In the case of the Offshore With-Profits Funds, the combination of the surrender charge and the possible application of an MVA (see below for both) could mean that you may not get your money back if you surrender in the first few years.

.....

§ If you take money out of the Offshore With-Profits Funds, either by switching or encashing, the amount paid may be reduced to reflect the current value of the underlying assets to protect remaining policy holders. This is known as the Market Value Adjuster (MVA).

§ Whilst we expect the MVA to apply only occasionally, we do not apply it in the following circumstances:

§ in the event of a death claim

§ when you have asked Clerical Medical to cancel units on a regular basis, provided that the request was received before the publication or notification to investors of an MVA, and that the amount of withdrawals in the preceding 12 months is less than 10% of the amount invested in the bond.....

§ when you cash in part or all of your bond on an MVA -free date (provided you confirm at least 30 days, but not more than three months, before the date that you wish to proceed with the encashment) ..."

The KFD goes on to say that an MVA might also apply on switching funds.

[41] One of the other documents received from Clerical Medical after the investment was made was a brochure (7/91) describing the CMI premier bond as "a flexible investment bond with the advantage of offshore status". Amongst the details given was information about the "Establishment charge" and the "Surrender charges", the latter applying if an investor wished to encash part or all of the bond within the first five years but subject to the exception of a withdrawal on death or where regular withdrawals up to 10% per annum were taken. These are matters about which Mr Robinson was clearly told at the meetings and there is no dispute about that. It also contains, at page 8, details relating to the MVA. I should quote this in full:

"Market Value Adjuster (MVA)

If you take money out of the Offshore With-Profits Funds, the amount paid may be reduced in some unusual circumstances. The purpose of an MVA is to protect Offshore With-Profits unit holders from the loss that would arise if significant monies were switched or encashed at a time when the face value of the units was higher than the value of the underlying assets. These funds are structured to give competitive returns over the medium to long term and therefore, there is a higher chance that early exits, particularly those in the first few years, will attract an MVA.

MVA-free date

Clerical Medical guarantees that no MVA will apply for withdrawals made on the twelfth anniversary of units allocated upon any investment or switch into any of the Offshore With-Profits Funds. In addition there will be further MVA-free dates every three years thereafter.

Provided that you confirm thirty days, but not more than three months, before any of these dates that you wish to proceed with an encashment or switch we will ensure that an MVA will not apply."

It then goes on to explain that they expect the MVA "to apply only occasionally" but that they do not apply it in certain circumstances such as death or withdrawals up to 10% as already summarised by reference to the KFD.

[42] Finally in this connection I should refer to the Policy Provisions applicable to the CMI premier bond (7/93). These provide a definition of the MVA as follows:

"A deduction which may be made by the Company from the value of units of an Offshore With-Profits Fund cancelled on any encashment under section 5 or any exchange under section 4 in order that the amount payable, or the amount applied in the allocation of units in any other Fund (as the case may be) shall reflect as nearly as possible the growth in value of the underlying assets of the Fund during the period units of the Fund have been allocated to the Policy and/or having regard to the need to protect the interests of other policyholders whose policies have allocated to them units in the Fund.

By way of example, the circumstances in which the Company may decide to make such a deduction include (but without limitation) any one or more of the following:

(a) where the growth in value of the assets underlying the Fund since the Investment Commencement Date relating to the units encashed is below that which the Company reasonably expected to justify the Bonus Interest Rate during that period;

(b) where the values of markets affecting the value of the assets underlying the Fund have, in the reasonable opinion of the Company, fallen significantly;

(c) where a number of Investors are encashing units of the Fund at the same time;

(d) where the amount payable on encashment of a Policy, including any other amounts paid on encashments of units of the Fund in the previous 12 months, is considered by the Company to be significant."

It then goes on to identify in the same manner as in the KFD the circumstances in which the MVA will not be applied. Later in the Policy Provisions in section 5, which deals with encashment, there is a statement that an MVA may be applied except in the same circumstances as have already been identified.

[43] It was agreed between the parties in a joint minute that Clerical Medical had not applied an MVA to their With Profits Policies prior to 12 September 2001. Both parties called expert witnesses, David Carlisle for the pursuers and Grahame Goodyer for the defenders. They spoke to the duties of independent financial advisors in the position of Mr Lind as at 2000. In the event, there was little dispute about these duties. I have set out the common ground between the parties based on their evidence at para.[2] above. Of more importance for present purposes was their evidence about the application of MVAs. Both witnesses confirmed that MVAs had been used very infrequently in the past. Mr Goodyer, for example, said that most life companies had not used MVAs since the fallout of the 1987 market crash, and those that did use them then did so for only some two years following the crash and at a rate rarely in excess of 15% of the policy value. Nonetheless, they both agreed that an independent financial advisor would be expected to explain to a potential investor what an MVA was, how it could be applied, when it had been applied in the past and the circumstances in which it might be applied in the future. However, no independent financial advisor could be expected to offer a view of the likelihood of an MVA being applied during the currency of the policy. That would depend upon market factors.

[44] MVAs are used by life assurance investment companies when the investment market is volatile. Mr Goodyer explained that they did it to avoid heavy dilution of the With Profits fund by policy holders who decided to cash in early to avoid possible financial loss; if they did not apply an MVA, they would find that the reserves of the With Profits fund would have been depleted by customers who had cancelled early and this would unfairly penalise the remaining policy holders in the fund. Mr Carlisle confirmed that when one was looking to the circumstances in which an MVA might be applied, one was looking for something more than a marginal fallback in the Footsie Index. With Profit funds deliberately smooth out investment risks and can absorb minor set backs on the stock market. But if there was a fall of, say, 10-15% he would expect consideration to be given to applying an MVA. But it was always at the discretion of the particular life office and involved assessment by actuaries. The purpose was to maintain equity between those who cashed in and those who left their investment in place. Both experts were agreed that the fact that MVAs had not been applied for many years and the fact that an advisor could not be

expected to predict the likelihood of an MVA being applied at any particular time in the future did not relieve him of the duty to advise the potential investor of the risk that an MVA might be applied and to explain the sort of circumstances in which that might happen.

[45] The parties lodged in process at 7/75 a letter from Clerical Medical giving the history of the applications of MVAs to all investments in their Sterling Off-Shore With Profits Fund from the time the investment was made in the third quarter of 2000. No MVA was applied until 12 September 2001. This was the day after the attack on the Twin Towers in New York, which triggered a panic in the equity markets and a significant subsequent fall in the value of investments. From 12 September 2001 until 31 January 2002 Clerical Medical applied an MVA of 7.5% on encashments over £50,000. For about 6 months from 1 February 2002 until 21 July 2002 they ceased to apply an MVA but from then on until 1 February 2007 an MVA in some form was applied. This began at 15% in July 2002, reducing to 7.5% from August 2002 to the end of January 2003, then rising sharply to 25% from 1 February 2003 to 31 July 2003 before dropping gradually to a level of 15% in the period 1 August 2005 to 31 January 2006. After that it continued to fall, being applied at a level of 10%, then 8% then 6% and finally 3% at various dates in 2006 until it was reduced to nil on 1 February 2007.

[46] The policy documentation was sent to Mr and Mrs Robinson by the defenders on 18 August 2000. As I understood the evidence, this was simply the defenders passing on the documents received from Clerical Medical. Thereafter Mr Robinson was sent by the defenders summaries of the value of his policy. Mr Robinson said in evidence that these were sent in response to requests that he made on each occasion, and the terms of the letter from the defenders in each case appears to bear this out. The first such letter is dated 20 September 2001, only 11 days after the attack on the Twin Towers and when, according to the evidence, Clerical Medical were already applying an MVA to withdrawals. That showed the current fund value as being £1,138,066.82. The letter of 7 October 2002 showed that the fund value had increased to £1,178,752.10. Neither of these documents referred to the fact that MVAs were being applied on withdrawals. On 18 November 2003 Mr and Mrs Robinson were sent a document in a different form headed "Investment Portfolio Summary" showing the current value of the bond to be £1,207,937.35 but with a "Surrender Value" at £911,328. 34. A note at the bottom said that the surrender values may not take into account any Market Value Reductions or any other penalties that might apply. The low surrender value was unexplained. Documents from the defenders following that included for the first time a column for the amount of the "Market Value Reduction" in addition to the separate column for the surrender penalty. That sent in September 2004 referred to a Market Value Reduction of over £230,000 so that the surrender valued was just over £954,000. Similar documents followed in November 2004, April 2005 and September 2005. Mr Robinson complained to the defenders. The first such letter of complaint was in November 2004. There was a good deal of correspondence after that. It is not necessary for present purposes to set out the details of the arguments in that correspondence. Suffice it to say that Mr and Mrs Robinson decided that they would wait until the bond matured, i.e. until five years had elapsed, but they would encash the bond. Mr Robinson had exited from Hearts. He wanted to invest in property in Portugal. He was chastened at the outcome of the bond. His evidence was, and I do not think he was challenged on this, that they took the decision well before September 2005 that in the autumn of that year they would seek to encash the bond. Instructions were given and the bond was encashed with an effective date of 18 January 2006. No surrender charges were imposed, the encashment being after the five year period during which surrender charges might apply. The amount paid to the pursuers was £1,034,510.73, that being reduced from the value of the bond by a "dividend adjustor" - i.e. an MVA - of £182,560.72. That represented an MVA of 15%, consistent with the figures provided by Clerical Medical.

[47] Having considered carefully all the evidence and documents put before me, I have come to the conclusion that Mr Lind did not give any explanation to the pursuers, or to Mr and Mrs Robinson personally, of what MVAs were and when and in what circumstances they might apply. I consider that it is probable that MVAs were not mentioned at all. However, if they were mentioned, it seems to me that they can have been mentioned only briefly and in passing and certainly not in such a way as to bring home to Mr and Mrs Robinson, or to any reasonably prudent investor, the impact that they might have upon the investment which they were about to undertake.

[48] In coming to this conclusion, I emphasise again that I have not formed the view that any of the witnesses were dishonest in their evidence. But I did form the view that in terms of reliability the evidence given by Mr and Mrs Robinson was to be preferred. Certain criticisms can be made of their evidence. I consider that Mr Robinson was probably wrong in saying that the KFD was not given to him at the meeting of 11 July 2000. On balance, I think it was. Further, I think it is possible that there was some discussion about a With Profits Investment along the lines recorded in the file note at 7/10 of process, though I do not think that any such discussion is likely to have been detailed. Mr Robinson may have been in error in his evidence that no such discussions took place. But this does not, to my mind, undermine the essential credibility and reliability of Mr Robinson's evidence about what was discussed.

[49] The starting point, so it seems to me, is that Mr Robinson had an investment in an AIG 5 year bond which was not performing as satisfactorily as he would have wished. He wanted to review that investment. He was minded to break the bond and place the money on deposit. He was persuaded by Mr Lind to consider the CMI premier bond and was persuaded that this was an attractive investment. It had little risk of loss of capital if kept in place for 5 years. Encashment penalties only applied during the first 5 years and there was the facility to allow withdrawals without penalty even during that time. Of more importance, however, to Mr Robinson's thinking was the strategy upon which he had decided with his wife. That was to invest the money for 5 years or possibly more but with the emphasis upon being able to have the cash available after 5 years. I accept his explanation of his thinking and his discussions with Mrs Robinson about their children's education, the possible investment in university flats, his likely departure from his position at Hearts, and so on. I accept that he was cautious about an investment in which he would risk losing part of the capital invested. Had he been told that an MVA might be applied to his policy upon withdrawal, it seems to me that he would have pressed for more information about it. I am satisfied that he did not know what an MVA was at this time. Had the nature of an MVA been explained to him, and had he been told that the first MVA-free date was 12 years into the investment, I am satisfied that he would have regarded this as an unacceptable mismatch between his intent of a 5 year investment and a policy under which he might be penalised if he withdrew the cash before 12 years had passed.

[50] From Mr Lind's point of view, he was new to Mr Robinson's account. He was relatively young and inexperienced. It seems to me that he may well have been slightly "star struck" when given Mr Robinson's file, asked to handle his investments and invited to meet him at Tynecastle. In assessing the reliability of his recollection, I have to take into account the fact that whereas for Mr Robinson the investment of a sum of £1 million was a significant act, for Mr Lind this client, however important, was one of very many to be looked after. He is less likely, in my opinion, to have a clear recollection of what was discussed. He accepted, candidly, that his evidence was to a large extent based upon the file notes that he made after each meeting or conversation and that is some cases was based on what he would normally have done. But I also bear in mind, and it seems to me that this is fundamental to an assessment of whether or not he would have mentioned the MVA, that at the time at which these discussions took place (mid 2000) life offices had not imposed MVAs for many years and the prospect of them being applied was considered remote.

[51] The meetings and discussions with Mr Robinson and, at the end, with Mrs Robinson were all relatively brief. I need say little about the first meeting at Tynecastle on 6 June. Although Mr Lind had by then obtained the quotation from Clerical Medical (at 6/1), he did not show this to Mr Robinson or discuss its terms with him. Mr Lind does not say that he raised the question of an MVA at this stage. Nor did he claim to have mentioned it in the telephone conversations of 6 July 2000. The first mention, according to him, was at the meeting at Tynecastle on 11 July 2000. It is accepted that this was a short meeting. The file note refers to "a lack of time at the meeting", meaning that they were unable to complete the customer information form. Although there is some difference between the parties on some of the detail in that file note, the crucial part is in the fourth paragraph where Mr Lind records that he explained "the nature of a market value adjustment which could apply and the optional MVA free date of 12 years." In his evidence Mr Lind said that they would not have spent any time in discussing the points on the MVA but he thought that Mr Robinson had understood what he had explained. He also said that he thought the discussions about the MVA would have taken up about five minutes of the meeting. I find this difficult to accept in the context of a meeting which lasted about half an hour and in which they were pressed for time. This was the

first meeting at which the CMI premier bond had been mentioned. There was a lot of discussion about the initial allocation of 105.5%, the guaranteed growth rate and the encashment penalties. Given the improbability (to Mr Lind's way of thinking) of an MVA being applied, I see no reason to think that he specifically mentioned either the MVA or the MVA-free date of 12 years. I am satisfied that had he mentioned an MVA-free date of 12 years, Mr Robinson would at least have raised questions about what this meant in terms of his intentions to invest for 5 years, and this too would have been noted in the file note if there was to be any notation about what was discussed on this matter. It may be that the KFD was left with Mr Robinson at this meeting, and I have found that it probably was, but it is accepted that unless Mr Robinson's attention was drawn orally to these matters and unless the MVA was orally explained to him, the provision of the KFD does not assist.

[52] The final meeting was with Mr and Mrs Robinson at their home on 28 July 2000. That, again, was a fairly brief meeting lasting some thirty to forty minutes. This was Mr Lind's first meeting with Mrs Robinson. She knew about the proposed investment from her husband and regarded the meeting with Mr Lind as a necessary part of the rubber stamping process. Nonetheless, Mr Lind would have wanted to introduce himself and there would have been a certain amount of the usual pleasantries. Time would have been taken to fill in the customer information form and the other documents to which I have referred. I accept that these were already in part completed. Nonetheless even flicking over the pages and filling in some details and then arranging for everyone to sign takes some time. I do not consider that this would have left sufficient time for a detailed consideration of the Report and Recommendations document brought along by Mr Lind to the meeting. This document set out in some detail a number of matters to be considered in relation to the Bond, underpinning the advice that this was a suitable investment. My impression of the meeting is that Mr Lind may well have handed over a copy but that they would not have gone through the document line by line. Rather it seems as though Mr Lind would have gone through it fairly quickly identifying the main headings. From his point of view, as well as that of Mrs Robinson, it was by that stage essentially just formality. I do not consider that he would have thought it incumbent upon him to explain to Mrs Robinson in detail what had already been explained to Mr Robinson. I am satisfied that if there was any mention of an MVA during that discussion on 28 July, it was so brief that it could not reasonably have brought home to Mr and Mrs Robinson the risk that an MVA might be applied even if they withdrew their money after the "maturity date" (as they viewed it) of 5 years. I am also satisfied that if there had been any mention of an MVA-free date of 12 years, Mrs Robinson would have raised concerns and that those concerns would have led to a much wider conversation which probably would have been minuted and would probably have caused Mr Robinson to pull out of the proposed investment. I note that in the file note there is no specific mention of discussion about the MVA or the MVA-free date. It may be that Mr Lind regarded it all as being covered by discussion of the Report and Recommendations document. If the discussions proceeded in the manner that I have found, there would be nothing wrong with that, the MVA simply being a heading (or two headings) within that document. But if there had been the sort of discussion of the type that I think would have occurred had the 12 year MVA-free date been brought home to Mr and Mrs Robinson, then I think the file note would have referred to it.

Conclusion on liability

[53] For these reasons, therefore, I find that the defenders were in breach of duty to the pursuers in failing to bring to their attention the risk that an MVA might be applied upon their withdrawing funds from the Bond after 5 years.

[54] There was some discussion about whether, assuming Mr Lind had explained the risk of an MVA being applied to the policy to Mr Robinson at the meeting of 11 July 2000, the defenders would nonetheless be in breach of duty if he failed to bring it also to the attention of Mrs Robinson at the meeting of 28 July 2000. This was touched upon only briefly by the experts. Mr Carlisle, who gave evidence for the pursuers, was somewhat equivocal, taking the view that it rather depended upon whether Mr Lind thought that Mrs Robinson was a necessary party to the decision making process. Mr Goodyer, who gave evidence for the defenders, thought that the position was clearer. He said that the pursuers, as a limited company, would nonetheless be regarded by the Financial Services Authority as a "private customer" with the consequence that not only would both directors require to be present at the signing but both would require to give their informed consent based upon a proper understanding of the product, including the risks of an MVA being applied. That evidence was adduced in cross-

examination and not challenged in re-examination. None of the regulatory background to which Mr Goodyer appeared to be referring was placed before the court and in those circumstances I would be reluctant to decide the case on this basis. Certainly, in so far as fact findings are required, I am satisfied that the MVA was not explained in any sufficient detail to Mrs Robinson. If Mr Goodyer is correct, therefore, then the defenders are liable for breach of duty whatever may have been explained to Mr Robinson at the meeting of 11 July 2000. I prefer to base my decision on the fact that the MVA was not sufficiently explained to Mr Robinson at the meeting of 11 July 2000 or to Mr and Mrs Robinson at that of 28 July 2000.

Damages

[55] I turn now to the question of damages. The pursuers' case is that had an explanation about the MVAs being given to them, they would not have gone ahead with this product but would have been likely to opt to invest their £1 million in an appropriate deposit account. Their evidence was not seriously challenged on this point. It is argued for the defenders that they might still have been attracted to the CMI Premier bond because of the initial enhancement of £55,000 which offset the penalty of withdrawing from the AIG bond. But I accept the evidence given by Mr and Mrs Robinson. The tenor of their evidence was that they were not greatly enthusiastic about another bond to replace the AIG bond. They were persuaded by Mr Lind to invest in the CMI premier bond. Mr Robinson's instinct had been to place the money on deposit. It seems to me clear from the evidence I have heard that had the MVA been explained, and in particular had it been linked to a 12 year MVA-free date, this would have been sufficient to make Mr and Mrs Robinson shy away from an investment about which they had never been very enthusiastic.

[56] Accordingly, I approach the question on the basis that had they been properly advised they would not have taken out the CMI premier bond but would instead have placed the money on deposit. The pursuers have put before the court (at 6/56) three schedules showing how the money would have fared on deposit. An investment of £1 million from 20 July 2000 (the date when the bond was taken out) to 20 January 2006 (when it was encashed), earning simple interest, would have given a value as at 20 January 2006 of £1,221,507 at bank rate minus 0.5% and £1,244041 at bank rate. Had the money been invested in a building society earning interest compounded at three monthly rests, as at 20 January it would have been worth about £1,272,209. The schedule covering this last calculation is defective in two respects. First, it assumes that the money was invested on 3 July rather than 20 July 2000. Secondly, it takes the calculation to 3 April 2006 rather than stopping at 20 January 2006. The figure of £1,272,209 is taken from the penultimate line of that schedule which stops at 2 January 2006. Although that falls short of the end date of the investment, that error approximately compensates for the initial error and it seems to me that this is the figure that I should take. On encashing the bond, the pursuers received £1,034,510.73. Comparing this with the schedule for building society interest compounded quarterly, that leads to a total figure for the claim of £237,698.27 (£1,272,209 less £1,034.510.73). Prima facie this is the measure of their loss.

[57] It was argued that the appropriate measure of loss was simply the amount of the MVA deducted in January 2006. That figure is £182,560.72. It is said that that is the precise figure which can be attributed to the failure to give proper advice on the MVAs. Any other figure takes into account the risk that one investment will over or under perform compared with another. Put another way, that sum of £182,560.72 is the loss attributable to the specific duty breached. On the facts of this case, I do not accept this argument. It seems to me that, once I accept that, had the proper advice been given, the pursuers would have invested the £1 million in a different manner, the proper measure of their loss is the difference between the investment that would have been undertaken and the investment that was undertaken. In so far as it is relevant to this point, there is no doubt in my mind that Mr Lind was well aware that he was "selling" this policy to the pursuers, and was aware that if they were not persuaded by the matters he put before them they would have put the money on deposit.

[58] Next, the defenders argued that the pursuers were contributory negligent in failing to read the Report and Recommendations, the KFD and the other CMI materials. I do not accept this. I have found, of course, that Mr Robinson was provided with the KFD on 11 July 2000. He and Mrs Robinson were, I think, left a copy of the Report and Recommendations at the meeting of 28 July 2000. They were sent the other CMI material on 18

August 2000 (7/37). These documents do of course provide the material which would enable the investor to form a view and, if necessary, to withdraw from the proposed investment up to the end of the cooling off period. It may be said that Mr Robinson should have read the KFD after the meeting of 11 July and raised questions with Mr Lind. But this seems to me to put too heavy a burden on an investor. The financial advisor is the person who explains to the investor what the advantages and disadvantages are of any particular investment. To hold a financial advisor liable for failing to give proper advice, but then to reduce the damages flowing from that because the investor, having the written materials, has not carried out his own research, would undermine the duties owed by the financial advisor. I do not think it is reasonable to criticise an investor for failing to second guess the advice given to him by the financial advisor from the materials which have been left with him. The main purpose of leaving the materials with the investor, or sending them to him, is to enable the investor to reflect upon what he has been told and, if what he has been told has left any nagging doubt in his mind, to look further into that issue in the documents with which he has been provided. The starting point must be what the investor has been told; and that will inform any consideration which he is minded to give to the written material sent to or left with him.

[59] Finally, an argument was raised about mitigation. The defenders criticise the Robinsons in failing properly to consider in January 2006 the possibility that the MVA might reduce in the relatively near future. Had they held on to their investment for a while longer, the withdrawal would not have been subject to an MVA. The percentage rates for the MVA were coming down, albeit slowly. Mr Robinson did not take any specific advice about whether the MVA might reduce or be removed. It was not clear in evidence that any such advice would have been forthcoming. Indeed it seems to me unlikely that any life office or independent financial advisor would want to take the risk of giving such advice. The tenor of the expert evidence was that it was impossible to predict. I do not think that the Robinsons can be criticised for deciding to take their money out after the 5 years rather than leave it in there with the risk that the MVA might increase rather than reduce. Further, Mr Robinson explained that they had a use, possibly even a need, for the money. They wanted to invest in property in Portugal. He was not seriously challenged on this. In those circumstances it was, so it seems to me, entirely reasonable that they should encash the bond at the end of the period for which it was intended as an investment.

[60] Mr Robinson did in fact explore with the defenders the possibility of another solution. He offered to assign the bond to the defenders at its current value, without any deduction for the MVA. If they were confident that it was a valuable product and that MVAs would reduce, or if they were happy to keep it until the end of the 12 year period, they could have taken up his offer. They would be taking the risk. In response the defenders suggested only that they might be willing to lend to Mr Robinson against the bond if he required to release cash at the end of 2005. Under this arrangement it would be the pursuers who would continue to take the risk under the Bond. If the defenders were unwilling to take the risk that MVAs would increase rather than reduce, why should Mr Robinson take that risk? I see no basis upon which the pursuers can be criticised for deciding to encash the bond when they did.

Disposal

[61] For those reasons, I shall sustain the first and second pleas in law for the pursuers, repel the defenders' pleas in law, pronounce decree for payment by the defenders to the pursuers of the sum of £237,698.27 plus interest thereon from the date of citation until the date of payment, and continue the cause in respect of all questions of expenses.