OUTER HOUSE, COURT OF SESSION

[2019] CSOH 11

CA90/18

OPINION OF LORD ERICHT

In the cause

AMIR KHAN

Pursuer

against

MUHAMMAD ZUBAIR HUSSAIN

Defender

Pursuer: E W Robertson; Drummond Miller LLP
Defender: Dunlop QC; MBS Solicitors

8 February 2019

Introduction

[1] The pursuer's regulatory authority, the Financial Services Agency, brought disciplinary proceedings against him. He was found to be in breach and as a sanction his authority to perform certain functions was withdrawn. The pursuer raised an action against the defender for breach of contract and professional negligence, and sought to recover from the defender his loss of earnings resulting from that sanction.

[2] The defender pled:

> "2. Any obligation incumbent upon the defender to make payment having prescribed in terms of Section 6 of the Prescription and Limitation (Scotland) Act 1973, the defender should be assoilzied from the Conclusions of the Summons.

3. The pursuer being precluded from recovering damages from the defender by reason of public policy – *ex turpi causa non oritur actio* – the defender should be assoilzied.

4. The pursuer having suffered no loss as a result of any breach of duty on the part of the defender, the defender should be assoilzied."

[3] The pursuer's pleas in law sought the repelling of these pleas.

[4] The action called before me for debate on these pleas in law.

Factual background

[5] The pursuer was the sole director and shareholder of Sovereign Worldwide Ltd ("Sovereign").

[6] The pursuer averred:

"In around March 2007 Sovereign was granted permission by the Financial Services Agency ("FSA") to carry on regulated mortgage and general insurance activities. The defender thereafter also contracted with the pursuer on a personal basis to provide advice about the pursuer's tax affairs as an individual and the submission of the pursuer's personal tax return." (Article 2 of condescendence)

[7] The pursuer further averred:

"In or around late 2009 the defender contracted with the pursuer that he would provide a financial reference for the pursuer to a lender, Intelligent Finance. The defender knew that the pursuer required to provide accurate financial information for the lender. The defender was also informed by the pursuer that the pursuer required to provide information in relation to the pursuer's earnings to another lender, Abbey National plc ("Abbey") for a loan to fund the purchase of a residential property at 1 Leven Terrace, Edinburgh. Under and in terms of the contract between the parties, the defender provided the pursuer with advice about his earnings and the way in which this should be evidenced to Abbey. In particular, the defender generated three payslips from Sovereign in favour of the pursuer for the months of July, August and September 2009. Under and in terms of the contract between the parties, the defender prepared a financial reference for the pursuer and sent this to Intelligent Finance. This financial reference was not shown to the pursuer before the defender sent it to Intelligent Finance. The reference was faxed direct by the defender to Intelligent Finance. The financial reference letter incorrectly stated that the pursuer had an earned income of £60,000 per annum. In fact, that figure was based upon a projection made by the defender and not historic figures. That figure was also consistent with the figures which the defender provided to Abbey in the form of payslips."

FSA regulatory proceedings

[8] The history of the regulatory proceedings by the FSA can be set out here by reference to facts agreed in the joint minute of admissions and to the relevant documentation.

[9] By letter of 21 March 2006 the defender contracted with Sovereign Worldwide Ltd to provide certain services. These were preparation of annual company accounts, completion of Corporation Tax returns (CT 600s), dealing with the payroll and other small sundry matters.

[10] The defender prepared and signed a letter dated 11 September 2009 in the following terms:

> "Dear Sir/Madam
>
> **Mr Amir Khan**
>
> We confirm that we act as accountants for Mr Amir Khan of 7 Forth View Place, Dalkeith, Midlothian EH22 2QS.
>
> We further confirm that Mr Khan has earned income of £60,000 per annum. In addition, he had investment income of £15,000 per annum.
>
> Faithfully yours
>
> **M Zubair Hussain CA**
> Principal."

[11] The pursuer was, from March 2005 until 4 March 2013, approved by the Financial Services Agency to perform certain controlled functions, under and in terms of the Financial Services and Markets Act 2000 ("the 2000 Act").

[12] In 2011, a complaint regarding the pursuer was made to the Financial Services Agency, as the regulator of the pursuer under the 2000 Act. The FSA started an investigation in 2011. The FSA investigation was not initiated because of concern about the pursuer's personal mortgage transactions. It was initiated because of a different concern about

passport certification in another transaction. By September 2011 the investigation had extended to cover a range of matters including the pursuer's mortgage transactions.

[13] The FSA issued a warning notice under section 67 of the 2000 Act on 18 October 2012. That section provides that if the FSA proposes to take disciplinary action against a person, it must give him a warning notice, and that a warning notice about a proposal to impose a penalty must state the amount of the penalty.

[14] By Decision Notice dated 4 March 2013, certain disciplinary sanctions were imposed on the pursuer by the FSA in terms of section 66 of the 2000 Act. Inter alia the FSA (1) directed the pursuer to pay a penalty of £80,000; (2) withdrew the approval granted to the pursuer, pursuant to section 63 of the 2000 Act, to perform controlled functions; and; (3) made an order, pursuant to section 56 of the Act, prohibiting the pursuer from performing any function in relation to any regulated activities carried on by any authorised or exempt persons, or exempt professional firm. Parts (2) and (3) of the Decision Notice of 4 March 2013 preclude the pursuer from working as an Independent Financial Adviser ("IFA").

[15] The summary of reasons in the Decision Notice included the following:

> "2. Whilst an approved person at Sovereign, Mr Khan:
>
> (1) failed to act with honesty and integrity in carrying out his controlled functions, in breach of Statement of Principle 1, by knowingly submitting a personal mortgage application to a mortgage lender containing false and misleading information about his income in the form of false payslips; and
>
> (2) failed to act with due skill, care and diligence in performing his significant influence function, in breach of Statement of Principle 6, by failing to take adequate steps to counter the risk that Sovereign might be used to further financial crime, despite being aware of such a risk.
>
> 3. The Statement of Principle 1 breach is aggravated by Mr Khan's conduct during the course of the investigation, namely his purported explanations for why he provided a false income figure. When he was interviewed in September 2011, the FSA was aware of only one of two personal mortgage applications, both of which contained the same false income figure. In

interview, Mr Khan repeatedly sought to divert responsibility to his professional adviser for the misstatement of his income and claimed to be naïve about the level of income he could declare to mortgage lenders.

4. The subsequent discovery of the second application submitted in 2007 and not made in his capacity as an approved person, seriously undermined the plausibility of those explanations. The FSA therefore considers that Mr Khan deliberately attempted to give a false and misleading explanation to the FSA.

5. The serious nature of these breaches, aggravated by his conduct in interview, leads the FSA to conclude that Mr Khan is not a fit and proper person to perform functions in relation to regulated activities carried on by an authorised person, exempt person or exempt professional firm, and should be prohibited from doing so. Only a full prohibition will prevent Mr Khan from undertaking mortgage activities.

6. The financial penalty on Mr Khan would have been higher but for his personal circumstances as explained later in this notice."

[16] The breach of statement of principle 6 referred to in 2(2) was overturned on appeal to the Upper Tribunal so is not of relevance to the matters before the court. What is of relevance are the matters relevant to paragraph 2(1), that is mortgage applications in 2007, 2009 and 2010.

[17] The Decision Notice stated as follows:

"**Sovereign's financial position**

13. Mr Khan confirmed that any income he earned via regulated business, unregulated business and personal contract work was paid to Sovereign in the first instance.

14. The following financial information was taken from Sovereign's annual accounts:

Year ending 30 June	Turnover	Net Profit/(loss)	Cash at bank and in hand	Director's loan owed to Mr Khan
2006	£8,913	£4,071	£9,862	£4,502
2007	£25,033	(£1,016)	£4,547	£884
2008	£18,716	£5,136	£18,649	£8,533
2009	£18,016	£2,506	£28,610	£15,643

15. Mr Khan said that he did not tend to take any salary or dividends from Sovereign because he lived from his rental income. The FSA has also obtained Mr Khan's HMRC records covering the period from 6 April 2007 to 5 April 2010. The records show that Mr Khan took a minimal salary and no dividends from Sovereign in that period.

Mr Khan's personal mortgage application in December 2007

16. On 9 December 2007, Mr Khan submitted a personal mortgage application through Sovereign to a lender. The application was to port an existing mortgage on a residential property to a new residential property. In this application, Mr Khan declared a 'present income' from self-employment of £60,000 gross and an annual rental income of £15,000. These amounts far exceeded those declared by Mr Khan to HMRC in his tax return.

Mr Khan's personal mortgage application in October 2009

17. On 13 October 2009, Mr Khan submitted an online mortgage application through Sovereign to a lender in his own name. The application was for a loan of £237,000 to fund the purchase of a new residential property.

18. In the application, Mr Khan stated that he was employed by WP Financial (a trading name of Sovereign) and declared a total annual income of £74,500, comprising a 'basic wage/salary before tax' of £60,000 and 'other secondary income' of £14,500 relating to property rental.

19. His declared income of £60,000 and his income from rent far exceeded the sums he had declared to HMRC.

Income receivable from Sovereign

20. Mr Khan claimed in interview that he could afford to pay himself a £60,000 income annually, in part because of the money he had access to in Sovereign's bank account. The balance of Sovereign's account on the day that Mr Khan submitted the mortgage application was £27,196.

21. In support of his mortgage application, Mr Khan submitted copies of three payslips to the lender, dated July, August and September 2009, which appeared to show that he had been paid a gross monthly income of £5,000 by Sovereign (i.e. the equivalent of £60,000 per annum). The payslips included a *'year to date –gross pay'* figure which gave the impression that Mr Khan had been paid (and had incurred income tax on) a total of £30,000 by Sovereign in the six months between 1 April 2009 and 30 September 2009.

22. The information provided in these payslips was false. Mr Khan's HMRC records showed that he had not been paid £5,000 by Sovereign for any month in 2009. Mr Khan confirmed this is to be the case during an interview.

Potential income from contract work

23. Mr Khan generated income by way of intermittent temporary contract work for financial services institutions. He always arranged for the proceeds of the contracts to be paid directly into Sovereign's bank account.

24. Mr Khan said that the £60,000 income figure he had declared to the lender took into account the income he stood to earn from contract work.

25. The FSA obtained records from Mr Khan and Mr Khan's recruitment consultants in relation to the contract work he had carried out in previous years. The approximate income generated by Mr Khan through contract work totalled £7,000 in the year ending 30 June 2007, £7,000 in the year ending 30 June 2008 and £2,000 in the year ending 30 June 2009.

26. On 9 October 2009, Mr Khan completed a six week contract for which he earned approximately £5,000. By 13 October 2009, the day that Mr Khan submitted his mortgage application, Mr Khan had been informed of a potential contract which he had been deemed suitable to perform. The contract was not however formalised until around five weeks after he submitted the application. If this contract had run its course on the agreed terms, Mr Khan could have netted a maximum of £18,000, which would have resulted in a maximum income from contract work in that tax year (April 2009-March 2010) of only £26,850. As it was, Mr Khan earned only £4,200 for that contract which was discontinued in January 2010.

Rental income

27. Mr Khan owns an unencumbered property which he had let out to students each year since 1993. In support of his mortgage application, Mr Khan submitted a rental income form in which he stated that the maximum annual income he could receive from the property's rental was £14,500. He also provided copies of tenancy agreements to the lender which showed that under the present rental agreement he expected to receive £12,000.

28. The FSA found that the rental income figures which Mr Khan declared to HMRC in the tax years ending 5 April 2008, 2009 and 2010 were significantly lower than £12,000, as he often did not receive the full amount of rental income in a year. When asked why he had declared rental income of £14,500 in his mortgage application, he said 'that's probably just an oversight'.

29. Mr Khan did not take up the mortgage offered by the lender as a result of his application of 13 October 2009 because he was not successful with the purchase of the target property. However, on 6 May 2010, Mr Khan signed and submitted a 'substitute property details application' to the lender in which he applied for a loan of £260,000 to fund the purchase of a different property.

30. Mr Khan signed the substitute application, which included the following declaration:

> '*This form is supplemental to my previous mortgage application form dated ____. I confirm that all the information given in both applications is correct and where changes have occurred these have been advised and the revisions inserted in (or attached to) the application form.'*

31. In the six months between submitting the original mortgage application and the substitute application, Mr Khan had generated £4,200 in income from one temporary contract which was paid into Sovereign's account. Mr Khan had not paid himself from Sovereign's account during that period.

32. In respect of the substitute application, Mr Khan did not take any steps to correct or revise the income figures he had declared to the lender in the original mortgage application. Mr Khan had no explanation for omitting to do so."

[18] The Decision Notice went on to state the following:

"**FAILINGS**

…

Breach of Statement of Principle 1

40. In his personal mortgage application submitted in 2009, Mr Khan declared income figures significantly more than those declared to HMRC. Furthermore, those declared income figures were significantly more than the annual income Sovereign had ever generated and therefore significantly more than he could ever have earned personally.

41. He therefore knowingly submitted a mortgage application to a lender which contained false and misleading information about his income.

42. Mr Khan's explanations for the declared income figure in the 2009 mortgage application were deliberately misleading.

False payslips

43. When asked by the lender to provide evidence in relation to his income, Mr Khan could have provided existing documents such as accounts, bank statements or HMRC returns. Instead, Mr Khan arranged for three payslips to be created which gave the impression that he had been paid a monthly salary of £5,000 by Sovereign between April and September 2009.

44. Mr Khan knew that the payslips were false and misleading given that:

    (1) most of the material information on the payslips was false, including that he did not take a monthly salary at any point; and

    (2) he knew that he had not received a wage from Sovereign in the six months preceding the first false payslip.

Rental income

45. Mr Khan also declared an annual rental income of £14,500 when he knew that:

    (1) the maximum rental income he could earn in a year was £12,000; and

    (2) the actual rental income he had received in the previous three years was substantially less than £12,000.

46. Given that Mr Khan submitted a specific rental income form and tenancy agreements to the lender in support of the mortgage application, Mr Khan's explanation that the £14,500 figure was an '*oversight*' is not credible.

Substitute application form

47. Six months after submitting the October 2009 application, Mr Khan signed a substitute application form which included a declaration that, the information he had provided to the lender remained accurate. During that period, Mr Khan had not paid himself any salary out of Sovereign's reserves. Mr Khan's suggestion that this was an oversight is not credible.

Summary

48. As the sole owner and controller of Sovereign, and as an individual who arranged mortgages for customers, Mr Khan was aware of the need to submit accurate and candid information to mortgage lenders when applying for a mortgage. He acknowledged that lenders rely on the total income received, not a prediction about what an applicant may be able to earn in the future.

49. Mr Khan knowingly provided false information about his income in his 2009 mortgage application. In support of his application, he submitted payslips

which he knew to be false and misleading. Accordingly, Mr Khan breached Statement of Principle 1.

50. This breach is seriously aggravated by Mr Khan's attempts to mislead the FSA about his 2009 mortgage application through the explanations he advanced for his declared income of £60,000. Those explanations, whilst already implausible, were shown to be false on the discovery of the 2007 mortgage application in which he had declared an identical income figure which bore no similarity to his financial position at that time. The 2007 mortgage application demonstrates that he did not naively accept his professional adviser's advice because he had made the same false declaration two years earlier.

…

Not a fit and proper person

54. Mr Khan failed to act with honesty and integrity by knowingly submitting false and misleading information to a mortgage lender in both 2007 and 2009… The seriousness of the facts and matters described above demonstrates that Mr Khan fell short of the standards expected of a person performing functions in relation to a regulated activity carried on by an approved person."

[19] The Decision Notice then went on to consider various representations made to the FSA by the pursuer and then made findings as follows:

"**FINDINGS AND CONCLUSIONS**

66. The written representations were unequivocal: "I maintain the information in the payslips which [my adviser] produced was correct". To his credit, when questioned in the course of making his oral representations about the information in some detail, Mr Khan acknowledged that the information was not correct. He said that the payslips were not true statements although he still believed they could be substantiated; that they were correct based on a projection; that they were incorrect based on an actual and that should have been made clear. Mr Khan admitted that it was not acceptable for him to have relied on the payslips as evidence of actual payments in support of a mortgage application.

67. Although some credit is to be given to Mr Khan in finally acknowledging the false nature of the payslips, it does not avoid the fact that:

(1) He knowingly used the false information in support of his mortgage application;

(2) he blamed his adviser for preparing payslips which he knew to be false without acknowledging his responsibility for ensuring that they were accurate;

(3) he made the 2009 application in his capacity as an approved person and that, as such, his clients would look to him to be a man of honesty and integrity; and

(4) he repeated in 2009 what he had done in 2007.

68. It is self-evident, and a mortgage broker must have been aware, that a prospective lender can only assess realistically whether to lend to someone when it is in possession of the information it asks for. It is not fair to a prospective lender, apart from being dishonest, knowingly to give a version of events, figures or information based on anything else and pass them off as true.

69. It is neither correct not relevant to say that '*The test of a successful mortgage application is the ability to meet payments'* as Mr Khan claimed (see paragraph 59). The obligation of an applicant is to answer the questions fully and truthfully, putting the lender into the position he expects to be. Referring, later, to matters such as arrears, complaints and disadvantage, cannot help answer the question 'Has the application form been properly completed?'

70. The declaration to the mortgage lender that the information was correct (see paragraph 30) was not the case and Mr Khan knew that it was not the case.

71. It should also be self-evident to anyone, and particularly to a mortgage broker acting in the course of his business, that certifying a photograph as having a true likeness to a person without having met the person is dishonest.

72. The FSA has come to the clear conclusion that Mr Khan knew exactly what he was doing when completing his mortgage applications and that his actions were dishonest rather than reckless. It was not inadvertence on his part that led him to make two applications in the manner that he did two years apart."

[20] The pursuer appealed to the Upper Tier Tribunal against part (1) of the Decision Notice of 4 March 2013 (i.e. the part that required him to pay a penalty of £80,000). He challenged the FCA's categorisation of the breach of Statement of Principle 1 and the size of the financial penalty determined by the FCA. By judgment dated 8 April 2014, the Upper Tier Tribunal refused that appeal.

[21] The Upper Tier Tribunal made the following findings of fact:

"**Findings of fact on the conduct issue**

Background

34. Mr Khan graduated with a degree in business studies from Napier University, Edinburgh in 1992. He then worked for a period of approximately 8 years with a number of large financial institutions in various administrative, analytical and management roles. In June 2000 Mr Khan decided to set up his own company, Sovereign, which at all material times was wholly owned by him and of which he was the sole director and employee. Sovereign's purpose was initially to operate in the unregulated sector providing advice and arranging commercial finance for small businesses within the financial sector, but in March 2007 Sovereign was granted permission by the Financial Services Authority ("FSA"), the Authority's predecessor, to carry on regulated mortgage and general insurance activities. On 5 March 2005 Mr Khan was approved by the FSA to perform the controlled function of director (CF1) and was approved to perform the controlled function of apportionment and oversight (CF8). He thus became an approved person subject to the provisions of APER.

35. Sovereign's business was relatively small. Its annual accounts for each of the five financial years between 2006 and 2010 showed the following results:

Year ending 30 June	**Turnover**	**Net Profit/(loss)**	**Cash at bank and in hand**	**Director's loan owed to Mr Khan**
2006	£8,913	£4,071	£9,862	£4,502
2007	£25,033	(£1,016)	£4,547	£884
2008	£18,716	£5,136	£18,649	£8,533
2009	£18,016	£2,506	£28,610	£15,643
2010	£14,750	£7,565	£29,408	£25,476

36. Sovereign arranged a total of 16 regulated mortgage contracts on a non-advised basis between March 2007 and March 2011. Mr Khan was responsible for all of those arrangements, acting in his capacity as an approved person of Sovereign, including in relation to the 2009 and 2010 Applications.

37. In addition to this business, Mr Khan continued throughout the period under review to undertake consultancy work under short term contracts with a considerable number of leading financial institutions the income from which was paid into Sovereign. During his consultancy work, Mr Khan would have become familiar with the relevant standards imposed by the financial services regulatory system, which he accepted was the case in his oral evidence, including in relation to the mortgage industry.

38. Mr Khan also personally owns two buy to let properties which during the period under review provided him with rental income.

39. Mr Khan declared the following income in his tax returns to Her Majesty's Revenue and Customs ("HMRC") in respect of the three tax years between 2007 and 2010:

Tax Year	**PAYE income from Sovereign**	**PAYE income from other contract work**	**Rental**
2007/08	£5,200	£6,960	£7,500
2008/09	£3,180	n/a	£7,500
2009/10	£4,170	n/a	£8,500

40. The Authority, using its statutory powers, obtained information about the consultancy contracts that Mr Khan worked on between 2007 and 2009. This information shows that Mr Khan had generated £9,450 from contract work in 2007, nothing in 2008 and £6,650 during 2009 up to the date of submitting the 2009 Application.

41. At the time of the submission of the 2009 Application Mr Khan did not have a current consultancy contract, but he had received an oral offer of a contract with Northern Rock which was confirmed in writing on 20 November 2009. This contract commenced on 30 November 2009 and was for a period ending on 26 March 2010. If the contract had run its full course it would have generated income of £18,000 but it was terminated after Mr Khan received poor performance feedback on 18 January 2010.

42. It was clear that up to the point that Mr Khan made the 2009 Application that he had not tended to take significant amounts of salary and no dividends from Sovereign. Hence, at the time of the first application, it had cash reserves of £27,196, built up over a period of some four years and most of which was represented by the balance on Mr Khan's director's loan account.

The 2009 Application

43. On 13 October 2009, Mr Khan submitted an online mortgage application through Sovereign on his own behalf to Abbey National Plc ("Abbey") for a loan of £237,000 to fund the purchase of a residential property in Edinburgh, namely 1 Leven Terrace. The application disclosed that Mr Khan's marital status was 'separated'. Mr Khan's unchallenged evidence, which we accept, was at the time this application was made, Mr Khan was engaged in an access dispute with his wife regarding his children which was resulting in considerable stress. Mr Khan was ultimately divorced on 17 December 2012 but he continues to press for custody of his children in proceedings which are ongoing.

44. The 2009 Application discloses that Mr Khan's current address was 7 Forth View Place, Dalkeith, which was the former matrimonial home and which remains Mr Khan's residence at the present time, Mr Khan sharing occupation with his disabled mother. Mr Khan disclosed that he was employed by Sovereign at a gross salary of £60,000 per annum and that he had secondary income of £14,500, which was explained as income from a buy to let property. Mr Khan also declared that 7 Forth View Place, on which he disclosed an outstanding mortgage of £218,000, would be rented out at £1,200 per month.

45. It is common ground that Mr Khan was not employed by Sovereign at a salary of £60,000 and had never received earnings of that magnitude from Sovereign, as shown by his tax returns. There was also a discrepancy between the rental income shown in respect of the tax year 2009/10 (£8,500) and the £14,000 declared by Mr Khan to Abbey National, although he explains this, which we accept, that the income actually received was reduced as a result of two student tenants leaving during the year having failed their examinations.

46. Mr Khan's consistent explanation as to why he declared an employment income of £60,000 which was given in interview with the Authority during the Authority's investigation, in his witness statement in these proceedings and in his oral evidence before the Tribunal was as follows.

47. Mr Khan's evidence was that he took advice from his accountant as to how to declare his income on the 2009 Application. At the relevant time, Sovereign's cash position and the director's loan account showed that amount in the region of £30,000 could be drawn out of Sovereign and on that basis, Mr Khan contends, his accountant advised him that he could show earnings as an employee of Sovereign via the director's loan account of £5,000 per month, bearing in mind the expected level of consultancy work, including the anticipated contract with Northern Rock, and the sums available for draw down from Sovereign. Mr Khan's evidence was that he included the anticipated rental income in that amount, although it is clear to us that he declared that in addition to the employment income rather than as a component of it.

48. Mr Khan accepts that he never drew money from Sovereign to that extent but that he believed, on the basis of the advice he received from his accountant, that he could have done so. He also accepts, he says with the benefit of hindsight, that neither he nor his accountant should have approached the calculation of his employment income on that basis, which he described as 'rough and ready'.

49. He now accepts that he was reckless to have relied on his accountant in this way, but he was not deliberately setting out to deceive the lender, as shown by the fact that without hesitation he voluntarily provided the files relating to his

own mortgage applications to the Authority in advance of it being indicated to him that the Authority had concerns about those applications.

50. Mr Khan also contends that his mind was confused at the time, because of the stress of the divorce proceedings.

51. It appears that Abbey National asked for proof of Mr Khan's employment. Accordingly, Mr Khan submitted copies of three payslips to Abbey National, for the months of July, August and September 2009. These payslips, which were in the usual form expected for such documents, stated that Mr Khan had received gross pay of £5,000 for each of the months in question, and that deductions for income tax, based on the tax code (647L) shown on the document and national insurance had been made. It is common ground that no such deductions had been made and that the relevant sums had not been accounted for to HMRC. The payslips also showed year to date figures, so on the October 2009 payslips gross pay of £35,000 was shown, indicating that Mr Khan had been receiving pay of £5,000 per month since the beginning of the tax year in April 2009. The copy payslips were certified as true copies of the original by Mrs A Mirza, Mr Khan's sister, who was also Sovereign's company secretary.

52. Mr Khan's evidence was that these payslips had been created by his accountant on the accountant's advice; he stated in interview that the accountant would be able to provide the necessary documentation to verify what sums the accountant had advised Mr Khan he was entitled to draw down from Sovereign. This evidence is consistent with the accountant's own evidence to the Authority, and we accept it and find accordingly.

53. Mr Khan accepted in his oral evidence that the information on these payslips was misleading, but not that it had been dishonest to produce them as evidence of income to Abbey National. He drew a distinction between creating false payslips from a site on the internet to justify non-existent income, and what had happened in this case, which was that the payslips had been created by the accountant, on the accountant's advice, to justify an income which the accountant had advised he was entitled to withdraw from Sovereign.

54. It is clear to us from the evidence as reviewed above that the employment income declared to Abbey National was false; at no time had Mr Khan been earning an income of £60,000 per year from Sovereign. The declaration that Mr Khan made to that effect relied on a projection of income, based upon advice from his accountant on the existing resources of Sovereign and what Mr Khan had anticipated he might earn in consultancy income. The question for us to determine, on the basis of those facts , was whether Mr Khan's behaviour was dishonest in representing he had an income of £60,000, and on the basis of the test in *Ghosh*, his behaviour will be characterised as dishonest if declaring an income of £60,000 in those circumstances would be considered

dishonest according to the ordinary standards of reasonable and honest people, and whether Mr Khan himself must have realised that what he was doing was dishonest.

55. In that context we also have to consider the question of the payslips. It is clear from the evidence that the payslips are false in that Mr Khan had not received the income from Sovereign declared to have been paid to him on these payslips. Neither had the income tax and national insurance contributions declared to have been deducted been so deducted and accounted for to HMRC. The question for us is whether the submission of those payslips to Abbey National in support of the income declaration made on the 2009 Application in circumstances where those payslips had been created by Mr Khan's accountant to support a level of income which the accountant had advised Mr Khan could be supported in the future, would be considered dishonest according to the standards of ordinary standards of reasonable and honest people and whether Mr Khan himself must have realised that what he was doing was dishonest.

56. In our view the correct approach is to look at the circumstances surrounding both the submission of the 2009 Application and the payslips in the round.

57. In our view the evidence that the behaviour concerned demonstrates dishonesty on Mr Khan's part is cogent and compelling.

58. Mr Khan is an experienced financial services professional who on his own admission is aware of the standards expected of persons in that position. Reasonable and honest people would understand the difference between being asked a question about their actual or historic income and what they might be expected to earn in the future. They would have known that stating they had an income of £60,000 from a particular employer when they had never received that sum in the past and were not expecting to do so in the future would be dishonest, even if advised by an accountant that it was legitimate to proceed on the basis of a projected income. If given that advice, the reasonable and honest person would have challenged it.

59. In any event, the evidence shows that an income of £60,000 per year could not be justified by the financial circumstances of Sovereign at the time; its cash resources of a little less than £30,000 had been built up over a period of four years and it had no long term consultancy contracts at the time the 2009 Application was submitted. Mr Khan must have known that to be the case based on his own tax returns, which he prepared, and the current position regarding consultancy work. Mr Khan must have known that he had never earned £60,000 per annum from Sovereign and that he was not at the time he made the 2009 Application expecting to do so. It must have been obvious to him, based on his experience, that lenders were expecting an answer based on his actual income rather than his projected income. He must therefore have

known when he answered the question on the form that his answer was dishonest.

60. In order for us to be satisfied that Mr Khan's behaviour was reckless rather than dishonest he would have had to have satisfied us that he was aware that there was a risk that a figure of £60,000 overstated his income and that if he actually checked the position more rigorously himself rather than relying on his accountant, he would have discovered that his actual level of income was significantly below that. For the reasons that we have stated above, the evidence clearly points to the conclusion that Mr Khan knew that his earnings from Sovereign's earnings did not at the time of the application amount to him having an income from employment of £60,000 per annum so he knew more than the fact that there was a risk his income was lower than £60,000 and his behaviour was not merely reckless but was dishonest.

61. An ordinary and reasonable person would also have known that the submission to a lender of a payslip declaring that he was entitled to £5,000 in respect of a particular month's salary and that he had received that amount less deductions for tax and insurance when that had not been the case would have been dishonest, notwithstanding the fact that such a payslip had been created by his accountant to support a projected rather than actual income of the stated amount. Mr Khan, as an experienced financial services professional, knows the purpose of submitting a payslip to a lender to support a mortgage application. It is to verify income actually earned, not to support a projection of income, and Mr Khan knew that he had not received the income stated in the payslip and that therefore the payslip was false. He must therefore have known that submitting the payslip to the lender in those circumstances notwithstanding the advice of his accountant was dishonest.

62. Nor do we believe that the fact that Mr Khan disclosed his mortgage applications to the Authority voluntarily affects the position. We agree that such action is normally indicative of the behaviour of an honest person, but we find the evidence surrounding the circumstances in which the 2009 Application and the payslips were submitted, as found above, to provide overwhelming evidence of dishonesty that outweighs this factor.

63. It is therefore clear in these circumstances that we must characterise Mr Khan's behaviour in relation to the 2009 Application as dishonest rather than reckless.

64. The purchase of the property envisaged by the 2009 Application did not proceed as a consequence of which Mr Khan submitted the 2010 Application in respect of an alternative property. We now turn to consider that application.

The 2010 Application

65. On 6 May 2010 Mr Khan submitted a further mortgage application through Sovereign on his own behalf to Abbey. This was submitted on what was described on the application form as a 'substitute property details application' in that it was supplemental to a previous application (in this case the 2009 Application) which proceeded on the basis of the information provided in the 2009 Application, save that the substitute property was the subject of the mortgage in place of the original property. Mr Khan was required to sign a declaration to the effect that the information provided in both applications was correct subject to any changes notified. The application also required Mr Khan to declare that he or a member of his immediate family intended to live in the property concerned; had that not been the case a buy to let mortgage application would have to be completed.

66. Mr Khan disclosed the property to be funded by the mortgage as 4 West Newington Place, Edinburgh, and a loan of £260,000 was sought. The purchase of this property was completed but Mr Khan did in fact only live in it for a short period, as he was able in due course to continue to reside in the former matrimonial home at 7 Forth View Place, Dalkeith. 4 West Newington Place is still owed [sic] by Mr Khan and he rents it out, but he admitted in his oral evidence that he had never, as he is required to do, notified Abbey that it is not occupied by him as a dwelling. Consequently, in effect Mr Khan continues to have a residential mortgage over what has become a buy to let property. It would appear that Abbey has also never been notified that he continues to occupy 7 Forth View Place as his residence, whilst the 2009 Application indicated that this property would be rented out to tenants.

67. In view of the fact that the 2010 Application was supplemental to the 2009 Application, it is clear that all of Mr Khan's representations in that application are equally applicable to both applications. On the basis of our findings in relation to the 2009 Application, we must therefore conclude that Mr Khan obtained the mortgage on 4 West Newington Place on the basis of dishonest representations as to his employment income.

Mr Khan's earlier application 2007

68. The Authority relies on an earlier mortgage application made by Mr Khan as aggravating Mr Khan's behaviour in relation to the 2009 and 2010 Applications. The application concerned was made on 9 December 2007 to Intelligent Finance in order to finance his purchase of 7 Forth View Place and the amount of the loan sought was £221,000. In that application Mr Khan declared that he was self-employed and had an annual income of £60,000 gross.

69. In the light of our findings of fact based on Mr Khan's activities since Sovereign was formed, we can only conclude that this representation was also dishonest.

70. This finding is of limited significance in relation to this case. The application was submitted by Mr Khan personally, rather than through Sovereign and was not therefore submitted in his capacity of an approved person. Consequently, it is not open to the Authority to seek to impose a financial penalty on Mr Khan in respect of his conduct in relation to this application.

71. However, in our view it is appropriate for us to take the circumstances of the 2007 application into account when assessing all the circumstances relating to the imposition of a financial penalty in respect of the 2009 and 2010 applications, and in particular when assessing Mr Khan's financial resources and considering whether the appropriate penalty should be reduced because of Mr Khan's financial circumstances. Accordingly, we consider the effect of the 2007 application in that context below."

[22] The pursuer appealed the judgment of the Upper Tier Tribunal to the Court of Session. Following an opposed Inner House hearing, leave to appeal was granted on 24 March 2016. On 26 August 2016, in light of the pursuer's financial circumstances, the Financial Conduct Authority ("FCA"), as successor to the FSA, agreed with the pursuer that he would withdraw his appeal in return for the FCA withdrawing the penalty of £80,000.

[23] By Final Notice dated 26 August 2016, the FCA confirmed that in light of serious financial hardship the £80,000 penalty was withdrawn, and made an order of new, under section 56 of the 2000 Act, prohibiting the pursuer from performing any function in relation to any regulated activity carried on by an authorised person, exempt person or not to contest the appeal. In the final notice the FCA stated inter alia:

"1. For the reasons given in this notice, the Authority hereby:

(a) publishes a statement of Mr Khan's misconduct ('a public censure'), pursuant to section 66 of the Act for failing to comply with Statements of Principle 1 and 6. Mr Khan provided verifiable evidence of serious financial hardship. Had it not been for his reduced financial circumstances the Authority would have imposed a financial penalty of £80,000; and

(b) makes an order, pursuant to section 56 of the Act, prohibiting Mr Khan from performing any function in relation to any regulated activity

> carried on by an authorised person, exempt person or exempt professional firm. This order will take effect from 26 August 2016.

[24] The Summons in the present action passed the signet on 2 March 2018, and was served personally upon the defender on that date.

Ex turpi causa non oritur actio

Defender's submissions

[25] Counsel for the defender submitted that the pursuer had been subjected to sanctions by his regulator and that it would be inconsistent, and contrary to public policy, to allow the pursuer to attempt to pass on the consequences of his own wrongdoing to the defender (*Safeway Stores Ltd and others* v *Twigger and others* [2011] Bus. L.R.1629 at paragraph [16]; *Gray* v *Thames Trains Ltd* [2009] 1AC 1339; *Les Laboratoires Servier and another* v *Apotex Inc* [2015] AC 430). It would be impossible for the pursuer to have insured against the consequences of FSA disciplinary sanction (*Colinvaux's Law of Insurance*, 11th Edition at 21-154); and by the same token he could not sue in negligence or contract in respect thereof. On the pursuer's own averments, he knew he was relying on false statements and as such could not recover damages for the consequences of such reliance (*Brown Jenkinson & Co Ltd* v *Percy Dalton (London) Ltd* [1957] 2QB 621).

Pursuer's submissions

[26] Counsel for the pursuer submitted that *ex turpi causa non oritur actio* should be upheld only in clear cases (*Bilta (UK) Ltd* v *Nazir (Number 2)* [2016] AC1). The present case involved a claim between two individuals and should be distinguished from cases involving corporate structures. The "turpitude" required by *Les Laboratoires Servier* v *Apotex* does not affect a

claim between private individuals. Context was very important (*Gray* v *Thames Trains Ltd* [2009] AC1 339 at paragraph 30, as the maxim was not based on a single justification but a group of reasons. In the present case, the pursuer's claim was not linked, nor did it rely on, any illegality or immorality on the part of the pursuer. There were strong policy considerations that persons who rely on another for professional services should be able to hold their advisor accountable (*Hounga* v *Allen* [2014] 1WLR 2889; *Ramblers Association, Secretary of State for the Environment, Food and Rural Affairs* [2017] EWHC 716 [Admin]). *Safeway Stores Ltd* v *Twigger* should be distinguished as it sought to recoup a penalty and it arose in a different statutory context and was concerned with a corporate setting rather between individuals. The pursuer did not accept that he knew he was relying on false statements, and there was a significant dispute as to facts on this.

Discussion

[27] The brocard *ex turpi causa non oritur actio* is well recognised as applying in Scots law (Bell *Principles* s35, *Winnick v Dick* 1984 SC 48, *D Geddes (Contractors) Ltd* v *Neil Johnson Health and Safety Services Ltd* [2017] CSOH 42). There has however been little or no judicial analysis of the brocard or of its history or development in Scotland, nor of its doctrinal basis in Scots Law. Parties did not address me on this but were content for me to proceed on the English authorities. I am content to do so.

[28] By contrast, in English law the brocard has in recent years been subject to extensive analysis both judicially by the House of Lords and Supreme Court (*Gray* v *Thames Trains, Hounga* v *Allen* and *Bilta (UK)Ltd* v *Nazir No* 2) and extra-judicially in the English Law Commission's 2010 report on *The Illegality Defence*.

[29] In this case it is not necessary to solve all the problems identified in England. It is necessary only to consider the application of the brocard to the circumstances of this case.

[30] In this case the pursuer seeks to recover from the defender losses which the pursuer has incurred as a result of a sanction imposed on the pursuer by the pursuer's regulator.

[31] In *Gray* v *Thames Trains Ltd*, Lord Hoffman in considering the brocard held that there was a well-established rule that "you cannot recover for damage which is the consequence of a sentence imposed upon you for a criminal act." (paras 32 and 41).

[32] The rule is not limited to sentences imposed for criminal acts. It extends to sanctions applied by a regulator. In *Safeway Stores Ltd* v *Twigger*, a supermarket company had participated in commercial activities which resulted in an increase in the selling price of milk and other dairy products. The Office of Fair Trading conducted an investigation into whether the Company had breached the prohibition on anti-competitive activities contained in sec 36 of the Competition Act 1998. The company admitted the breach and the regulator imposed a financial penalty on the company. The company sought to recover the penalty from its employees and directors who had been responsible for the company's participation in the activities. The employees and directors argued that the company's claim was barred as a matter of public policy as it infringed the brocard. The Court of Appeal found against the company. Longmore LJ stated:

> "The rationale of the maxim [*ex turpi causa non oritur actio*] is the need for the criminal courts and the civil courts to speak with a consistent voice. It would be inconsistent for a claimant to be criminally and personally liable (or liable to pay penalties to a regulator such as the OFT) but for the same claimant to say to a civil court that he is not personally answerable for that conduct." (para 16)

[33] The pursuer has been disciplined in terms of the financial services regulatory regime. He now seeks to recover for damage which is the consequence of the sentence imposed on

him under that regime. In my opinion he is prohibited from so doing by the rule set out by Lord Hoffman.

[34] I do not accept the pursuer's argument that the *Safeway* case is distinguishable as it was between the company and its directors and this case was not. The rule stated by Lord Hoffman is of general application and not limited to cases between a company and its directors or employees. There is no good reason in principle why the requirement for consistency between courts and regulators set out by Longmore LJ should be limited to such cases.

[35] I acknowledge that the brocard is founded on policy, and there may be circumstances in which the policy of the brocard has to defer to some other public policy. However, this is not one of them. Counsel for the pursuer founded on the public policy consideration that persons who rely on others for professional services should be able to hold their adviser accountable. However this case cannot be categorised as falling under any such public policy. The pursuer was not disciplined for acting in accordance with professional advice. He was disciplined for his own dishonest conduct. The Upper Tribunal found that the pursuer had previously made a dishonest representation in relation to a 2007 mortgage application which pre-dated the production of the reference and payslips by the defender in 2009 (para 69). The Upper Tribunal found in relation to the 2009 application that "He must have known that submitting the payslip to the lender…notwithstanding the advice of his accountant was dishonest" (para 61) and gave detailed reasons for this finding at paras 58 and 59.

[36] There can be circumstances in which the lack of knowledge on the part of the claimant that his acts were wrong might result in the exclusion of the brocard. Such circumstances may include, for example, strict liability offences where the claimant was not privy to the

facts making the acts unlawful (*Les Laboratoires Servier* per Lord Sumption at para 29). Another example was given by Lord Walker of Gestinthorpe in *Stone & Rolls Ltd* v *Moore Stephens* [2009] AC1391 at para 179:

> "…Suppose for the sake of argument that a trader engages an accountant for the primary and express purpose of preparing financial statements that comply with all the requirements of company law and tax law, so that the lawfulness of the financial statements is the very thing that the accountant undertakes to do; and suppose that the accountant negligently fails to perform this task, and the trader is in consequence liable to some penalty or criminal sanction. Could the accountant meet a claim for professional negligence by pleading the *ex turpi causa* defence? It is obviously impossible to answer that question without knowing more about the facts. If the trader had honestly supplied information which he believed to be correct and complete, and the accountant had negligently failed to notice that the information could not be correct and complete, it seems unlikely that such a regulatory breach, not involving dishonesty, would bring the *ex turpi causa* principle into play."

[37] The Upper Tribunal has found that the pursuer's regulatory breach involved dishonesty. It follows from this that the application of the brocard has not been excluded.

[38] Further, as noted above, the rationale for the brocard is that there should be consistency between courts. As Lord Rodger said in *Gray* "the civil court should cleave to the same policy as the criminal court" (para 82). That rationale has even stronger force where the regulatory structure is such that there is an appeal from the regulator to the same court as that in which the claimant has brought a claim for damages. It would be inconsistent to allow a claimant who failed in the Inner House on a regulatory appeal to revisit the factual circumstances of the regulatory decision in a damages action in the Outer House.

[39] In all the circumstances I find that the brocard applies to this case. I will uphold the defender's third plea in law and dismiss the action.

[40] In the light of this decision it is not necessary for me to make an order on the prescription and causation arguments. However, I set out below what my findings would have been had I not upheld the *ex turpi causa* argument.

Prescription

[41] This action was signeted and served on 2 March 2018. Accordingly, if the prescriptive period began to run on the date of the Decision Notice of 4 March 2013, prescription has not operated. However, if time began to run prior to that and outwith the five year prescriptive period, prescription has operated.

[42] The defender offers to prove the following averments:

> "On the hypotheses of fact upon which the pursuer proceeds, the defender acted in breach of duty in 2009. The pursuer's actions in founding upon the payslips took place in 2009 and 2010. By acting as aforesaid, the pursuer rendered himself vulnerable to the disciplinary proceedings which later eventuated, and at that time suffered actionable loss. In any event, the pursuer was first subjected to investigation by the FSA in 2011. He expended funds, time and effort –all of which would properly be the subject of a damages claim had the pursuer any proper basis therefor – in defending the FSA proceedings from 2011 onwards."

[43] The pursuer offered to prove following averments:

> "the investigation process was initiated as a result of a different concern about passport certification in another transaction, not the pursuer's personal mortgage transaction. It was the FSA determination of March 2013 which caused the actionable loss."

Defender's submissions

[44] Counsel for the defender submitted that the prescriptive period began to run as soon as the pursuer became subject to disciplinary prosecution by the FSA. At that point he became aware that he had suffered a detriment and had not obtained something which he sought or had incurred expenditure (*Gordon's Trustees* v *Campbell Riddell Breeze Paterson LLP* [2017] SLT 1287 at paragraph [21]). He suffered actual loss as soon as he became subject to disciplinary proceedings (*Knapp* v *Ecclesiastical Insurance Group Plc* [1998] PNLR 172). The fact that the FSA might ultimately have acquitted the pursuer was neither here nor there: the occurrence of loss was not postponed by the possibility that a later event might rectify it

(*Jackson* v *Clydesdale Bank Plc* [2003] SLT 273). By way of analogy, where a solicitor fails to timeously raise an action, the client's claim is timebarred subject only to section 19A of the 1973 Act (*Axa Insurance v Akhtar & Darby* [2009] PNLR 455). As soon as the pursuer became subject to disciplinary proceedings he became aware that he had suffered a detriment and not obtained something he sought (*Gordon's Trustees v Cambpell Riddell Breeze Paterson LLP* 2017 SLT 1287 at para [21]). The pursuer's pleadings did not discharge the onus of showing how his title to sue had been preserved (*Pelagic Freezing (Scotland) Ltd* v *Lovie Construction Ltd and Grontmij Group Ltd* [2010] CSOH 145 at [86] – [96]). Counsel invited me to dismiss the action.

Pursuer's submissions

[45] Counsel for the pursuer submitted that the case of *Kusz* v *Buchanan Burton* [2009] CSIH 63, 2010 SCLR 27 1H (1 Div) was analogous to the present case. He sought to distinguish *Jackson* v *Clydesdale Bank Plc* on the basis that the pursuer was not prevented from carrying out controlled functions until the decision of the FCA in 2013. He also sought to distinguish *Knapp* v *Ecclesiastical Insurance Group* on the basis that the loss in that case crystalized at the point of negligent advice. He further submitted that the expenditure that the pursuer incurred in relation to dealing with the initial investigation was not caused by the defender but by the need to deal with other matters raised by the FCA. The loss did not come from being subject to investigation (CF *Gordon's Trustees* v *Campbell Riddell Breeze Paterson LLP)*: instead, no loss from the defender's actions could be established until the decision was made by the FSA in March 2013. Counsel invited me to repel the defender's plea in law as to prescription.

Discussion

[46] Read short, Section 6 of the *Prescription and Limitation (Scotland) Act 1973* provides that an obligation to make reparation is extinguished if it has subsisted without claim or acknowledgement for a continuous period of five years after the date when the obligation became enforceable. Section 11 (1) provides that:

> "… any obligation….to make reparation for loss, injury or damage caused by an act, neglect or default shall be regarded for the purposes of section 6 of this Act as having become enforceable on the date when the loss, injury or damage occurred"

[47] In this case the "act, neglect or default" for which the pursuer seeks reparation is the advice, reference and payslips in 2009. The more difficult issue is when the "loss, injury or damage occurred". On the pleadings and in the discussion before me there were three contenders for when that might have happened:

(a) The dates in 2009 and 2010 when the pursuer founded on the advice and payslips by making representations to mortgage lenders;

(b) The date at which the pursuer expended funds, time and effort in relation to the investigation by the FSA; or

(c) The date of the FSA Decision Notice of 4 March 2013.

[48] In *Dunlop v McGowans*, Lord Keith said (p81):

> "An obligation to make reparation for such loss, injury and damage is a single and indivisible obligation, and one action only may be prosecuted for enforcing it. The right to raise such an action accrues when injuria concurs with damnum. Some interval of time may elapse between the two, and it appears to me that section 11(1) does no more than to recognise this possibility and make it clear that in such circumstances time is to run from the date when damnum results, not from the earlier date of injuria. The words "loss, injury and damage" in the last line of the subsection refer back to the same words in the earlier part and indicate nothing more than the subject-matter of the single and indivisible obligation to make reparation. In the present case the loss, injury and damage flowing from the respondents' negligent omission occurred at Whitsunday 1971 when the appellant, but for that omission, would have obtained vacant possession of the premises. A quantification of the loss was capable of being made at that date, notwithstanding that it would then

> necessarily have had to be made on the basis of estimation, and that greater accuracy might have been capable of being achieved, in the light of supervening events, at a later date. Whitsunday 1971 is therefore the date at which the prescriptive period began to run."

[49] In my opinion the *damnum* occurred at the time when the pursuer expended funds, time and effort in relation to the investigation by the FSA into the pursuer's representations in 2009 and 2010. At that stage the pursuer suffered damage which would have been recoverable from the defender if successful in this action. The expense incurred in defending professional regulatory proceedings for acting in accordance with negligent advice flows naturally from the giving of the negligent advice. Even a modest cost of instructing a solicitor is recoverable (*Bell* v *Browne* [1979] Ch 383 per Nicholls LJ at p 503 quoted in *Knapp* v *Ecclesiastical Insurance* per Hobhouse LJ at p184). If the pursuer had concluded in this action for the cost of defending the FSA investigation and proceedings (in so far as relating to the 2009 and 2010 representations) then he would have been entitled to these costs if successful. It does not assist the pursuer that he is suing only for the loss resulting from the penalty imposed by the FSA on 4 March. There can only be one point of concurrence between *damnum* and *injuria* (*Kusz* v *Buchanan Burton* at para 11). A pursuer cannot postpone the date from which prescription runs by not suing for the *damnum* incurred at the point of concurrence but instead suing only for further damage which occurred at a later date.

[50] There can be situations in which the *damnum* coincides with the *injuria* but cannot be quantified until a later time. This is often the case where a client has entered into a transaction on the basis of negligent professional advice. However in this case the pursuer does not seek damages for entering into a transaction. In my opinion this takes the current case into the category of "no-transaction" cases identified by Professor Johnston at para 4.32 of his book on *Prescription and Limitation*. *Kusz* v *Buchanan Burton* is an example of a case in

that category. *Jackson* v *Clydesdale Bank* is not. I agree with Professor Johnston that what is crucial in "no-transaction" cases is to pinpoint a moment at which it can be said that the loss was certain or bound to occur, leaving extraneous factors aside. In my opinion the loss was not certain or bound to occur at the time when the 2009 and 2010 applications were made. These applications might never have come to the attention of the FSA. They only came to the FSA's attention in the course of an FSA investigation into another unrelated matter relating to passport certification. If this had not happened, and the FSA had never become aware of the 2009 and 2010 applications, then there would not have been any loss. Accordingly the loss was only certain or bound to occur when the pursuer incurred loss in responding to the investigation.

[51] I was referred to *Gordon's Trustees* and *David T Morrison* v *ICL Plastics* 2014 SC (UKSC) 222 but did not find them to be of assistance as they turn on section 11(3) of the 1973 Act.

[52] I do not require to make any orders in relation to prescription as I have already dismissed this action on the *ex turpi causa non oritur actio* ground.

[53] Had I not so dismissed the action, I would not have dismissed the action on the prescription ground. Instead I would have allowed a preliminary proof before answer on prescription. That is because a fuller understanding of the facts would be required before I could apply to the particular facts of this case my decision that the *damnum* occurred at the time at which the pursuer expended funds, time and effort in relation to the investigation by the FSA into the advice and payslips tendered by the pursuer. The time at which the FSA investigation was widened to cover the 2009 and 2010 representations and payslips is not precisely specified in the decisions of the FSA nor the Upper Tribunal. I observe that the FSA Decision Notice at para 55 narrates dates on which the pursuer made written and oral representations. All of these dates are more than five years prior to the raising of this action.

I also observe that counsel for the pursuer confirmed to me that the pursuer had obtained legal advice and that this was not on a *pro bono* basis. I also observe that the pursuer was represented by counsel at the Upper Tribunal. However it would be speculation on my part to conclude from these observations that the written and oral representations to the FSA related to the defender's advice and payslips rather than only the passport issue. It would also be speculative to conclude that the defender incurred legal fees in respect of these representations. If that were the case, then applying my view on the law to these facts then the action would fall to be dismissed. However, it would be premature to come to any such conclusion without a proper enquiry into the facts.

Causation

Defender's submissions

[48] Counsel for the defender submitted that the decision of the FSA to prosecute the pursuer, and thereafter to impose sanctions, were independent of the defender and not matters for which he was responsible. That being so, there was no relevant averment of causation (*Boswell* v *North British Railway Company* [1902] 4F 500).

Pursuer's submissions

[49] Counsel for the pursuer submitted that but for the breaches of duty averred by the defender, the FCA would not have had the basis for the decision they reached and the pursuer would not have been placed in the situation he complained of but for these breaches.

Discussion

[48] The pursuer's case is that the defender provided negligent advice to him, he followed it and as a result he was disciplined by his regulator. That is a very different situation from *Boswell* v *North British Railway Company*. In that case a lady who had been tried and acquitted for illegal possession of a salmon, sued a railway company which had permitted a Fishery officer without a warrant to open a box which contained the salmon and remove it. The lady sought damages for the expenses of her defence and solatium. The court held that the prosecution followed on from what the railway company did, but was not a direct consequence of their action, and that the railway company had no responsibility for the decision to prosecute. In that case the railway company had no involvement in the alleged wrongful criminal act. All it did was allow the prosecuting authorities to gather evidence. In the current case however the defender had, according to the pursuer, a central involvement in the alleged wrongful acts of misrepresentation by the pursuer to the mortgage lenders: the misrepresentations were made on the defender's advice. Accordingly there is a direct causal link between the advice given by the defender and the sanction imposed by the FSA.

[49] Accordingly, had I not dismissed this case on the *ex turpi causa* ground, I would have found in favour of the pursuer on the causation argument.

Decision

[50] For these reasons, I uphold the defender's third plea in law and dismiss the action. I reserve all questions of expenses in the meantime.