Neutral Citation Number: [2023] EWHC 3270 (Ch)

Case No: FL-2023-000016

**IN THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**FINANCIAL LIST (ChD)**

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19/12/2023

**Before** :

**MR JUSTICE MILES**

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**Between :**

**MR SHOKROLLAH-BABAEE**

**Claimant**

**- and -**

**EFG PRIVATE BANK LIMITED**

**Defendant**

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**Thomas Ogden** (instructed by **Charles Russell Speechlys LLP**) for the **Defendant**
**Clive Wolman** (instructed **on a direct access basis**) for the **Claimant**

Hearing date: 7 December 2023

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# Approved Judgment

**This judgment will be handed down remotely by circulation to the parties or representatives by email and release to The National Archives at 10:30am on 19 December 2023.**

**Mr Justice Miles :**

1. The defendant has applied by notice dated 19 July 2023 to strike out the claim under CPR r.3.4(2)(a) or (b), alternatively for reverse summary judgment under CPR r.24.2.

2. A draft of the Claim Form was issued on 12 June 2023. It was served together with Particulars of Claim (**POC**) on 25 June 2023.

3. The POC alleges that, in connection with mortgage offers made by the defendant to the claimant in 2012 and 2015 and valuations carried out for the defendant as a lender by Savills Plc (**Savills**), the defendant breached (i) certain of the Mortgage Conduct of Business (**MCOB**) rules issued by the Financial Conduct Authority (**FCA**); and (ii) a duty of care in tort at common law.

4. The defendant contends that:

   (a) the claims are time-barred;

   (b) the Claim Form contains only a single claim for breach of statutory duty in relation to the valuations carried out by Savills for the defendant. The remainder of the claims in the PoC do not fall within the Claim Form. The Claim Form cannot be amended because the limitation periods have expired;

   (c) the defendant did not owe the claimant a duty of care in tort at common law in respect of the valuations carried out by Savills, which were prepared for the defendant for its own lending security purposes; and

   (d) the claims for breach of the MCOB rules and negligence are, in any event, based on fundamental factual errors (which are demonstrably wrong), internally inconsistent, hopeless on their face and unsupported by the available evidence.

5. The evidence for the application consists of witness statements of Mr Edward Craig and Mr Marios Voskopoullos for the defendant; and the witness statements of the claimant and Mr Maunder Taylor for the claimant.

**Factual background**

6. The facts are largely agreed. Where there is a dispute I shall address it.

7. The claimant was first introduced to the defendant in around 2007. The claimant was a high net worth individual. In 2012 the defendant estimated his net worth to be in the region of £20m.

8. The claimant had existing borrowings. He was interested in re-financing them with the defendant. They were secured on various assets including The Vicarage, 20 Stamford Brook Road, London W6 OXH (**the Property**), a substantial, late Victorian, detached villa arranged over lower ground, ground, first, and second floors.

9. In 2007 the claimant, via a financial advisor, enquired about a loan of £4.9m to re-finance three properties including the Property (which at that point had £3.86m secured against it). The claimant informed the defendant that the Property was worth around £6.5m and provided a valuation obtained from The Swift Group which supported his

estimate. The Bank obtained its own valuation from Knight Frank LLP (**the Knight Frank valuation**) which valued the Property at £6.65m when works to the lower ground floor had completed, and £5.2m in its existing condition.

10. In 2009 the claimant applied for a reduced mortgage of £3.5m which the defendant agreed to lend but which did not go ahead.

11. In 2012 there were negotiations between the parties about two loans. The first was an interest-only two year loan of £4.7m to re-finance the Property (**Loan 1**). The second was a loan of £1.25m (**Loan 2**), of which £1m was to be invested in a portfolio managed for the claimant with EFG Asset Management (EFGAM), an affiliate of the defendant. The claimant intended to use the proceeds of these investments, along with resources, to service the Loans.

12. At the time of the 2012 negotiations the Property was mortgaged for £4.7m, which the claimant had borrowed from two lenders, The Mortgage Business and BridgeCo Limited.

13. The claimant contends that part of the purpose of Loan 1 was to provide him with finance for a "career changing move" into residential property development. The defendant took issue with this and said that it was clear that the purpose of Loan 1 was simply to refinance the existing debt of £4.7m. The claimant said that part of the debt was short term bridging finance in anticipation of Loan 1 and that he would not have gone into property development had Loan 1 not been advanced. I am unable to resolve this dispute in this hearing and shall assume that the claimant's case is correct.

14. There is no dispute that during the 2012 loan application the claimant told the defendant that he "expect[ed] the property to be worth £8.5 million following the installations made to improve the property…based on his own discussions with valuers who have visited the property in the past." The valuers the claimant had spoken to included Savills. The claimant also stated that he would transfer £3m of additional cash deposits held in an offshore structure to the defendant as part of a wider relationship.

15. There is no dispute in the evidence that before making the 2012 mortgage offer there was a scripted call in which (among other things):

    (a) the defendant informed the claimant that it was not providing advice on the transaction (which was a non-advised regulated mortgage sale); and that any terms discussed with the claimant were subject to receipt by the bank of a satisfactory valuation of the Property; and

    (b) the claimant said the estimated value of the property was £8.5m.

16. On 13 June 2012 the defendant sent the claimant a copy of a proposed mortgage illustration. The claimant confirmed that he was happy with the mortgage illustration and asked the Defendant to issue the formal mortgage letter.

17. By a mortgage offer letter of 15 June 2012 (**the 2012 Mortgage Offer**) the defendant offered the claimant up to £5.95m comprising Loan 1 (the interest only loan of £4.7m) and Loan 2 (for £1.25m) on a 2 year term to be secured against, inter alia, the Property and an apartment in France owned by the claimant.

18. The letter, among other things, (a) said that the defendant had not recommended the mortgage to the claimant and that it was a matter for the claimant whether he accepted the mortgage; (b) gave an estimated value of £8.5m for the Property; (c) required the claimant to provide as security (i) first priority legal charges over both the Property and the French apartment; (ii) a first legal charge over a cash deposit in the minimum sum of £250,000; and (iii) a first legal charge over the EFGAM investment portfolio; and (d) imposed a number of Conditions Precedent on the drawdown of the facility including "a Valuation of [the Property] reflecting an aggregate market value on a vacant possession basis of not less than £8,500,000."

19. The claimant accepted the mortgage offer by signing it on 25 June 2012.

20. Also on 25 June 2012 the claimant gave the defendant details of Mr Sharp-Neal of Savills. The claimant had already informed the defendant that Savills had valued the Property at £8.5m.

21. In a letter of 28 June 2012 the defendant instructed Savills to provide a valuation of the Property which included Savills' opinion of the value of the Property for the purposes of loan security. The letter said that the report would be for the sole use of the defendant.

22. Savills, by its letter confirming its instructions (appended to the valuation report of 23 July 2012), stated that the valuation was for the purpose of loan security. The letter said that it only accepted responsibility in respect of its valuation to the defendant.

23. Savills provided the defendant with a valuation report dated 23 July 2012 (**the 2012 Savills report**). Savills explained that it had followed the requirements of the RICS (known as the Red Book). It valued the Property (freehold, vacant possession) at £8.5m and concluded that the Property was suitable for loan security purposes. The report said that it was provided solely for loan security purposes, that it was addressed only to the defendant and that no responsibility was accepted to any third party for the whole or any part of its contents.

24. The claimant contends in both the POC and his witness statement for this application that he was provided with a copy of 2012 Savills report. The defendant has no record of providing him with a copy and points to the confidentiality provisions. The claimant observes that the defendant required that his then wife should obtain independent advice and that she did indeed obtain legal advice. He says that it is likely that any lawyers would have insisted on seeing a valuation. I am unable to resolve this dispute at this stage and shall proceed on the basis that the claimant received a copy of the 2012 Savills report.

25. The parties signed an amendment letter concerning the agreed facilities on 14 August 2012. It essentially made some amendments to the covenants in the agreed form to allow the claimant to draw down Loan 1 before the security over the French apartment had been perfected.

26. The loan was drawn down on 30 August 2012 and the existing mortgages on the Property were redeemed. The claimant granted the defendant a legal mortgage over the Property on 3 September 2012. The investment portfolio was with EFG Zurich established in around June 2013.

27. The claimant did not repay the loans at the end of the term in June 2014. The parties discussed an extension the loans and they were not called in in the meantime. There is no dispute that during those discussions the claimant informed the defendant in February 2015 that "Savills have been instructed for valuation [of the Property]….They say they will put a figure of £8.750m".

28. The defendant again instructed Savills to prepare a report for its own lending security purposes. Savills accepted the instruction and prepared a report dated 23 March 2015 (the 2015 Savills report). The 2015 report was stated to be for the sole use of the defendant for lending security purposes. Savills again valued the Property at £8.5m.

29. The claimant states in his witness statement that he and his wife were provided with the 2015 Savills report. The POC however states that the 2015 Savills report was not passed on to the claimant. During the hearing counsel for the claimant said that the claimant could not remember whether he received the 2015 Savills report but said that he was aware of the valuation figure which Savills had arrived at.

30. In the course of the 2015 negotiations, the claimant signed a "High Net Worth Mortgage Customer – Opt Out" form by which he accepted and acknowledged that the defendant was not providing him with advice or advising on the suitability of the mortgage; (ii) he agreed to the mortgage being set up on a "Non-Advised (Execution Only) basis"; and (iii) he had read and acknowledged that his categorisation as a "High Net Worth Mortgage Customer" meant that he lost protections under the FCA's suitability rules.

31. It is not disputed that during a scripted call in the 2015 negotiations the claimant was informed that the defendant would not be providing advice on the transaction.

32. In a letter of 23 June 2015 (the 2015 Mortgage Offer) the defendant offered to extend the term of the existing facility until 30 June 2018. The letter said that the defendant had not recommended a particular mortgage for the claimant and had advised him to seek independent professional advice from a suitably authorised person if he was uncertain about whether the mortgage was suitable for his needs. The letter gave an estimate value of £8.5m for the Property.

33. The claimant accepted the defendant's offer on 10 July 2015 and the facility was extended to 30 June 2018.

34. The claimant's case is that from 2012 onwards he moved into residential property development. He alleges in the Claim Form that he invested all or most of £3.5m of the loan in speculative property development. He alleges that he would not gave done this had it not been for the defendant's alleged breaches of duty. He says that from 2016 he suffered a number of setbacks including (i) his divorce from his wife; (ii) macro-economic factors (including Brexit, COVID-19, interest rises and the effects of the war in Ukraine including sanctions) which impacted his property investment business; and (iii) damage to the Property for which he was uninsured.

35. The claimant did not repay the loans when the term came to an end in June 2018.

36. On 28 April 2022 the defendant presented the claimant with a statutory demand in the sum of c.£5.34m plus interest (with an unsecured balance of c.£2.4m). The claimant sought to set aside the statutory demand at a hearing on 9 March 2023 before ICC Judge

Prentis. The basis for the claimant's application was that the Property was (he said) in fact worth more than the sum of £5.3m demanded by the statutory demand (and during the hearing he suggested that it was worth as much as £9m). ICC Judge Prentis dismissed the claimant's application to set aside the statutory demand and the defendant presented a bankruptcy petition on 21 March 2023. On 12 June 2023, the day before the second bankruptcy hearing, the claimant issued the present claim. That led to an adjournment of the bankruptcy petition, which has still not been determined.

**Approach to strike out and summary judgment**

37. There was no dispute about the principles, which are well known. There is an accurate summary of the approach to CPR 3.4(2)(a) in the White Book at paras 3.4.2 and to CPR 24 at paras 24.2.3 and 24.2.4.

38. The claimant reminded me that in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial.

39. Counsel also said that some of the evidence relied on by the defendant was only provided in its reply evidence, which was served a few days before the hearing and that the claimant had not had the chance to respond. I shall bear this in mind below. For the reasons given below the outcome of this application does not depend on any of the points raised by the defendant in its evidence in reply.

**The claims advanced by the claimant**

40. The endorsement on the Claim Form contains a claim for breach of statutory duty in respect of the 2012 and 2015 Savills Reports:

> "C and RB [sc. the claimant's then wife] were induced to accept the mortgages by reports commissioned by D from Savills which valued H [sc. the Property] at £8.5. But in 2021-23 C discovered that they hugely overstated H's value by an estimated £3m. C now risks losing all or most of the £3.5m portion of the loan he expended on property. But for the negligent and false valuation that D provided to C in breach of its statutory duties as a mortgage lender, C would not have taken on with RB's consent £3.5m of the loan nor applied it to speculative property development. Further C lost the chance to consider on a properly informed basis more prudent mortgage financing."

41. The "breach of … statutory duty" is not elaborated. But it was common ground before me that this was a reference to s.138D of the Financial Services and Markets Act 2000 (FSMA) which provides that a contravention by an authorised person of a rule made by the FCA is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty.

42. In the POC there are a number of claims:

(a) As to the 2012 Mortgage Offer, paragraphs [6]–[11] allege that the document was in breach of MCOB Rules 5.4.1, 5.4.2, 5.6.6 and 10.4.2 on the basis that the claimant was required to (i) engage in a leveraged investment strategy by borrowing surplus funds at fixed interest rates; (ii) provide the defendant with additional remuneration taken from funds he was over-borrowing; and (iii) incur a total charge for credit in excess of the stated Annual Percentage Rate ("APR").

(b) As to the 2012 Savills Report, paragraphs [12]–[30] allege that the defendant acted in breach of MCOBS 5.6.6R and in tort at common law in respect of the Savills' Report.

(c) It is alleged that the 2012 Savills Report was incorrect in that the measurements of the Property were wrong and Savills failed properly to assess comparable values. It is said that Savills overvalued the Property by some £2.5-3m.

(d) As to the 2015 Mortgage Offer, paragraphs [31]-[33] and [36] allege that the offer document infringed MCOB Rules 5.4.1, 5.4.2, 5.6.6, 5.6.6R. and 10.4.2.

(e) As to the 2015 Savills Report, paragraphs [34]-[37] allege that "similarly, the Defendant was in breach of its duty of care to the claimant and his wife in the same measure as in 2012". The claimant accepts in the POC that he was not provided with a copy of the 2015 Report.

(f) In relation to the 2012 Mortgage Offer and 2012 Savills Report the claimant contends that had the report been prepared with reasonable skill and care or complied with the MCOB rules, he would have rejected the offer and put on hold his plans to move into property development. Further, he says that the defendant would have offered a smaller loan to the claimant (see paragraphs [27] – [30]).

(g) In relation to the 2015 Mortgage Offer and 2015 Savills Report the claimant contends that had he been provided with an accurate revaluation, he would have rejected the 2015 Mortgage Offer. Instead he and his then wife would have negotiated a standstill on repayments and found alternative funding (paragraphs [38]-[39]).

43. The claimant's primary claim is for the sum of £5.18m. This is made up of £3.325m he contends he overborrowed and invested unsuccessfully in property development; interest in the sum of £1.77m on the £3.325m; and £85,000 representing the difference between the APR and the alleged true cost of the credit. Alternatively, the claimant contends that he lost the chance to raise alternative financing (paragraphs [50]-[56]).

## The defendant's application

44. The defendant contends that:

(a) All of the claimant's claims are time-barred.

(b) In relation to the claims that the 2012 and 2015 Mortgage Offers were in breach of duties owed by the defendant under the MCOB rules: (i) the claims are not

included within the ambit of the Claim Form; and (ii) the claims are hopeless on their face and bound to fail.

(c) In relation to the claims concerning the 2012 and 2015 Savills Reports: (i) the negligence claim is not included in the ambit of the Claim Form; (ii) the claim in negligence has no prospect of success. The Bank did not owe the claimant a duty of care in tort at common law in relation to the valuations and the claimant has no prospect of establishing that such a duty was owed.

(d) The claims for breach of MCOBs and the duty of care are based on fundamental factual errors, hopeless on their face and are bound to fail.

(e) The Claimant's case on reliance and causation is fundamentally flawed and is bound to fail.

(f) The claim is brought for an improper collateral purpose, namely to prevent the Court from acceding to the defendant's bankruptcy petition and making a bankruptcy order against the claimant.

45. It is convenient to address the issues in the following order: Are the claims time barred? Was there a common law duty of care? Which claims are within the scope of the Claim Form? Was there a breach of the MCOB rules or common law duty of care? Are there other objections to the claims?

**Are the claims time-barred?**

46. The Claim Form was issued on 12 June 2023.

47. It was common ground that claims in common law negligence and for breach of statutory duty under s.138D of FSMA both fall under section 2 of the Limitation Act 1980; and that it is arguable that the latter claims also fall under section 9.

48. I note that in *Martin v Britannia Life* [2000] Lloyds PN 412, Jonathan Parker J treated a claim under s.62 of the Financial Services Act 1986 (a predecessor of s.138D of FSMA) as falling under s. 9 of the Limitation Act 1980, treating it as an action to recover any sum recoverable by virtue of an enactment.

49. In *Shore v Sedgwick Financial Services Ltd* [2008] PNLR 10 Beatson J treated a claim under s. 62 of the 1986 Act as a claim for breach of statutory duty and therefore as a claim in tort under s.2 of the 1980 Act. (The decision was appealed but not on this point: see [2008] EWCA 863.) I prefer the approach taken in *Shore v Sedgwick*, as s.138D states in terms that the claim is one for breach of statutory duty, a recognised tort.

50. The claimant contended that where the claims fall under two sections of the Limitation Act it is permissible for the claimant to rely on the section most favourable to it. The defendant did not take issue with this.

51. Under s.2 and s.9 of the Limitation Act the period is 6 years from the date when the claimant first suffered damage.

52. This is subject to the claimant's argument that the limitation period for claims for common law negligence and breach of statutory duty under s.2 is subject to s.14A (see below).

53. The defendant contended that in this case actionable damage arose at the time of the transactions in 2012 or 2015.

54. The claimant contended that there was further damage when the property transactions he undertook in 2012 led to actual losses. For instance he referred to a transaction concerning the redevelopment of a large residential property in Culross Street, Mayfair, which he said had to be refinanced from early 2017. He said that he incurred these in reliance on the 2015 valuation. By early 2017 he had fallen into difficulties financing the property and needed to raise a further £3m. His counsel contended that he had only suffered the loss thereafter once that venture failed.

55. I have concluded that the claimant suffered actionable loss at the time of the 2012 and 2015 mortgage transactions.

    (a) As to 2012, the claimant's case is that, but for the breaches of duty, he would not have entered the 2012 Mortgage, would not have borrowed as much as he did, and would not have used part of the proceeds of sale for the purposes of speculative property development.

    (b) I accept the defendant's submissions that by entering into the 2012 Mortgage the claimant committed himself to the full amount of the borrowings and fell under an obligation to repay. He also mortgaged the Property in favour of the defendant. On his own case the claimant overborrowed from the defendant and entered into speculative property developments which carried with them the risk of failure. By entering the 2012 Mortgage (and drawing down the loans) he became bound to repay the amounts owing to the bank irrespective of the success of his property ventures. In my judgment he thereby suffered an immediate, actionable, loss. He was stuck with the mortgage over the Property and the obligation to repay the loans come what may. The fact that his property ventures may only have failed later does not affect that conclusion.

    (c) As to the 2015 Mortgage the same reasoning applies. There were no new advances. The only detriment alleged by the claimant is that, but for the 2015 valuation, he would have negotiated a stand-still in servicing or repaying the existing loan for 12 months or more to allow them to find an alternative source of finance. Any loss arising from the alleged 2015 breaches must therefore turn on the difference between the terms of the 2015 Mortgage and an alternative refinanced mortgage arrangement with another lender (though this is not pleaded). In my judgment any such loss occurred when the claimant committed himself to the 2015 Mortgage.

56. Hence the primary limitation periods under s.2 or s.9 of the 1980 Act started to run at the time of the 2012 Mortgage (or drawdown under it) and the 2015 Mortgage respectively.

57. The next question is whether the claimant is able to rely on the provisions of s.14A of the 1980 Act.

58. That section applies to "any action for damages for negligence". Where it applies the relevant period is (a) six years from the date on which the cause of action accrued or (b) three years from the period defined in subjection (5) if that period expires later than the period in (a). By subsection (5) the starting date is the earliest date on which the plaintiff had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action. Subsection (5) is supplemented by subsections (6) to (11).

59. It is common ground that s.14A applies to the common law claim for negligence based on the alleged duty of care.

60. But there is an issue about the claims for breach of statutory duty.

61. The defendant submitted that a claim for breach of statutory duty under s.138D of FSMA does not fall within s.14A. It argued that such a claim is not an "action for damages for negligence".

62. The defendant relied first on *Martin v Britannia Life* and *Shore v Sedgwick.* As already explained, in *Martin* Jonathan Parker J treated a claim under s.62 of the Financial Services Act 1986 as falling under s. 9 of the Limitation Act 1980, and in *Shore* Beatson J treated a claim under s. 62 of the 1986 Act as a claim for breach of statutory duty under s.2 of the 1980 Act. In both cases the claimant sought to rely on s.14A to extend the limitation period. The courts in both decided that s.14A had no application to a claim under s.62. The defendant says that there is no relevant distinction between s.62 of the 1986 Act and s.138D of FSMA.

63. The defendant also referred to *Société Commerciale de Reassurance v ERAS International Ltd* [1992] 1 Ll Rep 570 where the Court of Appeal concluded that s.14A applies to actions asserting that the defendant has committed the tort of negligence but is not wide enough to apply to claims for breach of a contractual duty of care. Mustill LJ contrasted the phrase "action for damages for negligence" with s.11 of the 1980 Act which stated that "[t]his section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person."

64. The defendant contended that a claim under s.138D was a claim for breach of a duty that exists by virtue of a provision made by a statute.

65. The defendant also relied on *Laws v Society of Lloyd's* [2003] EWCA Civ 1887, where the Court of Appeal held that s.14A did not apply to a claim for negligent misrepresentation pursuant to s.2(1) of the Misrepresentation Act 1967 (which the Court of Appeal assumed was a claim in tort and governed by s.2). The Court of Appeal concluded at [91] that:

> "We agree that the words "any action for damages for negligence" (not "in negligence" as included in the above quote) denote that the defendant has committed the tort of negligence. Moreover, assuming that a claim for damages based upon a

> statutory misrepresentation is a claim in tort, as it may well be, for the reasons we have given we do not think that it can fairly be regarded for present purposes as an "action for damages for negligence" because it is not necessary to aver any negligent act or omission and because section 14A(8)(a) cannot work since there will be no "act or omission which is alleged to constitute negligence".

66. The claimant argued that the claim under s.138D in the present case involves the allegation that the defendant committed a negligent breach of duty (of MCOBs) and that the claim is therefore an action for damages for negligence. He submitted that in *Shore* Beatson J followed *Martin* but that in the earlier case it appears to have been common ground that the relevant primary section of the 1980 Act was s.9 rather than s.2. The claimant submitted that in *Martin* Jonathan Parker J's reasoning turned on the fact that the claim was one to which s.9 applies. He argued that *Shore* was therefore per incuriam and was wrong. He also submitted that the allegation in this case is that the defendant performed its duties under MCOB 5.6.6R (supplemented by 5.6.8G) negligently (through its sub-contractor, Savills) and that the claim is therefore one for damages for negligence.

67. The claimant also relied on the decision of the Court of Appeal in *Henderson v Merrett* [1994] CLC 55 for the proposition that a concurrent duty of care could arise in tort and contract and that the claimant could rely on the more favourable limitation period in respect of the tort claim. (That decision was of course appealed to the House of Lords but I understood the claimant to rely on the same principle as was endorsed there by Lord Goff.)

68. I prefer the defendant's submissions.

69. First, *Shore* is authority for the proposition that a claim under s.62 of the 1986 Act (the predecessor of s.138D of FSMA) does not fall within the scope of s.14A of the 1980 Act. Though the reasoning is compressed I do not consider that it is obviously wrong and I should therefore follow it. I do not think that the fact that *Martin* was decided by reference to s.9 of the 1980 makes a material difference or that this renders *Shore* per incuriam. The basis of the decision was that the cause of action under s.138D is for breach of statutory duty and that this is not an action for damages for negligence within the meaning of s.14A.

70. Indeed, as the defendant pointed out, the Court of Appeal in *Laws v Lloyd's* considered whether s.14A could apply without having to decide whether the primary limitation period arose under s.2 or s.9. It did not matter. The question (as here) was whether the claim was one for damages for negligence.

71. Second, the conclusion in *Shore* is to my mind strongly supported by the reasoning in *The Eras Eli.* The Court of Appeal contrasted the wording of s.14A with that of s.11 and concluded that this was a strong pointer against applying the provision to contractual duties of care. The same reasoning applies to actions for breach of statutory duty – these too are referred to in terms in s.11 but not in the narrower s.14A.

72. Third, the same conclusion is supported by the *Laws v Lloyd's* case. It shows that the question under s.14A is concerned with the nature of the cause of action (is claim one

for damages for negligence?) and not with whether the particular claim happens to involve an allegation of negligence.

73. In this regard, as the defendant submitted, a claim for breach of s.138D or indeed for breach of the MCOBs does not require an allegation of negligence and it is therefore analogous to a claim under the Misrepresentation Act. The claim is properly categorised as the tort of breach of statutory duty, and this does not count as a claim for damages for negligence, even if the claimant in the particular case happens to allege conduct (or an omission) which it describes as "negligent".

74. *Henderson v Merrett* does no more than show that there may be concurrent claims in contract and tort and that the claimant may rely on the more favourable limitation period. It says nothing about the present issue, i.e. whether a claim under s.138D of FSMA falls within s.14A.

75. I therefore conclude that s.14A does not apply to the claims under s.138D and that the claims brought under that section are statute-barred. (The claimant has not alleged any other breach of statutory duty.)

76. As for the claims based on the common law negligence, the defendant submits, first, that the burden is on the claimant to plead and prove the elements of an extension under section 14A, which he has not done; and, second, that the claimant was aware of various valuations of the Property from 2018 onwards which put its value significantly below the two Savills valuations. Time therefore began to run at least some time in 2018. The defendant relies in this regard on comments made in the divorce proceedings between the claimant and his wife.

77. The claimant says that he has done enough for the purposes of this application to raise the factual allegations needed to enable him to rely on s.14A. He points out that there has been no defence and, similarly, no reply, in which he would have pleaded the grounds for relying on the section. He says on the fact only became aware of lower valuations from 2021 onwards and that he did not consider any earlier valuations (including some given in the divorce proceedings) to be accurate. He says that his wife had an incentive to understate the value of the Property. He also says that some of the evidence relied on by the defendant is this regard was served only shortly before the hearing and that he had not had the chance to respond.

78. I prefer the position of the claimant on this point. I do not consider that I can properly determine this question on this application. The court has been provided with a partial picture but would be far better placed to assess the case under s.14A in the light of fuller evidence, including disclosure of all of the relevant valuations.

**Did the defendant owe the claimant a common law duty of care?**

79. As already explained the claimant has advanced claims for breach of statutory duty (which I have held are statute-barred) and for common law negligence.

80. The common law negligence claim requires the imposition of a duty of care.

81. The defendant submitted that the claim that there was a duty of care is fanciful. Throughout the documents and events recited above the defendant explained (and the

claimant accepted) that the defendant was not advising the claimant about the merits of the mortgage arrangements and that it was treating the claimant as an execution only client. There was therefore no room for an advisory duty. Assuming for the purposes of argument that the defendant provided the claimant with the Savills Reports, I conclude that it was clear to the claimant that those reports were being provided to the defendant for its own lending purposes and that they were addressed only to the defendant. The provision of a such a valuation in such circumstances will not (without more) give rise to a duty of care on the part of the lending bank: see *Rehman v Santander UK plc* [2018 EWHC 748 (QB). Moreover the existence of a statutory duty does not (without other circumstances establishing a duty of care) itself give rise to a coequal common law duty: see *Green v Rowley* [2013] EWCA Civ 1197. The claimant in the present case had alleged nothing more than the receipt of the Savills Reports and the fact that the defendant had required a satisfactory valuation of the Property as a condition of its lending in 2012. Those facts are not sufficient to establish a duty of care in relation to the valuations.

82. Counsel for the claimant accepted that the mere provision to the borrower by a lender of a valuation report prepared for the lender's purposes would not give rise to a duty of care and did not take issue with the decision in *Rehman*. He also accepted that there was no allegation of a general advisory duty. He submitted however that that position could be distinguished because there is an express rule (MCOB 5.6.6R and 5.6.8G) which required any estimated valuation to be a reasonable assessment based on all the facts available at the time. He said that this gave rise to a common law duty of care to take reasonable care in relation to such an estimated valuation.

83. I prefer the defendant's submissions on this issue. As it argued, the background is that the claimant accepted that there was no advisory duty. I also agree that the mere provision of the lender-addressed valuations (assuming this to have happened) would not give rise to a duty of care. It was clear on the facts that any valuations were being provided to the defendant for its own lending purposes and there was no basis in the documents or the provision of them to the claimant to conclude that the defendant was assuming any duty to the claimant in respect of them. Moreover the defendant consistently informed the claimant that if he required advice about the merits of the mortgage he should seek independent advice.

84. I am unable to accept the claimant's argument that a common law duty of care arose by reason of the requirements of MCOB 5.6.6R and 5.6.8G. A similar argument was rejected by the Court of Appeal in *Green v Rowley*. In that case the claimants were sold an interest rate swap by the defendant bank as a hedge against their existing liabilities. They subsequently brought an action in negligence alleging that the swap had been mis-sold to them in breach of the FSA's Conduct of Business Rules which required the bank to take reasonable steps to provide information in a way that was clear and fair, and to ensure its customers understood the risks involved in transactions. Section 150 of FSMA (a predecessor of s.138D) made a contravention of the Rules actionable at the suit of the claimants. The claimants abandoned a claim under that section in the belief that it was time-barred but continued their claim in negligence. The judge dismissed the claim in negligence. The claimants appealed, contending that there was a co-extensive duty of care at common law where a regulated entity had failed to comply with statutorily imposed regulations. The Court of Appeal dismissed the appeal. It held that since s.150 provided an express cause of action for breach of statutory duty where the

bank was undertaking a regulated activity there was no need or justification for the independent imposition of a duty of care at common law. As Tomlinson LJ explained at [18] the position may be otherwise where the bank is held to owe an advisory duty. In such a case the regulatory obligations may inform the nature of the duty and the standard of care. But where there are no grounds for alleging an advisory duty there is no reason to impose a common law duty which is co-extensive with the regulatory one.

85. Ultimately all the claimant relied on in support of the imposition of the alleged duty in the present case was the fact that the defendant was required to comply with MCOB 5.6.6R and 5.6.8G. I agree with the defendant's argument that no duty was owed on that basis.

86. For these reasons the common law claims in negligence must be dismissed.

**Which claims are within the scope of the Claim Form?**

87. The endorsement on the Claim Form is set out at [40] above. The defendant contended that while the Claim Form includes the claims for breach of statutory duty under MCOB 5.6.6., it does not include the other MCOB claims concerning the 2012 and 2015 Mortgage Offers. It does not include any claim that the APR was misstated ("the APR claim" for short).

88. The defendant said that the claimant would therefore require permission to amend under CPR 17.4(1) because there is (at least) an arguable case that the limitation period has expired. The defendant said that the APR claim is a new one and that it did not arise from the same facts or substantially the same facts as are already in issue on a claim in respect of which the claimant has already claimed a remedy in the existing claim form.

89. The claimant said that the Claim Form fell to be read with the POC, which were served at the same time. He relied on *Evans v Cig Mon Cymru Ltd* [2008] EWCA Civ 390. There the claim form contained a minor error (referring to "abuse" at work rather than an accident at work), which was corrected in the particulars of claim which were served at the same time as the claim form. The Court of Appeal held that it was possible to read the two documents together and that the word "abuse" was, in the context, an obvious error for "accident". The claimant argued that the same principle applied here.

90. The defendant responded by referring to *Libyan Investment Authority v King* [2020] EWCA Civ 1690 at [66] where Nugee LJ explained at [65] that *Evans* can be explained as an instance of established principles that documents intended to be read together can be read together and that obvious errors can be corrected as a matter of interpretation. He said at [66] that this had no application to the case before him where there was no ambiguity in the wording of the claim form and where it was not suggested that there was any clerical error. At [68] he said that there was no ambiguity or difficulty of construction in the brief details contained in the claim form and there was no need to resort to the particulars of claim to understand them. He said at [69] that in such cases the proper exercise is to consider the claim form without regards to the facts alleged in the particulars of claim.

91. I prefer the defendant's submissions on this issue. The section brief details of claim on the Claim Form refer only to breaches of duty arising from the provision to the 2012 and 2015 Savills valuations. They say nothing about the 2012 and 2015 Mortgage Offer

documents or the calculation of the APR. There is no relevant ambiguity or clerical error which would justify reading the Claim form together with the POC.

92. Apart from this argument based on the POC, the claimant did not suggest that the APR claim would not constitute a new claim. Nor did the claimant contend that the APR claims arise from the same facts as the claims already contained in the claim form. I agree with the defendant that the APR is a new claim and that it does not arise from an existing claim contained in the Claim Form.

93. It follows that the MCOB claims other than those under MCOB 5.6.6 (based on the Savills valuations) must be struck out on this ground: see e.g. *Free Leisure v Peidl & Co Ltd* [2023] EWHC 792 (Comm) at [29].

**Was there a breach of the MCOB rules or a common law duty of care?**

94. This does not arise but in case I am wrong I turn to the allegations of breach, starting with the claim under s.138D of FSMA.

95. The principal complaints concern the two Savills valuations.

96. The essential complaint is that the Savills valuations significantly overvalued the Property. The claimant says that Savills failed properly to measure the Property and that they wrongly relied on the measurements contained in the Knight Frank valuation; and that they used inapt comparables.

97. The principal complaints are brought under MCOB 5.6.6R which provided materially (italicised terms being defined terms):

> "As a minimum the *illustration* must be personalised to reflect the following requirements of the *customer*:
>
> (1) the specific *regulated mortgage contract* in which the customer is interested;
>
> (2) the amount of the loan required;
>
> (3) the price or value of the property on which the *regulated mortgage contract* would be secured (estimated where necessary);
>
> (4) the term of the *regulated mortgage contract* …
>
> (5) whether the *regulated mortgage contract* is to be an *interest-only mortgage* or a *repayment mortgage* or a combination of the two."

98. MCOB 5.6.8R provided as follows:

> "In relation to MCOB 5.6.6R(3) in order for the firm to comply with the principle of "clear, fair and not misleading" in MCOB 2.2.6, an estimated valuation, where the estimated valuation is not that provided by the *customer*, must be a reasonable assessment based on all the facts available at the time. For example, an overstated valuation could enable a more attractive

> *regulated mortgage contract* to be illustrated on the basis of a lower ratio of the loan amount to the property value – for example, one with a lower rate of interest, or without a *higher lending charge*."

99. The defendant accepted for the purposes of the application that the 2012 Mortgage Offer and the 2015 Mortgage Offer contained an "illustration" for the purposes of rule 5.6.6. insofar as it contained an estimate of the value of the Property.

100. As to the 2012 Mortgage Offer there is no realistic case of a breach of rule 5.6.6. At the time of the Mortgage Offer the defendant was not in possession of the 2012 Savills report. It is clear therefore that the estimate of value was provided by the claimant as the customer.

101. The claimant argued that the relevant date was that of the amendment letter, which came after the 2012 Savills report. I cannot accept this. The amendment letter did not contain any illustration on which rule 5.6.6 could bite; it simply changed certain terms to allow a drawdown before perfection of the security.

102. As to the 2015 Mortgage Offer the same point does not apply as the 2015 Savills report pre-dated the Offer.

103. As already recorded, the defendant said that it was likely that the valuation was that provided by the claimant. But that question cannot be determined on this application and without further disclosure.

104. However in my judgment there is no realistic case that the defendant was in breach of rule 5.6.6 in including a figure of £8.5m as an estimated valuation for the Property. The requirement is to give a reasonable assessment based on all the facts available at the time. The facts available to the defendant at the time included the 2015 Savills valuation of £8.5m. That valuation said that it was prepared in accordance with the requirements of the Red Book for lending purposes. The claimant has not pleaded or advanced in his evidence any grounds for saying that the defendant acted unreasonably in treating the valuation as reliable and accurate.

105. The claimant's argument was a different one, namely, that the defendant was under a duty and had sub-contracted the performance of that duty to Savills. It could not avoid the requirements of the duty by sub-contracting it to another. The claimant relied on *Mulready v J. H. & W Bell Ltd* [1953] 2 QB 117; *Donaghy v Boulton & Paul Ltd* [1968] AC 1 and *Bamrah v Gempride Ltd* [2018] EWCA Civ 1367. The claimant said that since Savills' valuations were not reasonably prepared, the defendant is fixed with liability for their default.

106. I am unable to accept these arguments. There is no analogy between the conduct of the defendant here and the case of a party who sub-contracts the performance of a duty to another party. The defendant did not sub-contract its obligations to Savills. The defendant's obligation in relation to the illustration was to provide an estimate of value which was reasonable in the circumstances. One of the steps it took (supposing the claimant's case about the chronology of events is correct) was to obtain a valuation from a chartered surveyor. In doing so it was not handing performance of a duty over to Savills; it was taking steps to inform itself of the estimated value. There is no pleaded

allegation that the defendant was at fault in selecting Savills, or that the defendant should have realised that there were any errors in the Savills reports.

107. In my judgment it is reasonable for a regulated entity seeking to comply with MCOB 5.6.6 to commission and take account of an apparently reliable valuation from an appropriate chartered surveyor. I see no reason to read the rule as making the regulated entity strictly liable for any lack of care on the part of the valuer.

108. Nor can the claimant find any support in *Bamrah*. That was a case where one party engaged another as its agent to act for it; the question was whether for the purposes of certain costs rules under the CPR the acts of the agent were to be treated as those of the principal. There is nothing in the present case to begin to suggest that the defendant engaged Savills as its agent; or indeed that Savills engaged with the claimant at all.

109. For these reasons I am unable to accept the claimant's contention that the defendant breached MCOB 5.6.6. in relation to the estimated value of the Property in 2012 or 2015.

110. As for the other alleged breaches of MCOB, the claimant alleged that the defendant had failed properly to state the total charge for credit within MCOB 10.4.1R and 10.4.2R. The latter (materially) provided that the total charge for credit included:

> "(1) the total of the interest on the credit which may be provided under the agreement; and
>
> (2) other charges at any time payable under the transaction by or on behalf of the *customer*, whether to the *firm* or any other person."

111. As I understood the claimant's case under this head it was that the total charge for credit contained in the illustrations of APR in the 2012 Mortgage Offer was understated because (a) the 2012 Mortgage Offer required the transfer to EFG Zurich of £3m, which it would treat as assets under management, failing which the defendant would have option to charge an extra 0.5% interest; and (b) had the claimant transferred the assets as agreed, EFG Zurich would have been able to charge 1.5% on the assets under management. It appears to be the claimant's case that the APR included in the 2012 Mortgage Offer was wrong and should have been 4.4% not 3.6% because "[the defendant's] 1.5% per annum management charge would have applied also to the £3.0m additional investment that the claimant was required to make."

112. In my judgment there is no realistic claim under this head. The claimant was not required make an additional investment. Under clause 14.3(d) of the 2021 Mortgage Offer if the claimant did not transfer a cash sum of £3m to EFG Zurich within 12 months of drawdown of the Facility the defendant reserved the right to increase the Interest Margin by 0.5% on the Loans. He was not required to do so and even if he did not there was no automatic consequence. Rather the defendant had a discretion whether or not to increase the margin rate. Moreover, the offer did not provide that if the sums were transferred a management fee of 1.5% would apply. I do not consider that there is a realistic case that the illustration of APR failed to provide proper details of the total charges for credit.

113. As for the 2015 Mortgage Offer the claimant has provided no details to support a case of breach of this requirement.

114. In relation to the common law negligence claims, assuming (contrary to the above) that there was a duty of care, in my judgment there is no realistic case that the defendant breached such duty in relation to the Savills valuations.

115. The premise of the claimant's claim is that the valuation was negligently prepared because Savills used the floor measurements previously obtained by Knight Frank (which the claimant says were wrong) rather than measuring the Property themselves and failed properly to assess the comparables.

116. But there is no allegation that the defendant failed to exercise proper care in selecting Savills or in relying on their reports as proper and accurate valuations.

117. It is also striking that Mr Maunder Taylor (the claimant's expert) does not state that Savills acted negligently in either respect.

118. As I understood it the claimant again sought to argue that the defendant, being under a duty of care, had sub-contracted the performance of the duty to Savills and was responsible for Savills' negligence. For reasons already given I am unable to accept this argument. Supposing that the defendant owed a duty concerning valuation, it could only have been one to take reasonable care. It did not sub-contract the duty; rather it obtained a valuation for its own purposes as a lender and made decisions based on the valuations. The claimant accepts that the defendant was entitled to regard Savills as properly qualified. There are no grounds advanced why the defendant should not have regarded the resulting reports as proper and accurate valuations. The suggestion that the defendant is somehow strictly liable for any (alleged) defaults of Savills appears to me to lack any coherent legal foundation.

119. For these reasons even if I had found in favour of the claimant on the earlier issues I would have concluded that there is no realistic case of a breach of statutory duty or breach of a common law duty of care.

## Other issues arising

120. In the light of these conclusions it is not necessary to address the further arguments concerning the allegations of reliance or causation, or abuse of the process.

## Conclusion

121. For the reasons given above the claims are struck out and dismissed.