OUTER HOUSE, COURT OF SESSION

[2019] CSOH 75

CA47/16

OPINION OF LADY WOLFFE

In the cause

JAMES MICHAEL SHANLEY

Pursuer

against

CLYDESDALE BANK PLC

Defender

Pursuer: Sanders; Jones Whyte Law
Defender: Dunlop QC, MacGregor; CMS Cameron McKenna Nabarro Olswang LLP

4 October 2019

Introduction

Background

[1] This action concerns a bridging loan ("the Bridging Loan") provided by the defender to the pursuer and his wife (who is not a party to this action) in December 2008 for the purchase of a property in Ettrick Road ("Ettrick") pending the sale of the pursuer's property (co-owned with his wife) at Frogston Road, Edinburgh ("Frogston"). Missives were concluded in May 2008 with a Mr and Mrs D ("the purchasers") for their purchase of Frogston, with a date of entry of 12 December 2008. The purchasers in fact never completed the purchase of Frogston.

The defender subsequently declined to grant a mortgage to the pursuer for his purchase of Ettrick, principally because he was unable to provide sufficient proof of income. Frogston was eventually sold off in 2013 and the Bridging Loan repaid.

Pursuer's grounds of action

[2] Putting it at its simplest, by this action the pursuer seeks recovery of the cost of the Bridging Loan. The action, which has been in dependence since 2014, has undergone a prolonged evolution resulting in a Closed Record approaching 50 pages. While the pursuer has been a party litigant at some points during that period, the pleadings were framed by Counsel and the pursuer was represented at the proof. The grounds of the pursuer's action include breaches of contract and delict -the latter framed essentially as a *Hunter* v *Hanley* standard of liability - as well as breach of statutory duty in the form of the Mortgages and Home Finance Code of Conduct Sourcebook ("MCOB"). The breaches of MCOB concern the facility letter ("the Facility Letter") associated with the Bridging Loan. The first two grounds of liability depend on the pursuer proving that the Bridging Loan was provided in the context of an "advisory relationship" (as that was explained in *Standard Chartered Bank* v *Ceylon Petroleum Corp* [2011] EWHC 1785 ("*Standard Charter*") at paragraph 505, adopting the analysis of Gloster J (as she then was) in *JP Morgan Charter Bank* v *Springwell Navigation* [2018] EWHC 1186, and in *Grant Estates Ltd (in liquidation)* v *The Royal Bank of Scotland* [2012] CSOH 133 ("*Grant Estates*") at paragraph 73). (In this opinion I shall use the phrase "advisory relationship" in the sense more fully defined in these authorities.) The financial adviser was said to be David Meek ("Mr Meek"), a relationship manager of the defender who was the point of contact (putting it neutrally) between the defender and the pursuer. The pursuer avers (in article 10) that but for

any breach, the pursuer would not have concluded missives for the purchase of Ettrick and would not have accepted the Bridging Loan from the defender.

The defender's position

[3] The defender's position is, first, that there was no advisory relationship. Second, even if there were, the pursuer's first two grounds of liability (in contract and delict) are precluded because they only arise in the context of an advisory relationship, which is outwith the scope of their relationship (as non-advisory) as defined in the basis clause ("the basis clause") or because these two grounds are contractually barred by reason of a contractual non-reliance provision ("the non-reliance clause") in the facility letter signed on 15 December 2008 ("the Facility Letter"). (The relevant part of the Facility Letter is reproduced at Appendix A. The basis clause is in section 2 and the non-reliance clause is in the sixth unnumbered paragraph in section 14 thereof.) The defender did not argue that the basis or non-reliance clauses excluded MCOB. To that extent, the MCOB ground was free-standing. Separately, not every breach of MCOB sounds in damages. In particular, not all breaches of an MCOB duty render a lender liable for loss arising from lending (*per Zaki and Others* v *Credit Suisse (UK)* Ltd [2013] EWCA Civ 14 ("*Zaki*") because a borrower is not entitled to compensation for an otherwise suitable investment just because there has been some breach (*Zaki*, at para 107). In relation to causation, the pursuer must prove that but for any breach of duty, he would not have proceeded with the Bridging Loan.

Scope of Preliminary Proof

[4] I heard a six-day preliminary proof restricted to liability and causation. The issues of quantification and contributory negligence, should they arise, were outwith the scope of the

proof. Mr Sanders, counsel for the pursuer, acknowledged in his closing submissions that, in light of the evidence, the focus of the pursuer's case was confined to the contention that the defender's procedures or documentation failed to comply with the requirements of MCOB ("the core issue"). For this purpose he identified the pursuer, David Meek and the parties' respective banking experts, Mr Nicholas Baxter ("Mr Baxter") and Mr Mervyn Iles ("Mr Iles") (collectively, "the banking experts") as the only relevant witnesses. In his closing submissions counsel for the pursuer accepted, in my view correctly, that there was no evidence or basis to maintain any case based on the following:

(i) Any implied term in contract, including any term importing an MCOB-like obligation,

(ii) Any implied term of a *Hunter v Hanley* negligence-type duty, and

(iii) In any event, it was accepted that the test for implication of a term had not been met in respect of any term (whether derived from MCOB or any common law standard in professional negligence actions).

[5] It was also accepted that the following chapters of evidence were of no relevance to the core issue:

1) The defender's decision in late 2009 to refuse to grant the pursuer a mortgage, or charge levied in or after 2009;

2) The basis of the defender's decision to refuse to grant a mortgage (which was accepted as consequent upon the pursuer's inability to show he had sufficient income to service the proposed mortgage), and ancillary issues (eg the defender's internal systems and the defender's attitude toward the county court judgment ("CCJ") against the pursuer);

3) The single meeting between Mr Raymond Baxter (not to be confused with Mr Baxter, one of the banking experts) and the pursuer (in March 2009) which post-dated the signing of the facility letter for the Bridging Loan (and the subsidiary dispute as to whether or not the pursuer's wife attended that meeting);

4) Mr Douglas Campbell's evidence, (concerning the defender's internal complaints procedures);

5) The pursuer's unsuccessful complaint to the Financial Services Ombudsman ("the FSO") alleging the unsuitability of the open-ended Bridging Loan. Mr Sanders accepted the consensus between the banking experts that the Bridging Loan was "suitable";

6) Whether the defender had a duty to warn the pursuer that there was a risk that the purchasers, who were also customers of the defenders, might not complete the purchase of Frogston. Mr Sanders accepted he had no expert banking evidence to support this contention – made in passing by the pursuer's agent (Mr Michael Ramsay ("Mr Ramsay"))—and, in any event, that such a step was likely to constitute breach of a banker's duty of confidentiality owed to its customer (ie the purchasers);

7) The pursuer's evidence about improper management of his affairs by his former accountant, the circumstances in which a CCJ passed against him, or his sequestration (and its recall) in the summer of 2008, and the defender's refusal to provide financing in relation to his Arngrove business interest.

[6] The pursuer's position was to challenge the basis clause as falling foul of the Unfair Contract Terms Act 1977 ("UCTA") if it were a penalty clause. In submissions, he also queried

whether the basis clause might also be objectionable, possibly on MCOB grounds, to the extent that the pursuer was "vulnerable" by reason of being under time pressure. The defender's position was that the basis clause was not a penalty clause, but simply one which defined the parties' relationship, eg of the kind discussed by Lord Hodge in *Grant Estates*.

[7] So far as I understood Mr Sanders, he focused on the breaches of MCOB and the evidence thereon of the banking experts (corresponding to the core issue). Mr Dunlop QC, who appeared for the defender, accepted that the basis clause did not preclude any case based on MCOB.

Agreed Chronology

[8] The parties agreed the following chronology:

1. On 16 May 2008, the pursuer and his wife concluded missives for the sale of 28 Frogston Road West, Edinburgh to the purchasers (the "Frogston Missives"). The pursuers had purchased said property in or around 1999.
2. By loan agreement dated 6 and 12 June 2008 the pursuer and his wife agreed to lend sums to the purchasers to cover the deposit for the purchase of Frogston.
3. On or around July 2008, the pursuer and his family moved to Australia.
4. By 21 August 2008, the pursuer was concerned as to the ability of the purchasers to pay the purchase price for Frogston. This is recorded in a file note produced by the pursuer's solicitor, Michael Ramsay of Morton Fraser LLP.
5. The pursuer was sequestrated in August 2008. The sequestration was recalled shortly thereafter.

6. On 17 November 2008, the pursuer discussed the sale of Frogston with Mr Ramsay. In a contemporaneous file note, Mr Ramsay recorded, *inter alia*, that the:

> "… [Pursuer] discussed with [the purchaser] the need for him to now obtain bridging finance to settle the purchase price for 28 Frogston Road West. You understand there is going to be a potential shortfall".

7. In or around November 2008, the pursuer decided to leave Australia and move back to Scotland.

8. In November 2008, the pursuer identified a property situated at 2 Ettrick Road, Edinburgh which he was interested in purchasing. Ettrick was being marketed at offers over four million pounds (£4,000,000).

9. In early November 2008, the pursuer made a verbal offer to purchase Ettrick for two million six hundred and fifty pounds (£2,650,000). The verbal offer was accepted at this stage although at this stage there was no legally binding agreement. The pursuer anticipated completing the purchase promptly.

10. On 20 November 2008, the pursuer emailed the defender's Mr Meek. (The full text of this email is set out in Appendix B.1 to this Opinion.) In the email he stated, *inter alia,:*

> "..I have just pulled of a cracking deal/ purchase…
>
> I need to pay for it A.S.A.P to get this deal as these dosent come around every day
>
> I Pay for Ettrick Road in Say a weeks or so time…
>
> I put in £1,000,000 cash and I borrow £1,650,000.00 from the bank, and in turn I make monthly payments until the funds of Frogston Road West hits the account.
>
> What can you do to assist me in delivering this quickly and to save as much money as possible?

PS…What,s the quickest and cheapest solution" (*sic*)

11. Following the email on 20 November 2008, the pursuer discussed the potential purchase of Ettrick with Mr Meek by telephone.

12. On 20 November 2008, Mr Meek emailed the pursuer stating, *inter alia*,:

"In terms of finance, increasing your mortgage on Frogston Road is not a quick process - normally takes 5-6 weeks before funds are available.

Quickest option would be to consider a 'Closed Bridging Loan' on the basis that the missives have been concluded for the sale of Frogston Road. The bank are, rightly given market conditions, cautious about bridging finance as recently a number of seemingly 'closed' bridging loans have not been repaid on the due dates as the deals have fallen through (despite missives having been concluded) and they have ended up with open-ended bridging positions. I would need some written comment/confirmation from your solicitors dealing with the sale of Frogston Road that they are confident that the sale will settle on time – they will need to get confirmation from the purchasers solicitors that the purchasers have sufficient funds (&/or mortgage funds) available to settle…

In addition, I need to cover the 'worst case scenario' that the sale of Frogston Road falls through – in this case I need to prove that you have sufficient income to service the borrowing for an indefinite period".

(Other parts of this email were agreed, see para 30 of Appendix D. The full text of this email is set out in Appendix B.2 to this Opinion.)

13. On 25 November 2008, Mr Meek emailed the pursuer in relation to his proposed purchase of Ettrick. Mr Meek described "*Plan* A" as being closed bridging and "*Plan* B" as open bridging. Mr Meek stated, *inter alia*,:

"My initial thoughts are that closed bridging be applied for until say end of Jan or Feb next year with the condition that if not satisfactorily resolved by then, *Plan* B kicks in with the additional security being taken at that time".

14. On 28 November 2008, Morton Fraser received instructions from the pursuer to submit a written offer for the purchase of Ettrick.

15. As at 1 December 2008, the pursuer knew that the purchasers might not be in a position to complete the purchase of Frogston.

16. On 3 December 2008, a credit application was completed for the proposed lending to the pursuer and his wife in relation to Ettrick.

17. On 5 December 2008 (09.10), Mr Meek emailed the pursuer stating, *inter alia*,:

> "Given the current state of the property market and recent experience with bridging finance the bank look at every potential bridging deal very closely".

18. On 5 December 2008 (12.06), Mr Ramsay emailed Mr Meek stating, *inter alia*,:

> "For the purposes of your credit application you need to assume worst case scenario that the purchaser does not perform and Jim will be suing him for breach".

19. Mr Meek submitted a credit application to the defender's credit department on 5 December 2008.

20. On 8 December 2008 (11.08) Mr Meek emailed Mr Ramsay and stated, *inter alia*,:

> "I have spoken with Jim this morning & he authorised me to advise you that the Bridging Funding has been approved subject to the following conditions…".

21. On 10 December 2008 (1.45), the pursuer emailed Mr Ramsay and stated, *inter alia*,:

> "Can to please ensure we conclude Ettrcik by 5pm today please and ping me a we email to confirm as Sheona is chasing me saying someone it trying to step in?
>
> Who knows but anyway please conclude" (*sic*).

22. Missives for the purchase of Ettrick, by the pursuer and his wife, were concluded on 10 December 2008.

23. On 11 December 2008, the pursuer's solicitors, Morton Fraser, contacted Savills to advise that Frogston may need to be re-marketed.

24. In terms of a letter dated 11 December 2008, Mr Meek sent the facility letter to the pursuer's solicitor, Mr Ramsay. In the letter, Mr Meek stated, *inter alia*,:

"In accordance with instructions received from Mr Shanley I enclose 2 letters of offer for the Bridging finance for signing…"

25. 12 December 2008 was the proposed date of entry in terms of the Frogston Missives. The purchasers did not pay the balance of the purchase price on 12 December 2008.

26. On 15 December 2008, the pursuer and his wife signed the Facility Letter.

27. On 16 December 2008, Mr Meek referred the pursuer and his wife to Mr Ray Baxter, one of the defender's financial advice planners. A "Wealth Management Advice Introduction Form" was completed on behalf of the pursuer and his wife by Mr Meek. The form was completed by Mr Meek as financial planner. The protection policy was put in place on an advised basis, said advice being provided by Mr Baxter.

28. On 18 December 2008, Mr Ramsay returned documents to Mr Meek, these being a letter of pledge over deposit account [xxxxxx82] and certificates completed by the pursuer and his wife stating, *inter alia*,:

"I was told that I could consult a Solicitor before executing and delivering the Form of Charge but declined to do so".

29. On 23 December 2008, Mr Meek emailed the pursuer to confirm that:

> "… all deposit monies received & bridging funds sent to Morton Fraser today".

30. The funds made available to the pursuer and his wife were drawn down. The pursuer and his wife completed the purchase of Ettrick on 24 December 2008.

The foregoing relates to the core issue. Parties' agreed chronology extended to additional matters postdating the material time by a year or more. I record this in Appendix C. They also agreed other matters, apart from their chronology, and this is recorded in Appendix D to this opinion.

Documentation considered

[9] I have reviewed the witness statements, expert reports, the notes of evidence, the four volumes of productions, the pleadings, the agreed statements of legal principles, the joint minute, parties' written and oral submissions and, to the extent relevant to the remaining issues, parties' earlier Notes of Argument and the authorities cited to me (comprising the agreed Joint Bundle and the additional volume of cases produced by the defender on the last day of the preliminary proof). These materials are voluminous: the written submissions alone, produced for the last day of the proof and which I found most helpful, exceed 140 pages. However, in light of the considerable narrowing of the issues acknowledged by counsel for the pursuer in his closing submissions, it is unnecessary to refer in detail to all of these materials.

Evidence at the preliminary proof

Witnesses led

[10] Six witnesses gave evidence at the proof. The other witnesses to fact, apart from the pursuer, were David Meek (the pursuer's relationship manager with the defender), Michael Ramsay (the pursuer's solicitor), and Raymond Baxter, a financial planner (who spoke to one meeting post-dating the relevant events). The two remaining witnesses were the parties' respective banking experts, Mr Baxter and Mr Iles. I note more fully below the submission for senior counsel for the defender to the effect that, given the passage of time, the documentary evidence should be given primacy. In my view, there is considerable force in that submission. Accordingly, I first record what the unchallenged documentation disclosed, before recording the parole evidence on contested matters.

What is disclosed in the documentation relative to the purchasers' ability to complete and the pursuer's decision to purchase Ettrick using Bridging Loan finance

The purchasers' difficulty in complying with financial obligations in the missives

[11] In terms of the missives for the purchase of Frogston, the purchasers were obliged to pay a non-refundable deposit of £330,000, being c 10% of the purchase price. The purchasers did not do so and, eventually, they agreed to grant a postponed standard security therefor over their own property in favour of the pursuer to secure this. An additional £70,000 fell to be paid as part of this arrangement (seemingly, to purchase the furniture). (The documentation relative to this, including ranking agreement with the purchasers' existing lenders (who were not the defenders) dates from June 2008.) This accords with the agreed chronology (see para [8] (2), above) recording the pursuer's offer to lend the purchasers the deposit they were due to pay him. These sums remained unpaid as at the end of July 2008.

The pursuer's agent, Mr Ramsay, continued to chase the purchasers in respect of the deposit/standard security in lieu: see eg the emails of 17 and 18 July 2008 between Mr Ramsay and the pursuer (who queried whether the purchaser had the money or whether he was over geared) about the difficulties of securing even this. Mr Ramsay's file note of a call on 21 August 2008 with the pursuer recorded the pursuer being "very uneasy" as to the ability of the purchasers to perform under the contract. The purchasers had given the pursuer to understand that they had c £1 million of equity in their house. It was noted that their bank was unwilling to fund the deposit and the pursuer was recorded as "being concerned that there will be no chance the [purchasers'] Bank will also fund the purchaser". Mr Ramsay wrote to the purchasers' agents outlining these concerns. By this point, the purchasers had been in default for 3 months. The purchasers' own agents wrote on 25 August 2008 proposing that Frogston be discretely re-advertised at their expense. Mr Ramsay responded the next day that the suggestion that the property be re-marketed "completely horrifies" his clients (ie the pursuer and his wife).

Further steps the pursuer considered or took to accommodate the purchasers' difficulties

[12] Notwithstanding the pursuer's offers to lend the purchasers the money to meet their obligations under the missives and the proposed grant of a standard security by them in his favour, the purchasers' difficulties in meeting their obligations under the missives were still unresolved, to the extent that in around November 2008 the pursuer had offered variously to pay off a sum in the region of £300,000 to the liquidator of the purchasers' company in order to have the inhibition on the purchasers' property lifted. The rationale for this further unusual proposal was to enable the purchasers to raise finances to settle the purchase of

Frogston or to acquire the purchasers' own property in exchange for a reduction of the price of Frogston, which the purchasers rejected.

The pursuer's offer for Ettrick

[13] Meanwhile, on about 17 November 2008, the pursuer advised Mr Meek of his verbal offer to secure Ettrick at a substantial reduction on the asking price. This was accepted on 28 November 2008, with the condition that the pursuer paid a £1 million deposit within two days of conclusion of the missives.

The pursuer's view of the purchasers as recorded in Mr Ramsay's filenotes

[14] In relation to the sale of Frogston, Mr Ramsay's file note of 26 November 2008 recorded his call with the purchasers' agent, and that the purchasers had not yet provided any "concrete evidence" that the purchasers could complete. That same file note recorded that the pursuer had "lost confidence" that the purchasers could perform and there was a need to protect his position. The pursuer followed this with an email the next day to Mr Meek ending "we need to prepare for the worse with this guy". That this remained the pursuer's view is borne out by Mr Meek's file note of a phone call on 1 December 2008 recording the pursuer's conversation with the purchasers and their negativity about completion and that "it was clear from your perspective that he [the purchaser] is now going to be reneging on his contractual obligations". It was noted that the pursuer would stay quiet until his return to the UK at the end of that week to discuss options in relation to pursuing performance under the contract.

Exchanges between Mr Meek and Mr Ramsay in relation to funding

[15] In several exchanges on 4 and 5 December 2008 between Mr Meek and Mr Ramsay, the latter sought an assurance that the defender would put the pursuer in funds. In his emails in reply on 5 December 2008, timed at 9:10 and 10:10, Mr Meek did not commit to this, advising that he will not have an answer that day (from the credit management side of the defender); that due to the amount it required a higher level approval; that given the "current state of the property market and recent experience with bridging finance the bank looks at every potential bridging deal very closely", and that he could not give any assurance until the proposal was sanctioned. None of what is recorded in paragraphs [8(4) and (6)], [11] to [12] or [14] was disclosed to Mr Meek at that time.

[16] Mr Ramsay warned the pursuer of the "need to go slow on Ettrick" until Mr Meek has all of his "ducks lined up". A few minutes later, at 10:19 am on 5 December 2008, Mr Ramsay pressed Mr Meek for a response, explaining that the pursuer will come under pressure shortly to conclude missives on Ettrick and that the pursuer "runs the risk of losing the property" in the absence of confirmation.

[17] Mr Meek asked about progress with the sale of Frogston and if funds will be forthcoming on the settlement date (ie on 10 December 2008), querying whether the defender should "now presume that the purchaser cannot come up with the funds & that we are looking at open ended bridging? This is crucial for my Credit department". By email timed at 12:06 Mr Ramsay advised Mr Meek that there was no update in relation to the purchasers' completion and that, accordingly, the defender had to assume "worst case scenario that the purchaser does not perform and [the pursuer] will sue him for breach".

[18] By email of 8 December 2008 timed at 11:08, Mr Meek advised Mr Ramsay of the approval of "Bridging Finance" subject to certain conditions, including a standard security

over Ettrick and a pledge of £300,000 to cover interest for two years, life cover and a fresh valuation of Frogston if the sale did not complete by 31 January 2009.

Mr Ramsay's reflections in 2011 on the pursuer's motivation at the material time

[19] As noted below, the pursuer's recollection and presentation of events does not wholly accord with the contemporaneous documentation. In the context of his subsequent pursuit of other complaints, the pursuer asked Mr Ramsay to review his file in March 2011. Mr Ramsay noted that it was a 6-month facility and that at the time the pursuer did not have any other funding solutions and so the pursuer "probably took the view that [he] would accept what was on the table from the [defender] – and then have a discussion with them on renewal of the facility 6 months later if need be". A subsequent document discloses that the pursuer disagreed with Mr Ramsay's understanding of these events.

[20] I have set out the material communings as derived from the documents, in part because these are largely agreed (although the pursuer did not agree the passage quoted in the previous paragraph) and in part because of the submission made by the defender's senior counsel as to the unreliability of witnesses' recollection of events more than a decade ago, and the primacy to be accorded to the documentation. I turn, now, to record the parole evidence insofar as it is relevant to the core issue and in so far as it is necessary to do so (ie without repeating their evidence in respect of unchallenged communings or other documentation).

Evidence of Witnesses to fact

The pursuer

[21] A substantial amount of the pursuer's evidence in his witness statement and at proof related to matters agreed by his Counsel not to be relevant to the issues at the proof or to the core issue maintained at the end of proof. (For completeness, I should note that the pursuer prepared his own witness statements.) The pursuer gave evidence over the course of nearly two days. Having adopted his two witness statements at the outset of his evidence, most of his parole evidence comprised cross-examination. It was noted that in court the pursuer, who is dyslexic, had a little difficulty reading some of the documentation (presented digitally) from the computer screens in court. Accordingly, hard copies of the documentation were used and sufficient time afforded to him to ensure the pursuer could fully absorb the contents of documents being put to him in order to respond to questions. This did not affect his evidence. He was confident, even adamant, in his view of events. Indeed, at times the pursuer presented as voluble and combative. These qualities contributed to the pursuer's difficulty in answering in a clear or focused way questions put to him. He frequently deflected himself onto other topics (eg complaints in relation to his accountant's conduct of his tax affairs or the reasons for the failure of Arngrove).

[22] I have had the benefit of the transcripts produced from a live-transcription service of the evidence of all of the witnesses, including that of the pursuer. These are available to parties. In substance, the pursuer's position in respect of the matters relevant to the core issue was as follows:

1) Mr Meek's role: The pursuer was paying £25 per month for the services of Mr Meek in return, as he saw it, for advice or assistance that he could rely on. He had relied upon Mr Meek in 2007 for a regulated mortgage for Frogston. Mr Meek was, he said, the only person on whom he had relied in 25 years for financial advice.

2) Lack of financial nous: The pursuer was at pains to present himself as financially naïve. He claimed never to have used or understood "complex" financial products. He had only ever had a mortgage. This had been advised. He stated that Mr Meek never told him that he (Mr Meek) was not providing the pursuer with advice in respect of the Bridging Loan and he did not then recommend that the pursuer should obtain independent legal advice. At other points in his witness statement the pursuer emphasised that he was a successful entrepreneur, with assets of around £7 million at the material time, and that he had successfully sold his business for £3.6 million in July 2008 (shortly before emigrating to Australia). He was also proud of having been shortlisted for "Director of the Year" in Scotland, in respect of which candidates required to demonstrate business acumen and financial success in running a business.

3) What he sought from Mr Meek in November and December 2008: He understood from Mr Meek that it would take five or six weeks for a mortgage to be organised. He was adamant that Mr Meek never warned him he might not get a mortgage and, had he known that, he would not have proceeded to purchase Ettrick. The pursuer stated that his "worst case scenario" was the sale of Frogston falling through and it was in respect of this (which he also referred to in his parole evidence as "Plan B") that he said he sought advice. He understood that the Bridging Loan was intended to be short-term. He maintained that Mr Meek was aware of the risk that the sale of Frogston might fall through. His position was that Mr Meek failed to protect him against this worst case.

4) The pursuer's knowledge of the purchasers' ability or intention to complete: On this topic, the pursuer's witness statement was quite brief. He referred to his instruction to Mr Ramsay to take a second charge over the purchasers' own property in order to secure payment of the deposit (of £325,000), which had not been paid when due. The pursuer explained he was comfortable with this as he knew the purchasers; in his words they "were good for the money", being "asset rich, cash poor". However, there is no reference in his two full witness statements to the concerns or matters recorded in paragraph [8(4) and (6)] or paragraphs [13] to [16], above.

[23] The key issues explored in cross examination were as follows:

1) The pursuer was crossed extensively under reference to findings in English proceedings that he had forged a document critical to those proceedings; that he had maintained the veracity of the forged document for a considerable period of time and was, ultimately, sentenced to a term of imprisonment for that conduct. While the pursuer could not but accept this, he sought to minimise or deflect his responsibility for this behaviour.

2) The pursuer denied having had any experience of complicated bank financing and, in particular, had never had open bridging before. At a later point he acknowledged that he understood that "basic" bridging was finance "until something [ie funds] coming through". Mr Meek had made open-ended bridging "sound very nice". At a later point in his evidence, however, the pursuer accepted (under reference to Mr Meek's email of 20 November 2008) that Mr Meek had explained to him the difference between closed and open-ended bridging, and that he had understood this at the time. He

nonetheless effected not to know how it could be "indefinite". He regularly fell back to the contention that Mr Meek was the "expert" and he should have given him "advice".

3) The pursuer resisted the proposition that bridging finance was the only form of finance possible in the circumstances and within the timescale for which financial support was desired.

4) Attempts to explore with the pursuer what his other options for finance were at that time, or what he would otherwise have done, were simply met with the assertion that Mr Meek should have advised him he might not get a mortgage and that he thought getting a mortgage was a "mere formality" – a phrase he oft repeated – and that he had "relied" on Mr Meek. He did not understand or had never heard of open-ended bridging, and was effectively "trapped" by the Bridging Loan. He denied being advised to get independent legal advice or that reference had been made to the need to involve a mortgage adviser. He was unable to provide a coherent answer to explain what the £300,000 pledge was for, if the Bridging Loan were intended to be as short-term as the pursuer now insisted it was to have been.

5) He accepted that at the time his "plan b" was to cover a delay in the sale of Frogston. He nonetheless denied knowing that an open-ended bridging loan could be for an indefinite period.

6) At times, the pursuer appeared to contend that his worst case was not the sale being delayed but no sale. But, somewhat inconsistently, he repeatedly downplayed the possibility that the purchasers would not complete. When passages were put to him, eg recording that he was "uneasy" about the

purchasers or had "lost trust" in their ability to complete , the pursuer tried to explain these passages away by saying he had then been given reassurances; the purchasers were good friends and they were contracted in to the purchase of Frogston.

7) He ultimately accepted that by the time he had concluded missives for the purchase of Ettrick it was apparent that the purchasers were not going to complete and that the pursuer would be obliged to sue them. In fact, the pursuer accepted that by 1 December he was aware that the purchasers were not going to complete or that that was "a real risk". In his view, the purchasers were good for the money; they were on the hook but were "100% obliged to buy". As the pursuer put it "we could sue because he [ie the purchaser] was good for the money …". At other points, the pursuer accepted that he was someone who was prepared to take "calculated risks".

8) There was extensive cross under reference to the Facility Letter. As I understood his evidence, the pursuer was not really misled when he signed this. At other points he said it was "confusing". He signed it to get the paperwork done. He could not recall, or was unwilling to give a clear answer, as to whether he had relied on the Facility Letter when he proceeded to purchase Ettrick. Nor could he answer the question of what he would have done, had the errors in the Facility Letter not appeared. He fell back to his position that he had relied on Mr Meek and had paid £33,000 for his advice. He relied on the email of 20 November 2008 and "trusted" the paperwork. The purchaser was "definitely good for the money"; he had no thought that the purchaser did not have the money. He ignored the

disclaimer in the Facility Letter (founded upon by the defender) and signed it on trust. Mr Meek had "trapped" him in this product.

9) The pursuer appeared to find it difficult to accept that it was the common position of the banking experts that the Bridging Loan was a suitable product.

Mr Meek and Mr Ramsay: preliminary comments

[24] In respect of their evidence on the core issue, Mr Meek and Mr Ramsay were almost entirely reliant on the contemporaneous documentation referred to in their witness statements. This is not surprising, given that the events concern the provision of a bridging loan over ten years ago, in December 2008. In light of parties' agreement of a joint chronology and of the productions (including those relevant to the core issue), there is no need to record their evidence speaking to this documentation.

Mr Ramsay

[25] Insofar as Mr Ramsay had any recollection, he confirmed that the pursuer and his wife had been advised to get independent legal advice. So far as he could recall, he had not been asked for advice in respect of the Bridging Loan. Under reference to some of the emails, which he confirmed correctly reflected the understanding at the time, he explained that there was "a doubt in everyone's mind" about the purchasers. They had failed to settle the deposit. It was anticipated that they wouldn't complete in time, but that they would eventually settle. He had asked Mr Meek to assume a "worse-case scenario", which meant the Bridging Loan would be open-ended. The pursuer believed at the time he was getting "a very good deal".

Mr Meek

[26] Mr Meek described the role of a relationship manager, which was essentially to provide a single point of contact for customers. He had been involved in the provision of only one advised product to the pursuer in the past, being the mortgage over Frogston in 2007. In a later passage of evidence it emerged that he himself could not advise on or approve this, but that applications for such products were passed onto a different department within the defenders. In relation to the pursuer's proposed mortgage for Ettrick, this person was Veronica McAlister. (The criticisms of the time it took for this to be passed to or processed by her, are outwith the scope of this proof.)

[27] He was pretty clear that in relation the pursuer's options at the material time, which were essentially whether the Bridging Loan was closed or open-ended, he was providing information, not advice. Under reference to the pursuer's email of 20 November 2008, the pursuer was not asking for advice. He wanted funds quickly and he suggested a route to achieve this. The pursuer wanted a deal done on Ettrick as soon as possible; he treated time as of the essence. By the time of the email of 28 November 2008, the pursuer had indicated there might be a possible delay to the sale of Frogston, but the clear impression he gave was that he was working with the purchasers and he was confident that he could get the deal done (ie the sale to the purchasers); the pursuer was adamant he could get it "over the line".

[28] In cross examination he was asked about the Arrangement Fee of £33,000. He explained that this was based on a percentage of the facility; it reflected the level of time to prepare the documentation. Bank staff had had to drop everything and to put this in place quickly. It also reflected the fact that the bank had to change the proposal from closed bridging to open-ended bridging during the application process. He explained why the fee had increased during this process. Originally, it had been calculated on the basis of closed

bridging. That would be the starting point, to which a percentage was applied, and then it would be reduced because there was less risk to the bank at that time. However, an open-ended bridging loan reflected a different level of risk. By reason of the purchasers' delay and the absence of confirmation from their agents that funds were available, the defender's credit team took a view, and the finance became open-ended. Mr Meek had had to resubmit an application for open-ended bridging. Mr Meek explained that this became more complicated and the rate and fee therefore increased.

[29] Under reference to some of the financial documentation from the defender, Mr Meek accepted that some of the terminology was less than clear but in his view the pursuer was not confused by it at that time. He understood and expected that the pursuer would want and get a mortgage over Ettrick at some point in the future. As at January 2008 the pursuer was adamant that he would get the deal over the line. The sale of Frogston remained the exit strategy from the Bridging Loan, even if it would not be via this particular sale to these purchasers. He maintained that the pursuer was well aware that if the sale of Frogston to the purchasers did not complete, the Bridging Loan would become open-ended. He rejected the proposition that the pursuer had had no advice or warning as to the implications of no sale of Frogston; the pursuer was aware that if Frogston didn't sell, the Bridging Loan would become open-ended until he achieved another sale. He explained that the pledge was intended to cover two years' interest on the Bridging Loan. This was to protect the defender. The original term of six-months for the Bridging Loan was to enable the pursuer to get the deal over the line.

[30] One significant feature of his parole evidence was the material contained in the pursuer's agent's files and which Mr Meek had not seen prior to preparing to give evidence. This included the continuing difficulties the purchasers had in paying the deposit, the

several steps the pursuer offered to address this or the pursuer's growing doubts about the purchasers' ability actually to complete. (See the matters detailed in paragraphs [8(4) and (6)] and [11] to [12] and [14]. He was "shocked" by the information contained in those files. In his view, the defender had had "no idea of the true picture" of the sale of Frogston. Mr Meek said he could not believe what he was reading: the purchaser had failed to come up with the 10% deposit, which then had to be secured by a standard security; the purchasers were struggling to come up with the £70,000 agreed for the furniture; there had been an inhibition against the purchasers affecting Frogston, and in respect of which the pursuer was offering to pay off the inhibiting creditor. This amounted to four months of to-ing and fro-ing but none of this was disclosed by the pursuer (or by his agent, Mr Ramsay) to him at the material time.

Parties' submissions on credibility and reliability

Pursuer's submission

[31] Mr Sanders accepted that, save for Mr Baxter (the one witness to fact whose evidence I have not recorded), all of the witnesses (including the defender's Mr Meek and Mr Iles) were credible and reliable.

Defender's general observations on the approach to witness evidence and attack on pursuer's credibility and reliability

[32] Mr Dunlop mounted a sustained challenge to the credibility of the pursuer. He noted that the underlying events in the present case took place in late 2008 and early 2009, more than 10 years before the preliminary proof. He submitted that the passage of time was highly relevant to the approach that the court should adopt to the witness evidence adduced

in this case. It was, he submitted, impossible for the events to be fresh in the mind of any witness. Further, witnesses have had significant time for reflection and this had an impact on the quality of the evidence they can provide. It was virtually impossible for witnesses not to indulge in *ex post facto* rationalisation of the relevant events. Accordingly, he submitted that the contemporaneous documentation was crucial, and should be viewed as far more important than the oral evidence.

[33] This was emphasised in respect of the pursuer's evidence, which Mr Dunlop submitted should not be accepted unless it coincided with another, reliable source. His reasons for his sustained challenge to the pursuer's credibility and reliability were as follows (the references in paragraphs are Mr Dunlop's references to the transcript):

1) Mr Shanley's contempt of court in the English proceedings shows him as a man prepared to lie – indeed, to forge documents – to meet his desired objective. It will be said on his behalf that he admitted this candidly, but he could not in reality have done otherwise. Moreover, his attempts to justify what he had done by supposed but unvouched wrongdoing on the part of others did him no credit. He referred to HHJ Pelling QC's comments on the pursuer's conduct in proceedings in the English courts, to the effect that the pursuer:

> "… admitted fabricating the document on which he founded his originally pleaded case, denied forgery and sought to support his originally pleaded case in his Reply and two witness statements, in circumstances where each statement of case and witness statement contained a statement of truth signed by him …"

Mr Dunlop also referred to the same judge's comments at the sentencing hearing:

> "It is difficult to see, save in one respect, how there could be a more serious or flagrant contempt by the facts of this case."

In the Court of Appeal, to which the pursuer had appealed, Sir Bernard Rix described the pursuers' actions as amounting to: "… manifest and repeated dishonesty …". Mr Dunlop noted that in his evidence in this case the pursuer sought to justify his actions in the English litigation as being a response to a "false letter" from one of the defendants (Day 1, p18); he continually wanted to provide "context" to try explain his crime (eg Day 1, p23). The pursuer described his actions as a "bad decision" (Day 1, p11, lines 12-13) and a "moment of absolute madness" (Day 1, p19, lines 24-25). (The references are to the live-note transcriptions.) However, he submitted that it was clear that the pursuer's actions were a deliberate course of conduct that spanned a significant period of time. It involved the creation of a forged document and the submission of two witnesses' statements attesting to the purported veracity of the forged document. The defender submitted that the finding of contempt in the English proceedings taints the pursuer's evidence. He was an individual that will say or do anything to attempt to advance his position. It is noteworthy, he submitted, that the English litigation involved two banks. The pursuer described the litigation as involving "dishonest bankers" (Day 1, p11, lines 10 and 11). During his evidence, the pursuer came across as an individual with a vendetta against the banking industry.

2) As a second basis to reject the pursuer's evidence, Mr Dunlop submitted that the pursuer prevaricated and vacillated throughout his evidence. He was incapable of giving a simple answer to a simple question. The manner in

which the pursuer gave his evidence, and his demeanour, were relevant to the weight (if any) that should be placed on the pursuer's evidence. The pursuer repeatedly provided lengthy responses which bore no relationship to the question asked. He noted that the pursuer was clearly capable of understanding the questions posed and of responding appropriately. This was demonstrated by the approach from the pursuer during re-examination. During re-examination, the pursuer was able to provide short succinct answers in response to the questions posed by his own counsel. However, the repeated prevarication by the pursuer in cross examination further undermines his evidence. The pursuer repeatedly answered questions with a variety of rehearsed statements and mantras which he considered assisted his case. He was not a witness intent on providing the Court with full and frank answers.

3) Mr Dunlop also submitted that the pursuer's conduct in the present litigation was also relevant. He required to provide an undertaking to the court that he would desist from seeking to contact the defender's employees (*per* the Minute of proceedings for 7 June 2017). He has also sent inappropriate communications to the defender's solicitors. This included the distasteful email accusing the senior partner of the defender's agents of being a "thug" and "lying", as well as an insinuation of what went on "behind closed doors".

4) Mr Dunlop noted that there was the inherent unreliability of memory given that the court was here concerned with events, discussions and telephone calls that occurred more than 10 years ago. He referred to comments in *Gestmin SGPS SA* v *Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm)

("*Gestmin*"), Leggatt J (as he then was) at paragraph 15 to 22 (which I do not set out in full):

> "Evidence based on recollection
>
> 15 An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.
>
> 16 While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony.... Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.
>
> 17 Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).
>
> 18 Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. ...
>
> [...]
>
> 22 **In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts.** This does not mean that oral testimony serves no

> useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, **it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.**" (Emphasis added by the defender.)

Mr Dunlop submitted that these comments apply to all witnesses in the present case. However, they apply with particular force to the pursuer. The pursuer has had years to reflect – indeed, to obsess – on the events of late 2008. When the original lending was provided to the pursuer and his wife, they made no complaints. Indeed, even when the pursuer made a complaint in 2010, he made it clear that he was not complaining about Mr Meek. It was only much later that the pursuer sought to advance the complaints which now form the kernel of the litigation. Mr Dunlop submitted that the pursuer had, in the intervening years, convinced himself that any misfortune he has experienced in his life was attributable to other parties - particularly the defender, other banks, and his accountant. The case the pursuer sought to articulate was not supported by the contemporaneous documents. That is a point of particular importance, standing the advice of Arden LJ (as she then was) in *Wetton (as Liquidator of Mumtaz Properties)* v *Ahmed and Others* [2011] EWCA Civ 610, where she stated (at 12ff):

> "There are many situations in which the court is asked to assess the credibility of witnesses from their oral evidence, that is to say, to weigh up their evidence to see whether it is reliable. Witness choice is an essential part of the function of a trial judge and he or she has to decide whose evidence and how much evidence, to accept. This task is not to be carried out merely by reference to the impression that a

> witness made giving evidence in the witness box. It is not solely a matter of body language or the tone of voice or other factors that might generally be called the 'demeanour' of a witness. The judge should consider what other independent evidence would be available to support the witness. Such evidence would generally be documentary, but it could be other oral evidence … **contemporaneous written documentation is of the very greatest importance in assessing credibility.**" (Emphasis added by the defender.)

Mr Dunlop observed that the pursuer was unable to countenance any view other than his own. That was abundantly clear in the evidence that he gave during cross examination. This inevitably tainted his evidence. He submitted that the pursuer's evidence should be rejected in its entirety, save insofar as it is supported by another, reliable, source.

5) Mr Dunlop's fifth and final reason for inviting the court to reject the pursuer's evidence was because he did not call his wife, Mrs Arlene Shanley, as a witness. She clearly had material evidence to give in relation to the critical events. She was a party to the Facility Letter. In particular, she could have provided evidence in relation to what the couple would have done in 2008 but for the alleged breaches of duty by the defender. This was, after all, a joint decision that the pursuer and Mrs Shanley would be making, as a family, as to where would be their family home. The defender invited the Court to draw an adverse inference from this absence of a witness who could have provided material evidence. (*Morrison* v *J Kelly and Sons Ltd* 1970 SC 65 at 79; *Gateway Assets Ltd* v *CV Panels Ltd* 2018 SCLR 736 *per* Lord Clark at [59].)

[34] In relation to all of the other factual witnesses, Mr Dunlop submitted that the general observations in *Gestmin* and *Wetton* applied and the focus should be on the

contemporaneous documents. However, subject to those observations, Mr Dunlop submitted that the other witnesses should be treated as credible and reliable. They were all genuinely seeking to assist the Court as best they could.

Discussion

Credibility and reliability

[35] The only witness identified as relevant and whose credibility and reliability was challenged was the pursuer. As I have indicated above, there is considerable force in the defender's challenge and I accept that challenge is well-founded for the reasons advanced. The English Court found the pursuer to be dishonest. Even in his evidence in these proceedings about that, the pursuer sought to minimise his conduct (see the passages Mr Dunlop identified and which are recorded at para [33(1)], above), the effect of which simply reinforced the very considerable doubts such a finding raises as to the pursuer's credibility or, indeed, his veracity. In those passages, the pursuer is, in effect, misrepresenting the very conduct which another court found in the strongest possible terms to be dishonest. The pursuer's misconduct is not confined to those English proceedings. His email to the defender's agent was intemperate and unacceptable. Those matters apart, the pursuer's evidence as to his understanding or intentions at the material time was significantly inconsistent with what was recorded in the contemporaneous documentation- none of which was challenged as inaccurate or incomplete in any way. In his presentation of his evidence in the form of his witness statements – and for which, it must be noted, he (and not his agents) is solely responsible – the pursuer gave an incomplete account or manipulated evidence to suit his view of the case. One example in relation to critical evidence will suffice: the pursuer nowhere in his witness statement sets out or

acknowledges the doubts he entertained and the difficulties he experienced about the purchasers' ability to meet their obligations in respect of Frogston. None of what is recorded above (at paras [11], [12] or [14]) is referred to. Instead, he seeks to gloss over this inconvenient evidence, with an assertion that the purchasers were "cash poor, asset rich". That is a misrepresentation as to his actual state of knowledge or belief at the material time. For these reasons, I am disinclined to accept the pursuer's evidence unless it is supported by other evidence which is credible and reliable.

[36] In relation to the other witnesses to fact, I accept Mr Dunlop's submission under reference to *Gestmin* and *Wetton* that, in this case, it is appropriate to give primacy to the evidence derived from the contemporaneous documentation.

Questions to be addressed

[37] In addressing the pursuer's case it may be helpful first to consider the following questions:

1) Was there an extant 'advisory relationship' (in the *Standard Charter*/*Grant*-relevant sense) as at November 2008?;

2) If not, did the exchange of emails on 20 November 2008 bring such a relationship (or its duties) into existence?;

3) If that question is answered in the affirmative, an ancillary question arises as to whether the contractual terms relied on by the defenders to preclude this are effective as a form of contractual bar or outwith the defined scope of their relationship (as the defender contends) or ineffective by reason of falling foul of the UCTA or similar (as the pursuer contends).

The banking experts agreed that aspects of the Facility Letter were not compliant with MCOB. However, this left unresolved the last question:

4) What is the consequence of any breach of MCOB? Putting it another way, would the pursuer have acted any differently if there had been no breach of MCOB?

This last question encompasses the issue of causation.

Factors relied on to establish an advisory relationship

[38] In support of the contention that there was an ongoing advisory relationship in the relevant sense, Mr Sanders relied on the fact that there was a prior advised mortgage in 2006 or 2007 (see para 1 in Appendix D). He also relied on the monthly payments made in respect of Mr Meek's services (amounting to either £12.50 or £25 per month) and the terms in which those services had been described. Those terms referred to "your private partner" who "will discuss your needs and put you in touch with an expert adviser. All these professionals will act with your best interests at heart, working to protect your assets and ensure that your money works harder for you." These same materials also defined "A Private Partner" as "a skilled individual that is dedicated for meeting your banking needs and financial requirements ... [to] ... make sure you are getting the most out of your banking plans and services ...". Mr Sanders submitted that the pursuer took these descriptions at face value. He also relied on the fact that there had been a long association between the pursuer and the defenders and the pursuer was a long-standing customer. While he referred to the standard contract terms for the accounts held, no specific term was identified as relevant to this issue. In substance, that factor added nothing to the fact that the pursuer had been a long-standing customer of the defender. In the alternative, if there had been an advised product in the form of the earlier mortgage but not an ongoing

advisory relationship, then the pursuer's fall-back position (his "alternative case") was that the email exchanges of 20 November brought into play a new advisory relationship. In short, in relation to those exchanges, the pursuer's position was that he sought and was given advice. Mr Sanders suggested that these emails had to be subjected to an objective reading. Mr Sanders acknowledged that his expert, Mr Baxter simply assumed that there was an ongoing advisory relationship.

[39] For his part, senior counsel for the defender's position was that at the material time the relationship was not an advisory relationship. If correct, any criticism that the defender failed to give sufficient notice of a change from an advisory to a non-advisory relationship necessarily failed.

[40] In submissions, Mr Sanders confirmed that these were the factors he identified as relevant to, and said to be supportive of, there being an ongoing advisory relationship between the pursuer (or the pursuer and his wife) and Mr Meek. Dealing with these in turn, while the pursuer was a long-standing customer of the defender, in my view this is an entirely neutral factor. The pursuer had had one financial product in the course of that relationship, in the form of a mortgage, which had been provided on an advised basis. In other words, that advisory relationship arose in respect of a specific product and was confined to it. That factor reinforces the fact that, otherwise, the long-term relationship of customer and banker remained just that and was never on the footing of an advisory one.

[41] As for Mr Meek being a relationship manager and for which the pursuer paid a nominal fee, I accept Mr Dunlop's submission that the defender's literature surrounding this is marketing material and falls to be understood in that light. The reference to the dedicated relationship manager putting the customer "in touch with an expert adviser" militates against the relationship manager acting – or being held out as acting- in that role.

[42] In relation to the payments, the monthly sum was never more than a nominal amount. It could not seriously be maintained that payment of a nominal monthly sum instructed a continuing advisory relationship covering any advice in relation to any and every kind of financial product, regardless of the amount of that financial product or the degree of risk for the defender. Any protestation to the contrary by the pursuer is in my view not credible. Payment of that monthly sum secured a degree of more direct personal contact with a relationship manager, a service commonly offered by large banks to high net-worth individuals. Nothing in that arrangement or in the relative marketing literature comes close to providing any basis for the assumption of an advisory relationship, in the *Standard Charter*-relevant sense. At one point in his evidence, the pursuer asserted that the arrangement fee of £33,000 represented "payment" for advice. This evidence conflicts with Mr Meek's explanation that this was an arrangement fee and of how it was calculated: see para [27], above. None of this evidence was challenged. I prefer the evidence of Mr Meek on this point and reject the pursuer's evidence. The arrangement fee was not referable to financial advice; it was to reflect the work undertaken urgently on behalf of the pursuer, work which increased by reason of the need to change this from closed to open-ended bridging, and to reflect the risk posed to the defender from that arrangement at that time.

[43] Other than the marketing material noted, the pursuer has not produced any documentary materials to support his position that there was an ongoing advisory relationship between him and the defender. The most glaring omission in this part of the pursuer's case is the want of a contract setting out the terms and scope of any advisory relationship. The warning in the Facility Letter that the pursuer should obtain independent advice is a factor that militates, in my view strongly, against the proposition that the

Bridging Loan or Facility Letter were tendered in the context of an advisory relationship. Such a warning is inimical to the existence of such a relationship.

[44] On a consideration of the whole evidence, I find that on this issue there was no ongoing advisory relationship as at November 2008. For completeness, I note that even had there been any evidence of a general or continuing advisory relationship as a consequence of the advised mortgage, that product was soon to be paid off upon the sale of Frogston. The pursuer had sold his business and emigrated with his family to Australia. Those factors might be seen as disruptive of any ongoing advisory relationship, had there been any evidence to support this.

Did the exchange of emails on 20 November 2008 bring such a relationship (or its duties) into existence?

[45] Turning to the second question, as noted above, Mr Sanders proposed the court take an objective view of the email exchanges the pursuer relies on. Neither party suggested there was any specific feature of the evidence that formed a relevant context. Having considered these exchanges, I find that these did not bring into existence an advisory relationship between the pursuer and Mr Meek generally or one specific to the financial support the pursuer was then seeking. The pursuer's email set out clearly what he was looking for in the form of financial support; he identified in terms that this was in effect bridging finance pending the sale of Frogston (this accords entirely with the explanation the pursuer gave in the course of his cross examination of what "bridging" was: see para [23(2)], above). Mr Meek responded appropriately, providing some information on the hypothesis presented. He immediately sounded a cautionary note about the state of the property market and specifically on the use of Frogston or an extension of the mortgage on

that property as the means to secure the desired finance. He identified closed bridging finance as a route – he did not then share the pursuer's state of knowledge about the considerable doubts of the purchasers completing the purchase of Frogston timeously- and so did not, at that stage, need to consider open-ended bridging. He was appropriately guarded even in respect of the provision of bridging finance, citing the bank's recent experience about a number of "seemingly 'closed' bridging loans" not being repaid on the due dates. He explained the need for confirmation that the purchasers were in funds. He also explained the additional requirements in the form of proof of sufficient income to service the borrowing, to cover the eventuality of the sale falling through. In short, he provided information about how the defender might provide the financial support requested by the pursuer in the timescale.

[46] In my view, this exchange did not bring into existence an advisory relationship in respect of the Bridging Loan. Mr Meek's replied to "an old client [coming] back" (the pursuer's words) and, in response to the pursuer's objectives that this was delivered "quickly and to save as much money as possible", he explained the bank's likely response to what was initially proposed (an extension on the Frogston mortgage) and provided information about the only possible route (in the form of closed bridging finance) by which the defender could offer this. On a proper construction of these emails, no advice was tendered. Nothing in these emails is capable of instructing an assumption of responsibility by Mr Meek (or doing so vicariously on the part of the defender) of an advisory relationship in respect of the Bridging Loan and for which he did not have the requisite regulatory authorisation. As I understood the pursuer's case, these two emails were the only communications relied on for the pursuer's alternative case (ie that these emails brought into existence an advisory relationship, if the pursuer's primary position that there was an extant

one was not accepted). For completeness, I find nothing in the subsequent exchanges lent support to the pursuer's alternative case.

The ancillary question

[47] In light of my determination of these first two questions, the ancillary question (as I described it) of the efficacy of the defender's contractual bar / basis clause arguments does not arise. The parties agreed that basis clauses and non-reliance clauses are unobjectionable: *per Grant Estates* at para 73 (and cases cited therein). They also agreed a basis clause, ie one that defines the scope of the relationship between the parties, does not engage UCTA: *Titan Steel Wheels Ltd* v *Royal Bank of Scotland Plc* [2010] EWHC 211 (Comm). In brief, I would have preferred the defender's submissions on this issue. Properly construed, the basis clause the defender relies upon simply defines the scope of the parties' relationship as a non-advisory one and the non-reliance provision is, in my view, an effective bar to the pursuer's contractual and delictual grounds of action. Neither clause operated in a way that was caught or precluded by sections 16 or 17 of UCTA. Properly construed, neither was an impermissible restriction or exclusion of liability. In any event, there was no evidence on which any finding could be made that it was not fair or reasonable to incorporate these into the parties' contract. In submissions, passing reference was made to the pursuer being "vulnerable" by reason of the time-pressure he was under or that there was a disproportionality of the parties' bargaining. In reality, this time pressure was brought about by the pursuer: all of the contemporaneous evidence disclosed the extreme urgency with which the pursuer wished to secure Ettrick and the pressure this brought to bear upon the defender (as explained by Mr Meek). This was compounded by the need for the bridging loan to be changed from closed to open-ended. Having regard to the pursuer's

state of knowledge and belief, and the doubts and difficulties about the purchasers' compliance with the obligations in the missives, he was lacking in candour in not disclosing this, or failing to do so fully, to the defender at the material time. This resulted in further work by the defender and the assumption of a riskier lending proposition than closed bridging (all as explained by Mr Meek), and the delay in issuing the Facility Letter. Nor do I accept that there was an inequality in bargaining power, or that the parties' respective positions would have made any difference to the terms or nature of the financial support the pursuer secured. There was no evidence to support the latter contention; not even the pursuer asserted as much. The pursuer secured what he wanted, namely bridging finance, and, indeed, he secured open-ended bridging in order to accommodate the risk of purchasers' delay in completing. There was nothing in the evidence to suggest that the terms on which the Bridging Loan was offered would have been different, if there was a different balance of power as between the parties. The fee and rates were determined by risk factors. Accordingly, I find that there is no force in, or factual support for, the pursuer's brief submission (at p 44 of the closing submission) based on UCTA. My conclusion on the ancillary question does not affect the pursuer's remaining case, based on MCOB, and which both parties accepted could not be precluded by the basis or non-reliance clauses.

Consequence of these findings for any contractual case

[48] The parties' common position was that the contractual duties founded upon could only come into play if there were an advisory relationship. As I have found that there was none, this branch of the pursuer's case necessarily fails. That leaves the pursuer's statutory case based on MCOB. It is in that context that the expert evidence falls to be considered.

Consideration of the expert evidence

The banking experts' minute of points of agreement and disagreement

[49] Before addressing the expert evidence it may assist if I set out the points of agreement arising from the meeting of the banking experts prior to the proof. The statutory case advanced is based on breaches, some of which are admitted, of certain MCOB rules. The particular rules founded on fall broadly into two categories: those requiring communications to be clear, fair and not misleading (eg MCOB rule 1.2.8, 2.2.6, 2.2.7, 2.2.8) and those requiring disclosure, whether anent advice (eg as to whether advice was being provided and whether the product was appropriate for the purposes of MCOB rule 4.4.1 and 4.8.2) or disclosure of the details of products (eg MCOB rule 5.3.2, 5.4.1). The banking experts' points of agreement and disagreement may be summarised as follows:

1) The Bridging Loan was a regulated product subject to MCOB, and not all of the applicable MCOB rules were followed;

2) In relation to rules 1.2.8 and 2.2.6 requiring communications to be clear, fair and not misleading, it was agreed that the Facility Letter was not clear to the extent that it used terms such as "mortgage", "overdraft" and "loan" interchangeably. Mr Iles did not consider the Facility Letter to be misleading or unfair (even if it were unclear), as its principal purpose was to support a short-term facility (ie a bridging loan). Mr Baxter went a little further, in that he felt it was not fair by reason of the defender's failure to issue an initial disclosure document (an "IDD") nor an updated one when the nature of the transaction changed from "recommended" to "information". (He has

assumed that the relationship was advised up until the issue of the Facility Letter.)

3) In relation to rules 2.2.7 and 2.2.8 and the pursuer's knowledge of a home finance transaction, it was agreed that the Facility Letter was not clear. Notwithstanding this, Mr Iles did not consider that the Facility Letter was unfair or misleading, as the pursuer had understood the nature of a bridging transaction. The pursuer demonstrated as much in his email of 20 November 2008. Mr Baxter is not recorded as demurring from this assessment.

4) In relation to rule 4.4.1 and 4.8.2, it was agreed that no IDD was issued. It was accepted that the Bridging Loan was an appropriate financial product for the pursuer's purposes. Mr Iles considered that no advice had been provided. Mr Baxter's criticism was that the "x" in the box on the Facility Letter that information only was provided (not advice) would have been overlooked by a lay person and that if this were a change (as he presumed) from an advisory to a non-advisory relationship, this should have been explicitly notified to the pursuer.

5) In relation to MCOB rule 5.3.2, ensuring that customers received details of the product (especially in relation to interest rates) and had the opportunity to satisfy themselves it was appropriate, it was agreed that the requirements had been met. Mr Iles noted that the pursuer declined to take independent advice in respect of the £300,000 pledge. Mr Baxter's observations were confined to noting that, as the rule concerns "pre-application disclosure", the information in the Facility Letter should have been disclosed before issue of the Facility Letter.

6) In relation to MCOB rules 11.3.1 and 11.3.5, concerning a customer's ability to pay, it was agreed that the Bridging Loan was affordable.

7) On the more general question of whether the pursuer (and his wife) were ever told by the defender that they would be given a mortgage, neither expert went this far. In Mr Iles' view there was no evidence they were ever offered a mortgage on Ettrick. He felt that Mr Meek should have been more explicit that increasing the mortgage on Frogston was not a quick process. Mr Baxter felt that the various options should have been made clear; and

8) The banking experts were agreed that the repayment or "exit" route had been made clear to the pursuer. It was noted that the pursuer himself articulated this – being the repayment of the Bridging Loan from the proceeds of Frogston -- in his email of 20 November 2008.

Mr Baxter

[50] Mr Baxter adopted his report. Most of this sets out the general regulatory context, the MCOB rules and the terminology and nature of various financial products. Apart from those noted in the minute of the banking experts' meeting (noted above), Mr Baxter's specific criticisms were that:

1) There was no apparent shift of the position from an advisory to a non-advisory role;

2) The defender did not issue the pursuer with an IDD,

3) The defender failed to determine whether or not it was an advisory role or it otherwise failed to advise the pursuer Mr Meek was acting in a non-advised role; and

4) There was a failure to advise impartially between different products.

[51] The following matters were elicited in cross examination:

1) Mr Baxter's more recent experience was at a higher level than mortgage products provided to the ordinary consumer. He was concerned at board-level with risks for things that fell "outwith the mandate" of executives. In short, this meant overseeing loans that no one else (ie lower down in the lending hierarchy) could authorise. His last work on the provision of typical mortgages was in 1993.

2) He accepted that he confined his description of the "background" to the email exchanges of 20 November 2008. He did not accept that his report was confined to the offer of a closed bridging loan, because MCOB applied to both closed and open-ended bridging loans. His criticism that there was no exit route was confined to the closed bridging loan. He had not actively considered the "plan B" scenario, of the Bridging Loan changing from closed to open-ended. He accepted that by about 5 December, the Bridging Loan was going to be open-ended bridging. He accepted, in common with Mr Iles, that the exit route was the use of the sale proceeds from Frogston. Under reference to the comment in his report that the pursuer was not disabused of the idea that a mortgage would be forthcoming, he accepted that the pursuer was told he would require a mortgage interview. He accepted it was normal banking practice to have a bridging loan in place and thereafter to organise long-term financing in the form of a mortgage.

3) He repeated his criticism that an IDD should have been produced to the pursuer and it should have been made clear earlier in the process that the

Bridging Loan was on a non-advised basis, before it became time-critical. He accepted that he had simply assumed it was an advised relationship, based on the mortgage in 2006. If it was advisory, and had changed, then this was to be notified in a new disclosure document.

4) In relation to the need to advise of other products, it was put to him that the Bridging Loan was the only product on offer. He was unaware of what the defender's suite of products was.

The first criticism assumes there was an ongoing advisory relationship. I note at this point, that there was no evidence to support Mr Baxter's fourth criticism (noted in para [45(4)]); there were no alternative financial products.

Mr Iles

[52] Mr Iles also adopted his report. Nothing in the evidence he had heard, having sat in throughout the proof, caused him to change his views. While his report was shorter than Mr Baxter's, it dealt in more depth with the issues and set out the relevant background more comprehensively. In short, in his view:

1) An open-ended Bridging Loan was suitable having regard to the urgency with which the pursuer required the defender to act;

2) There were no alternative products that could have been offered to the pursuer at the time;

3) Mr Meek should have been more explicit in his email of 20 November 2008 than simply stating that increasing the mortgage on Frogston was not a quick "process", but should have stated that a formal application would require to be submitted and considered. However, Mr Meek was under no duty to

"warn" the pursuer that he might not get a mortgage if Mr Meek did not possess material information at that time that might significantly impact the application. Nothing on the face of the pursuer's statement of assets and liabilities, or any other matter known to Mr Meek in November and December 2008 would have warranted him cautioning the pursuer on this point.

4) The Facility Letter was confusing in its use of terms such as "mortgage" and "overdraft" interchangeably. He surmised that Ms McAlister had adopted a pro forma mortgage letter to cover the Bridging Loan. He did note, however, that in section 14 thereof, it did "clearly" state that the defender was not providing any financial, personal investment….advice" and that the pursuer must seek his own independent advice on the Facility Letter.

5) In relation to compliance with MCOB, while the Facility Letter was confusing and poorly presented, it was not misleading nor unfair in its principal purpose to set out a six month bridging facility. Given that short time scale, and the absence of regular repayments, it is unlikely that the pursuer would have interpreted this as a mortgage. The pursuer's email of 20 November 2008 referred in terms to a bridging loan. Mr Meek's use of "bridging" was therefore not apt to mislead; a bridging loan was a straightforward and simple product for the pursuer to have understood.

6) The exchange of emails on 20 November 2008 should have triggered the issue of an IDD. In relation to the customer having received sufficient details of the product offered and an opportunity to consider the same (for the purpose of MCOB rule 5.3.2), this was satisfied by the offer letter sent to the pursuer's

agents, Morton Fraser, and its return, duly signed, via that channel. The defender could reasonably assume that if the pursuer had a question or doubts, he could have raised them with his solicitor or with the defender. He noted that the pursuer declined the defender's recommendation to take independent advice in relation to the £300,000 pledge.

7) The Facility Letter was MCOB- compliant in respect of illustrating the costs of the Bridging Loan.

[53] The principal matters canvassed in cross-examination with Mr Iles were as follows:

1) Mr Iles did not accept the proposition that by December 2008 the "shock waves" were hitting the banking system. It was not yet the "eye of the storm" of the financial crisis. Rather, there was a gradual build up; the extent of the banks' bad debts and that the economy was entering a recession was not known until the first quarter of 2009. He clarified that his comments about 'warning' the pursuer about a possible mortgage refusal were not to be understood as arising because of this more general background (such as the financial crisis) but in respect of anything specific to the pursuer's circumstances.

2) While he had not been aware of the pursuer's CCJ or bankruptcy, if Mr Meek had been aware of these factors at the time and was satisfied with the pursuer's explanations, then these factors would not be a major factor in the defender's consideration of the pursuer's mortgage. They did not trigger any duty to warn. This line of questions was not pursued further.

3) Mr Iles readily accepted that certain features of the Facility Letter, a legal document, were poorly presented or confusing.

Assessment of the expert evidence

Preliminary comments

[54] Before turning to the substance of the evidence from the banking experts, I make three preliminary comments. First, it must be observed that the expert evidence provides scant support for the pursuer's case. Mr Sanders acknowledged (in my view, rightly) that he had no factual basis or (where this was required) supporting expert opinion for most of the grounds advanced in the pursuer's pleaded case and which, quite properly, he did not insist on at the end of the proof. Secondly, on the totality of Mr Baxter's evidence, his criticisms are confined to technical breaches of some of the MCOB rules. I will consider the evidence on these matters below. Thirdly, little in the pursuer's evidence was relevant to or provided a factual basis for the legal grounds of his action maintained at the end of the proof, including that based on MCOB.

Credibility and reliability

[55] Neither counsel challenged the other party's banking expert's credibility and reliability. It is clear from their CVs that each is an extremely experienced and eminently qualified expert in banking practice and familiar with MCOB. Each was plainly doing his best to answer questions put to the best of his ability and to assist the court. In point of fact, it will be apparent from the foregoing that the differences between Mr Iles and Mr Baxter were essentially on points of detail, not substance.

[56] On points of difference, I prefer the evidence of Mr Iles, for several reasons: Mr Iles had considered more of the background in-depth; his report was more comprehensive and more persuasively reasoned, as were his answers in evidence; and his experience relevant to

the issues in this case was more recent than Mr Baxter's experience. As Mr Baxter explained his current role, it was far removed from the more usual type of day-to-day lending with which this case is concerned. This last feature may explain the impression given by Mr Baxter's evidence, in this case, of focusing closely on technical breaches of MCOB (ie in isolation) without consideration of whether, in fact, any breach might have had any impact on the pursuer's decision-making or the sequence of events resulting in the Bridging Loan. This may be contrasted with Mr Iles who, for example, having identified a technical breach, nonetheless expressed a view as to the likely effect of any breach. Two examples of this suffice: While Mr Baxter focuses on the absence of an IDD, Mr Iles pointed out that the pursuer himself had identified from the outset, in his first email of 20 November 2008, the kind of finance he wanted and which was, in effect, a bridging loan. Secondly, while Mr Baxter found that some features of the Facility Letter were unclear, Mr Iles was willing to consider whether, that lack of clarity notwithstanding, the pursuer was unlikely to have been misled by the inadequate or non-MCOB-complaint features of the Facility Letter.

[57] On the broad issue of the lack of clarity or precision comprising the technical noncompliance of the Facility Letter with MCOB, in the light of the evidence I have heard none of this was of any causal significance. In my view, whatever the deficiencies of expression in the documentation, the pursuer was aware from the outset of his contact with the defender's Mr Meek on 20 November 2008 what he wanted: immediate financial support to enable him to buy Ettrick as a matter of urgency, and which financial support he proposed to repay from the proceeds of the sale of Frogston. The communications at the time amply vouch the pursuer's conviction that he was about to secure the purchase of Ettrick at a saving of nearly £1 million on the asking price and his continuing, if ill-judged, confidence that he would be able to extract the proceeds of the sale of Frogston to the

purchasers, even if that were delayed. Driven by these considerations, and his concern that he might lose out on Ettrick, the pursuer got what he set out to achieve: urgent financial support in the form of short-term finance. The pursuer's later protestations, that he did not understand the Bridging Loan or Facility Letter, ring hollow. I am unpersuaded by the pursuer's evidence on this point. The fact that the criticisms he now advances were not advanced until some years after the events reinforces the strong impression that this is an illustration of the kind of *ex post facto* rationalisation Mr Dunlop identified.

[58] Did the absence of an IDD issued to the pursuer prior to, or by the time of, the issue of the Facility Letter matter? In my view, it did not. The pursuer did not give the impression of being a man readily deflected from his ambitions by the niceties of forms. On the whole evidence, I have no doubt that even if the pursuer had been provided with an IDD, and even if that had stated explicitly from the outset that the Bridging Loan was on a non-advised basis, on the evidence I have accepted he would nonetheless have proceeded exactly as he did. All of the documentary and parole evidence reinforces the point that the pursuer was a man of determination and drive, and he was determined to close on Ettrick and get financial support from the defender to achieve his ambition. The findings I have just made are also relevant to the criticism that the defender did not give the pursuer sufficient notice that the bridging loan was on a non-advised basis, or that pursuer was vulnerable (because under time pressure) at the material time. The pursuer's overwhelming objective was to make an offer for Ettrick as soon as possible. The offer submitted on his behalf was capable of immediate acceptance, which explains in part the pursuer's need for confirmation of financial support from the defender as a matter of urgency. There was no evidence that the pursuer had other sources of finance available to him, or available in the short time-frame the pursuer imposed. Furthermore, given the pursuer's belief that the purchasers were good

for the money one way or another, he would have viewed the Bridging Loan as only a short-term necessity. On the whole evidence, I find that the pursuer would have acted no differently than he did even if he had been told at an earlier point in time that the bridging loan was on a non-advised basis.

[59] Turning to the other criticism Mr Baxter focused on, namely the failure to advise of a change in the relationship to a non-advisory one, this is clearly based on the assumption that the relationship between the pursuer and Mr Meek was an advisory one. I have already explained why this assumption finds no support in the evidence. Accordingly, this criticism falls away.

[60] While the foregoing suffices to determine the core issue, I note for completeness that the evidence of the banking experts provided no support for any case based on an asserted duty to "warn" the pursuer of the risk of not getting a mortgage. While I do not accept the pursuer's repeated contentions that Mr Meek assured him that a mortgage was a "formality", the absence of any supportive expert evidence renders this line of evidence irrelevant. I do not accept the pursuer's evidence on this point for several reasons. It is inconsistent with the email exchanges on 20 November 2008 between the pursuer and Mr Meek; it is contradicted by Mr Meek's own evidence that a separate application would be required and it sits uncomfortably with the defender's cautious approach, even in respect of short-term closed bridging finance, borne of its then recent experience- all of which is set out in Mr Meek's first email, of 20 November 2008.

[61] As already noted, it is no part of the pursuer's pleaded case that he should have been provided with a mortgage. Notwithstanding this, at points in his evidence this appeared to be the pursuer's principal complaint. The pursuer's original email of 20 November 2008 identified an extension of the mortgage on Frogston as the quickest means (as he saw it) to

secure short-term support from the defender. Mr Meek immediately explained in his reply why that was not a feasible option, given the pursuer's desire to proceed as quickly as possible. The subsequent emails are eloquent of the pursuer's sense of urgency and the pressure this imposed on the defender. Leaving aside his own views as to the ability of the purchasers to complete, what he represented to Mr Meek was the need only for short-term support, just until Frogston completed. Having regard to the parties' understandings and expectations at the material time, a separate mortgage made no sense in the circumstances the pursuer presented. Furthermore, the pursuer's understanding at the time, as disclosed in the documentation and as conceded by him at one point in cross (see para [23(7)]], above), was that he *would* get the money for Frogston from the purchasers one way or another. This was because he regarded the purchasers as good for the money, particularly on the basis that there was sufficient capital in their own property which could be extracted, if necessary, by suing them. It will be recalled that it was in *these* terms that he discussed his options with Mr Ramsay – not disclosed to Mr Meek at the time – namely, if the purchasers did not settle, the pursuer "could sue" them. Those circumstances would suggest a slightly longer delay in securing the proceeds of Frogston but for which a long-term mortgage would have been unsuitable.

[62] This analysis of the evidence is also relevant to test the pursuer's protestations in his parole evidence that the defender failed to protect him against his "worst case scenario", ie of the Bridging Loan becoming indefinite. His essential complaint was that he was "trapped" in the Bridging Loan. I do not accept that this was the pursuer's "worst case scenario" at the material time. In light of the evidence I have already referred to, his "worst case scenario" to be guarded against, or his "plan b", was if the sale of Frogston was delayed. As has already been noted, the pursuer (and Mr Ramsay) had a much more

complete understanding than Mr Meek of the risks that the purchasers would delay or not complete the purchase of Frogston in terms of the missives. Mr Meek did not share that understanding, because most of this information about the pursuer's ongoing difficulties in securing the purchasers' compliance with other obligations in the missives was not disclosed to him. This is readily apparent from his comment in the internal application dated 3 December 2008 he submitted in support of the pursuer's application for open-ended bridging, and in which he stated that the pursuer's agents "are confident that the sale will proceed although the settlement date may be delayed until nearer the end of the month". In short, Mr Meek could not protect the pursuer against a risk not made known by the pursuer to him. It was in the pursuer's own interests to minimise the difficulties experienced with the purchasers in presenting his case to Mr Meek, lest the defender not make the finance forthcoming. In acting as he did, the pursuer readily assumed the risk of the purchasers delaying or failing to complete.

[63] Furthermore, in light of the evidence I have accepted, I reject as an *ex post facto* rationalisation the pursuer's contention that the failure to sell Frogston to the purchasers was his worst case scenario. As already noted, the pursuer believed that the purchasers were good for the money, even if it had to be extracted by suing them under the missives. On the whole evidence, it is clear that at the material time no one anticipated as a realistic prospect that the purchasers would wholly fail to complete or that legal recourse against them would not generate the anticipated proceeds. The impact of the world-wide banking crisis or the softening of the property market was still fully to unfold in 2009. The pursuer's evidence at proof that he had wanted or needed a mortgage from the outset is, in my view, the kind of after-the-fact rationalisation referred to by Mr Dunlop. In my view, at the material time the pursuer understood and accepted the risks inherent in open-ended

bridging. He did so, because he did not foresee the twin risks which came to pass: namely, the purchasers' total failure to meet their obligations under the missives (and the inability to recoup that from their assets), and the inability to sell Frogston thereafter due to the decline in the property market.

Decision

[64] It follows that the pursuer's case fails. The defender is entitled to absolvitor. I shall grant a decree in those terms. I reserve any question of expenses.

APPENDIX A: THE FACILITY LETTER

So far as material, the facility letter provided in sections 1, 2, 3, 7, 13, 14 and 18 as follows:

"Property offered as Security: 2 Ettrick Road, Edinburgh, EH10 5BJ

We are pleased to offer you a **SECURED OVERDRAFT** on the following basis.

Purpose: Bridging Loan

This offer is valid for 90 days from date of issue, although we may withdraw the offer at any time and / or need not advance the overdraft if your financial circumstances change. You do not need to proceed with this offer but if you decide not to proceed you would lose any valuation fee that you have already paid to the valuer and any Arrangement / Establishment fee or Booking fee you have paid to the Bank.

Once the mortgage contract is concluded you cannot withdraw from the contract but you can repay it at any time in accordance with the terms of the mortgage contract (See Section 10 for an early repayment charges which may apply). For a description of the interest rate and when it may change please see Section 4.

1.	**ABOUT THIS OFFER DOCUMENT**
•	The information in this document forms part of your mortgage offer. You are not bound by the terms of this offer.
•	You should compare this offer document with the illustration given to you before you applied for this mortgage, to see how the details may have changed.
2.	**WHICH SERVICE DID WE PROVIDE YOU WITH?**
☐	We have recommended, having assessed your needs, that you take out this mortgage.
☒	We have not recommended a particular mortgage for you. You must make your own choice whether to accept this mortgage offer.
3.	**YOUR MORTGAGE REQUIREMENTS**
This offer is based on the following requirements:	

- You require a secured overdraft of : £1650000.00

  Purchase Price : £2650000.00

  You require this facility on an interest only basis.

- You require this facility over 0 years 6 months

The overdraft will be reviewed at the end of this period, subject to which the Bank may be prepared to continue it on the same or amended terms. A fee may be payable by you when the Bank reviews the overdraft/.

The Bank reserves the right to review the overdraft at any other time where there is a valid reason.
Any changes to any of the information you have given us could alter the details in this Offer. If this is the case please ask for a revised Offer.

...

7. ARE YOU COMFORTABLE WITH THE RISKS?

What if Interest rates go up?
The total amount you must pay back shown in this offer document could be considerably different if interest rates change. For example, for one percentage point Increase in Clydesdale Bank's base rate, the total amount you must pay back will increase by around £8227.40.

Rates may Increase by much **more than this so make sure you can afford the monthly payment.**

What if your income goes down?
You will still have to pay your mortgage if you lose your job or if illness prevents you from working. Think about whether you could do this.

Make sure you can afford your mortgage if your income falls.

...

13. WHERE CAN YOU GET MORE INFORMATION ABOUT MORTGAGES?

Contact Details
If you wish to discuss this mortgage offer please contact Veronica McAlister at LEVEN, 12 Durie Street, KY8 4HE or Telephone 0-1333 42738.

YOUR HOME MAY BE REPOSSESSED IF YOU DO NOT KEEP UP REPAYMENTS ON YOUR MORTGAGE

14. ADDITIONAL INFORMATION

You will at all times keep the properties over which security has been taken by the Bank in good order and repair. The Bank's officials or agents will have access to inspect them at any time provided the Bank has given you reasonable advance notice of its intention to inspect them.

The Bank reserves the right, when it considers it necessary, to obtain professional valuations of all property secured in favour of the Bank. Such valuations shall be prepared by a valuer approved by the Bank and conducted at your expense.

You have the right to end this facility at any time by notifying the Bank in writing and repaying the outstanding balance on your account, together with any interest and charges which may be due.

The Bank may at any time set off any credit balance on any account you have with us against any sum you may owe to us from tie to time.

For the avoidance of doubt where any agreement regulated by the Consumer Credit Act 1974 (other than an agreement to overdraw on current account) forms part of the facilities made available to you by us, nothing in this letter shall modify or in any way affect the terms of, or security for, that agreement.

The Bank has **not** provided any financial, personal investment taxation or legal advice to you. You must seek your own independent advice on the Facility. Other than recommending this mortgage to you, if this is stated in Section 2 above, the Bank **has not given** and shall not be treated as having given any confirmation to you that the facility is suitable, adequate or appropriate for the purpose or purposes for which you intend to use it.

You undertake and covenant to the Bank that you will comply with all applicable laws and pay all obligations that, if unpaid, might result in a lien (another claim on your assets resulting from non-performance or non-payment).

The security for your secured overdraft will be any security already held by the Bank for your liabilities (or in the case of a joint account any security held for the liabilities of any one or more of you) together with the following proposed security:

A first raking fixed charge over the Property referred to at the start of this Offer Document
28 Frogston Road West
Edinburgh
EH10 7AR

Please note that the security referred to above will act as security in our favour for all sums which are due by you (or by either or both of you in the case of joint borrowers)

to us, now or in the future. This may include business borrowings and other liabilities which are not yet due such as sums due under a guarantee.

Any existing or future security which is stated to be granted for all sums owing by you (or either of you) and which does not exclude the sums due under the secured overdraft will also operate as security for sums due under this interest only mortgage.

Acceptance by Customer

Important Information

Please take time to read this offer carefully and please do not hesitate to discuss with us anything you are not sure about.

This secured overdraft will not be available and you should not use this secured overdraft until you return the signed Offer Document and all security requirements are met to the satisfaction of the Bank.

You should only sign this offer when you fully understand the consequences of doing this.We strongly recommend that you take Independent advice before accepting the offer and signing any documents.

I / We hereby accept your offer, of which this is a copy, on the terms and conditions contained in this Offer.

Customer Signature [Signed by pursuer and his wife] Date 15/12/08"

APPENDIX B: THE EMAIL EXCHANGES OF 20 NOVEMBER 2008

1. The pursuer's email of 20 November 2008:

The context for the pursuer's email of 20 November 2008 is that the pursuer and his family had emigrated to Australia in the first part of 2008. Missives had been concluded in May 2008 for the sale of Frogston, the family home, albeit that transaction was not due to complete until December 2008. While in Australia a county court judgement ("CCJ") had been issued against him and he had been sequestrated. However, as the pursuer's email to the defender's Mr Meek discloses, the pursuer had resolved to return with his family. The pursuer wrote to the defender's Mr Meek in the following terms (the punctuation, spelling and layout are as in the original):

> "Morning George/David
>
> Hope both of you are well and the declining economy is not all bad news and the new deals are now starting to shine through.
>
> As you are aware we have decided to come home (Touch down on Edinburgh tarmac on the 7/01/09. We are returning for a number of reasons one of them being we don't want to end up with a global family. Although this can happen to any one, and they may move in the long term. Arlene and I think its wrong to leave them at such a young age being without having there careers behind them etc and being (so far away). But to be honest, WE BOTH miss home and our friends and family and the business buzz and George you wont be used to this ,but I miss reading/watching the team at the top of the league So Im sorry to disappoint your day you are getting your old client back!
> My plan is to work with my son and buy a small business to help him and to grow it sensibly. I plan to get involved in property now that the sensible approach will be returning to the market! With reference to Completecare I plan to give the guys some extra support, although I have been doing this from here it will have more impact for them being back in Edinburgh.
>
> As you are aware we have sold our house for £3,250.00.00 and we are due to be paid on the 10th of December, However I need to ensure I purchase our new home/asset.
>
> So I been working hard on this and taking into account were the market is and I have just pulled of a cracking deal/purchase.

Frank knight have been trying to sell his house for £4,000.000.00, but dropped the price to £3,500.000.00. After very heavy negotiations I have managed to broker a deal. This house was the former chairmen of standards life , who has returned to London and its lying empty. So working with my agents we have managed to buy it for £2,650,000.00 nearly a £1,000,000,00 of the price. I need to pay for it A.S.A.P to get this deal as these dosent come around everyday.

So here is my proposal and I would welcome your thoughts I have to work on the worst case senorio and say what if the sale purchase payment id delayed etc on Frogston Road West, this would be the route I propose to do.

I pay for Ettrick Road in Say a weeks or so time , Purchase price is £2,650,000.00
I put in £1,000,000.00 from the bank, and in turn I make monthly payments until the funds of Frogston Road West hits the account.

At the moment we have a mortgage of £450,000.00 on Frogston Road West, But have a pending sale of £3,250.000.00 leaving a clear balance of £2,800,000.00
And Ettrick is worth £3,500,000.00
We would have a total fee equity of £5,800.000.00 but have a facility of £1,650.000.00 leaving a free balance of £4,150,000.00
We could sort out the mortgage amount when I come back. This should give the bank a huge protection, as the properties are worth £6,750,000.00.
You may well would be able to do this over Frogston alone which would be easier and more importantly quicker. We also have virtually no borrowing on all our properties. **The easiest way I think is to increase the mortgage on Frogston ?**

So to summarize

Overall property value of Frogston £3,250.000.00 Mortgage £450,000.00
Ettrick Road Value £3,500,000.00 , We will put one million cash down But require facility of £1,650,000.00.

If I can pay them sooner then I may be able to price chip slightly more.

What can you do to assist in me delivering this quickly and to save as much money as possible.

Please can you keep this completely confidential.

Regards

Jim

Ps I am having my engineer,architect,preservation surveyor and survey done on this on Friday,But I plan to try and use this as a price chip but need the purchase price there ready

Urgently as the dangling carrot so can someone review and get back to me asap if possible. I viewed the house 10 years ago and no it well It have fantastic potential.
I will send a picture and brochure and there is a video on Frank Knights we Site which is good so log on if you require but please don,t mention my name to them as if they

Know its me they will attempt to put the price up as I know them and my agents kept them in the dark until the final hour and everything been bolted down and final price

Agreed.A quick response from yourselves will help me package this up quickly. What,s the quickest and cheapest solution?"

2. The defender's reply on 20 March 2008:

By email dated 20 November 2008 timed at 11:58 replied as follows:

"Good Morning Jim

The lure of the Scottish weather is obviously too much for you to resist & you will be back in time for a Scottish winter! Property market lacks confidence at the moment and the predictions are that prices will continue to fall through 2009, with recovery not starting until 2010 at the earliest. (However these forecasts seem to change every week).

Re your proposals, looks like you have done a great job in negotiating the purchase price. In terms of finance, increasing your mortgage on Frogston Road is not a quick process – normally takes 5-6 weeks before funds are available. Quickest option would be to consider a 'Closed Bridging Loan' o the basis that missives have been concluded for the sale of Frogston Road. The bank are, rightly given market conditions, cautious about bridging finance as recently a number of seemingly 'closed bridging loans have not been repaid on the due dates as the deals have fallen through (despite missives having been concluded) and they have ended up with open-ended bridging positions. I would need some written comment/confirmation from your solicitors dealing with the sale of Frogston Road that they are confident that the sale will settle on time – they will need to get confirmation from the purchasers solicitors that the purchasers have sufficient funds (&/or mortgage funds) available to settle.

If we proceed with the Bridging Finance then I will need to get you & Arlene to sign an Assignation in Security over the 'net free sale' proceeds of Frogston Road. (Our current security only covers the mortgage) & this would need to be lodged with your solicitors & acknowledged by them before we can release funds. In addition, I need to cover the 'worst case scenario' that the sale of Frogston Road falls through – in this case I need to prove that you have sufficient income to service the borrowing for an indefinite period.

In addition to the security over Frogston Road, the bank would look for security over your new home.

I have attached a Statement of Assets & Liabilities/Income & Expenditure form which I need completed & returned.

Regards

David"

APPENDIX C: MATTERS AGREED THAT POST-DATED THE BRIDGING LOAN AND FACILITY LETTER

The additional matters parties agreed, as noted at the end of paragraph 8, were as follows (retaining the parties' numbering):

31. On 7 December 2009 the defender's Mr Meek e-mailed the pursuer and explained that the defender was not attracted to the pursuer's mortgage request due to his sequestration order in 2008 and his CCJ in 2006.

32. The pursuer and his wife did not repay the sums that were borrowed in terms of the Facility Letter after the initial six month period set out in the Facility Letter. The defender agreed to extend the facility.

33. The pursuer complained to the Financial Ombudsman Service ("FOS") in relation to the facility that was provided to him in terms of the Facility Letter. In terms of a determination dated 27 September 2012, the FOS found in favour of the defender and refused to uphold the pursuer's complaint. The decision stated, *inter alia*:

> "You confirmed to me that if you believed there was a risk of no mortgage you would not have purchased Ettrick. I do not accept that…
>
> …in my opinion there were grounds to show the bridge was viable…
>
> …on balance I do not consider the bank at fault in terms of providing the bridge. Overall, I feel that there was a reasonable rationale in place to deal with the inherent risk of this type of transaction…".

34. The pursuer did not accept the initial decision of the FOS. A further decision was issued by FOS on 22 August 2013. The Ombudsman rejected the pursuer's complaint. The ombudsman stated, *inter alia,*:

> "In principle, Clydesdale is entitled to offer bridging loan facilities and then refuse a further advance to the same borrower. The decision as to whether to allow a customer to borrow money – and on what basis – is a matter for Clydesdale's commercial judgment. I would interfere only if I was satisfied Clydesdale exercised its judgment unfairly or unreasonably"

35. The pursuer and his wife sold Frogston on or around August 2013.

36. On 17 September 2013 Mr Stuart Lorraine, executive of the defender, emailed the pursuer and stated:

> "Mr Meek does not hold a role as a mortgage advisor (nor does he hold the necessary qualifications that would be required to fill that role per JB251). David's role is that of a Relationship Manager, Private and Business Banking. In this role he can call upon the expertise of others within the Bank should specific advice be required on certain banking products."

37. The entire borrowing of £1,650,000.00 in relation to Ettrick and the entire borrowing of £450,000.00 in relation to Frogston and all charges and monthly interest and renewals throughout the five years that the pursuer and his wife had with the defender, was repaid by December 2013.

APPENDIX D: Other Matters Agreed

Other Matters the parties agreed, not falling within the chronology, were:

1. The pursuer and his wife took out two previous mortgages over Frogston. The mortgage offer issued by the defender to the pursuer and his wife on 2 April 2007 for Frogston was on an advised basis.
2. The pursuer and his wife were long-standing customers of the defender and, initially, paid a monthly fee for the services of the defender's Mr Meek as "private partner".
3. The defender's asserted position, in contrast to the pursuer's, is that the lending provided to the pursuer in terms of the Facility Letter was not provided on an advised basis.
4. The banking experts held a joint meeting of experts on 2 April 2019 with no other persons being present at said meeting. Their finalised record of that meeting is a true and accurate record of what was discussed, what the points of agreement were and what the points of disagreement were. (A copy of their note is appended to this opinion.)
5. Any decision regarding the facilities a bank will make available to a customer is a matter of commercial judgment for the bank.
6. Any lending decision depends on the individual risk profile of the proposal. Lenders are entitled to reject proposals that do not meet their risk profile.
7. The borrowing which the defender provided to the pursuer and his wife in terms of the Facility Letter was a regulated mortgage contract.
8. A closed bridging loan is a form of short term finance.

9. In principle, there is nothing objectionable about banks providing bridging loan facilities to customers. Bridging loan facilities are suitable for a variety of situations, including:

   (i) To provide short term finance when a property is being bought in a hurry; and

   (ii) To allow the borrower to buy a new property before the sale of their existing property has completed

10. In the period to 2008, the pursuer had taken out previous mortgages.

11. In 2008, the pursuer had joint assets – namely heritable property, shares and cash – of approximately nine million pounds (£9,000,000).

12. The pursuer and his wife had private banking facilities with the defender. Their relationship manager was Mr Meek. They paid for private banking facilities, although this fee was latterly waived by the defender.

13. Prior to moving to Australia, Frogston was the pursuer's family home and main residence.

14. The pursuer and his wife had taken out a mortgage on Frogston with the defender in 2007. The mortgage was provided on an advised basis.

15. In terms of the Frogston Missives, the sale price the purchasers agreed to pay to the pursuer and his wife was £3,250,000.

16. In terms of the Frogston Missives, £3,250,000 was due to be paid to the pursuer and his wife on 12 December 2008.

17. As at 16 May 2008, the pursuer and his wife had outstanding borrowing of approximately four hundred and fifty thousand pounds (£450,000) first charged and secured against Frogston with the defender.

18. In November 2008, Ettrick was marketed for sale for four million pounds (£4,000,000).

19. A verbal offer of two million six hundred and fifty thousand pounds (£2,650,000) was made to the owners of Ettrick on behalf of the pursuer and his wife in early November 2008. The vendors verbally accepted this offer.

20. On 17 November 2008, the pursuer discussed the potential purchase of Ettrick with Mr Ramsay. In a file note, Mr Ramsay records the conversation in the following terms:

> "You see the property as having huge potential and you feel that you are getting it at a good price and are prepared to take a view on the basis that you have not actually seen it yourselves but, on the basis of the recommendations of Shona Gordon who you know personally, you are prepared to go ahead with it."

21. When the verbal offer was accepted, the pursuer sought to review his options. He intended to complete the purchase of Ettrick in November 2008. The pursuer intended to complete the purchase within a week of the verbal offer being accepted if they could secure suitable lending.

22. The pursuer considered that he was obtaining a bargain by purchasing Ettrick for two million six hundred and fifty thousand pounds (£2,650,000).

23. The pursuer required to borrow the sum of one million six hundred and fifty thousand pounds (£1.65m) in relation to the proposed purchase price of Ettrick pending the completion of the sale of Frogston.

24. The defender offered to lend money to the pursuer and his wife on the terms set out in the Facility Letter. The Facility Letter records that the purpose is: "Bridging Loan", and the Facility Letter states that:

(i) "You should compare this offer document with the illustration given to you before you applied for this mortgage, to see how the details may have changed"

(ii) Clause 2 states:

"We have not recommended a particular mortgage for you. You must make your own choice whether to accept this mortgage offer"

(iii) Clause 3 relates to "Your Mortgage Requirements". It states:

"You require this facility for 0 years and 6 months

The overdraft will be reviewed at the end of this period, subject to which the Bank may be prepared to continue it on the same or amended terms. A fee may be payable by you when the Bank reviews the overdraft"

(iv) Clause 14 is entitled "Additional Information". It states:

"The Bank has not provided any financial, personal investment, taxation or legal advice to you. You must seek your own independent advice on the Facility…[T]he Bank has not given and shall not be treated as having given any confirmation to you that the Facility is suitable, adequate or appropriate for the purpose or purposes for which you intend to use it"

(iv) The section entitled "Acceptance by Customer" states:

"Important Information

Please take time to read this offer carefully and please do not hesitate to discuss with us anything you are not sure about…

You should only sign this offer when you fully understand the consequences of doing this. We strongly recommend that you take independent advice before accepting the offer and signing any documents".

25. The pursuer signed the Facility Letter in the presence of Mr Ramsay on 15 December 2008.

26. As at 15 December 2008, the pursuer knew that the purchasers did not have funding in place to complete the purchase of Frogston.

27. A bank has to retain the final decision to lend or not with each bank assessing every lending proposition against its own risk appetite.

28. Underwriting decisions may not be difficult, but the fact that such a decision is easy to reach does not mean that a decision will be favourable to the customer.

29. Lenders such as the defender have the right to reject applications that do not meet their risk requirements.

30. The defender responded to the pursuer's proposal on 20 November 2008, as follows:

> "increasing your mortgage on Frogston Road is not a quick option-normally takes 5-6 weeks for funds to be available. Quickest option would be to consider a 'Closed Bridging Loan' on the basis that missives have been concluded for the sale of frogston Road. The bank are [sic] rightly given market conditions, cautious about bridging finance as recently a number of seemingly 'closed' bridging loans have not been repaid on the due dates as the deals have fallen through (despite missives having been concluded) and they have ended up with open-ended bridging positions. I would need some written comment/confirmation from your solicitors dealing with the sale of Frogston Road that they are confident that the sale will settle on time-they will need to get confirmation from the purchasers [sic] solicitors that the purchasers have sufficient funds (&/or mortgage funds available to settle."

31. The Mortgage Code was launched by the Council of Mortgage Lenders in July 1997 and extended to intermediaries when the Mortgage Code Register for Intermediaries ["MCRI"] was formed in April 1998.

32. The Mortgage Code was a voluntary code setting out standards of mortgage lending practice and was initially relevant to lenders only from July 1997). The MCRI involved a total of 15,000 mortgage intermediary firms and 41,000 individuals. The development of the Code and the MCRI was seen by Government that the mortgage industry was taking voluntary self-regulation seriously.

33. In September 1999 the lenders' trade body, the Council of Mortgage Lenders (CML) requested that the MCRI should also take responsibility for lenders. At this time, the name of the MCRI changed to the Mortgage Code Compliance Board (MCCB). The first council meeting of the MCCB took place on 18 November 1999 and at this time

the MCCB extended its responsibilities to monitoring adherence to the Mortgage Code by both lenders and intermediaries.

34. The objectives of the MCRI and MCCB were to improve consumer protection and improve best practice within mortgage sales and advice.

35. The Mortgage Code placed various requirements on intermediaries (from April 1998) and lenders (from July 1997).

36. As a result of European Directives (mainly the Distance Selling Directive) mortgage sellers had to be statutory regulated. To comply with the European Directives the Financial Services Authority ["FSA"] took over responsibility for mortgage lending compliance from 31 October 2004.

37. The FSA rules in respect of mortgages are contained in the Mortgages and Home Finance: Conduct of Business Sourcebook rules ["MCOB"].

38. The Financial Conduct Authority ["FCA"] took over responsibility for MCOB in April 2013.

39. A regulated mortgage is defined in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 and is reproduced as appendix C to Mr Baxter's report.

40. Bridging loans potentially fall within the definition of a "regulated mortgage contract" and FSA Regulation.

41. The FSA has 11 statements of principal being accurately stated in part 4.2 of Mr Baxter's report.

42. The defender during the period of events covered in this action was firstly regulated by the FSA and latterly by the FCA.

43. Experts have concluded that this loan was a regulated Mortgage Contract and MCOB applied to this lending and it is further agreed not all the MCOB rules have been properly followed.