Neutral Citation Number: [2018] EWHC 3227 (QB)

Case No: HQ13X02317

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/11/2018

Before :

MARTIN CHAMBERLAIN QC
(sitting as a Deputy Judge of the High Court)

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Between :

Robert MASON (1)	**Claimants**
Norma MASON (2)	
- and -	
GODIVA MORTGAGES LIMITED	**Defendant**

- -
- -

Candace Mason (with leave of the Court) made submissions on behalf of the **Claimants**
Mark Fell (instructed by **Eversheds Sutherland**) for the **Defendant**

Hearing dates: 9, 10 and 11 October 2018

- -

Judgment Approved

Martin Chamberlain QC :

Introduction

1. The Defendant, Godiva Mortgages Ltd ("Godiva"), a wholly owned subsidiary of the Coventry Building Society ("Coventry"), is a mortgage lender. It is authorised and regulated by the Financial Conduct Authority (formerly the Financial Services Authority). The Authority has made rules, the *Mortgages and Home Finance: Conduct of Business Sourcebook* ("MCOB"), with which authorised persons are required to comply when carrying on the "regulated activity" of entering into "regulated mortgage contracts".

2. The Claimants, Mr Robert Mason and Mrs Norma Mason, engaged the services of an intermediary or broker, Mr Martyn Balm, who offered his services through a number of corporate entities, including Access Business Finance Ltd ("ABF"). With the assistance of Mr Balm, the Masons entered into a regulated mortgage contract with Godiva on 4 February 2008 under which Godiva lent £487,500 on an interest-only basis for a five-year term. The loan was secured on the Masons' home in Egham, Surrey. The Masons met all the interest payments during the term of the mortgage, but were unable to repay the capital at the end of the mortgage term.

3. The Masons say that Godiva should never have offered them the mortgage. It should have realised that the income figure of £100,000 for each of Mr and Mrs Mason stated in the online application form (which Mr Mason says he instructed Mr Balm to remove) was implausible and likely to be false. It should therefore have known that the mortgage was unaffordable. By this claim, the Masons seek damages for breach of a common law or contractual duty of care which they say Godiva owed them and for breach of the duty imposed by s. 150(1) of the Financial Services and Markets Act 2000 ("FSMA"), which was in force at the time of the contract but has since been repealed and replaced by the materially similar s. 138D. Section 150(1) conferred, as s. 138D confers, a right of action by a "private person" against an authorised person for breach of the rules in MCOB. Godiva accepts that Mr and Mrs Mason are private persons for these purposes.

4. Godiva resists the claim. It says that it was not offering advice: that was Mr Balm's job. In those circumstances, no common law or contractual duty of care arose and Godiva did not breach any of the applicable rules in MCOB. In any event, Godiva contends that none of the loss pleaded by the Masons can be shown to have flowed from any breach by it. It counterclaims for the total outstanding balance on the mortgage account and for an order for possession of mortgaged property, not to be enforced for 12 months.

Representation

5. There have been a number of interlocutory hearings in this matter. Latterly, most have been before Master McCloud. It was apparent from the orders she made, and was confirmed to me at the trial, that she had permitted Mr and Mrs Mason to be represented at these hearings by their granddaughter Ms Candace Mason. Ms Mason has lived with Mr and Mrs Mason from the age of 4 and continues to live with them in the mortgaged property the subject of the proceedings.

6. There was evidence in the form of notes from their GP that Mr Mason (who is 79 years old) suffered from a number of medical conditions and was suffering from stress in connection with the proceedings and that Mrs Mason (who is 80) was suffering from anxiety in connection with the proceedings and was not medically fit to be cross-examined.

7. Mr Mason attended on the first day of the trial. Mrs Mason did not. Mr Mason told me that he and Mrs Mason wished to be represented by Ms Mason because she was better able to present the case than them. I had careful regard to paragraphs 92-93 on pp. 1-25 to 1-29 of the February 2018 edition of the Equal Treatment Bench Book and in particular to the excerpt there set out from the judgment of Hickinbottom J in *Graham v Eltham Conservative and Unionist Club* [2013] EWHC 979 (QB), at [31]-[38]. I considered that it was appropriate, exceptionally, to permit Ms Mason – a close family member – to represent Mr and Mrs Mason at the trial. First, there was cogent medical evidence that they would find it very difficult to represent themselves. Second, it was obvious both from the interlocutory history of the proceedings and from what I was told by Mr and Ms Mason, that Ms Mason had done a lot of work on the case and was in a position to put their case more effectively than they would be able to themselves. Third, it was obvious that, although she had filed a "witness summary", Ms Mason was not in truth seeking to give evidence of her own. Mr Fell, for Godiva, had no objection to my permitting Mr and Mrs Mason to be represented by Ms Mason.

8. I am grateful to Ms Mason for putting Mr and Mrs Mason's case clearly and succinctly in circumstances that I am sure have been stressful both to Mr and Mrs Mason and to her. I am also grateful to Mr Fell and his team, for Godiva, who very properly recognised the difficulties that Ms Mason faced as a lay person in finding her way around the documents and did their best to assist her, both by locating the important documents and by identifying any points of law that might arguably assist the Masons' case. I permitted Ms Mason to make additional submissions in writing after the conclusion of the hearing and Mr Fell to respond in writing to those submissions insofar as they raised anything new. Ms Mason's written submissions were received on 15 October 2018. Mr Fell's submissions in reply were received by the associate on 19 October 2018 and transmitted to me on 22 October 2018. I have carefully considered both of these documents.

The evidence

9. The Claimants' principal evidence was contained in three "witness summaries" of Mr Mason, Mrs Mason and Ms Mason; and in the evidence of Mr Martyn Balm, in respect of whom a witness summons had been issued.

10. Each of the "witness summaries" was endorsed with a statement of truth and signed, though not dated. It was only Mr Mason's statement that contained substantive evidence of real relevance to the proceedings. Mrs Mason's statement contained just a single paragraph of substantive text, which conveyed her perception that Martyn Balm had groomed and lied to the couple, without details. Ms Mason's "witness summary" was endorsed with a statement of truth. As I have said, it summarised the Masons' position but did not purport to give first hand evidence relevant to any of the issues in the case.

11. Mr Mason was cross-examined. I formed the impression that he was a straightforward and honest witness, though he had some difficulty remembering the order in which events had occurred more than 10 years ago. When it was pointed out to him that the documents showed his memory to have been at fault, he accepted appropriately that he must have been mistaken.

12. Deputy Master Brown had directed that, if Mr Balm was to be called, Mr and Mrs Mason must file and serve a summary of his evidence. They did not do so. Ms Mason rectified this, at my direction, by sending the summary by email to Godiva's solicitors on the morning of the second day of the trial. By postponing the start of Mr Balm's evidence until 2pm that day (the court did not sit in the morning), it was possible to ensure that Godiva was not prejudiced.

13. In assessing Mr Balm's evidence, I have borne in mind that he was being asked questions about events that took place more than 10 years ago; and that he had not been shown many (if any) of the relevant documents in advance of giving evidence. Even taking these matters into account, however, I found Mr Balm to be an unsatisfactory witness. He was defensive and at times argumentative. He was repeatedly at pains to minimise his own role in providing advice to Mr and Mrs Mason. First, he emphasised that the authorised intermediary was the limited company, ABF, even though that entity (which has since been dissolved) was owned and run by Mr Balm and his wife Alison. Then, he suggested that the mortgage application might have been submitted by Pink Home Loans, a mortgage club, rather than by him or ABF. This was contrary to the documentary evidence, which showed very clearly that the information had been submitted directly to Godiva by ABF. I find it impossible to place much if any reliance on Mr Balm's evidence.

14. Godiva's evidence was given by Ms Jane Jennings, a Senior Customer Relations Manager employed by Coventry for over 40 years, and Mr Andrew King, a Technical Operations Manager who has been employed by Coventry for 5 years. Both were cross-examined. Both gave clear and helpful evidence relevant to their areas of expertise, but neither was involved with the Masons' mortgage application. Whilst their evidence as to Godiva's policies at the relevant time put the documents in context, my principal conclusions are drawn from the documents themselves.

What the documents show

15. Having sold the family paint-finishing business, and with a view to moving into property development, Mr and Mrs Mason formed a company, Mason Homes Ltd, in 2002. Part of the capital to be used in the business came from a loan of £350,000 from TMB, secured by a mortgage on the Masons' home in Egham, Surrey. It appears that this loan was organised through Mr Balm or one of his corporate entities.

16. In 2007, Mr and Mrs Mason again sought the assistance of Mr Balm. On 28 August 2007, they entered into an agreement with Flex-Marketing Ltd ("FML", another corporate entity associated with Mr Balm) by which FML agreed: (1) to find a plot for Mr and Mrs Mason to develop in return for a fee of £2,500 and 12% of the purchase price; and (2) to source financing for the plot in return for a fee of 12% of the arranged facility.

17. Mr Balm located what he considered a suitable plot at Bredons Norton, near Tewksbury. It was too expensive for the Masons to buy outright, but Mr Balm was aware of another investor, Rebecca Johnson, who was also looking to invest. Mr Balm introduced Mr and Mrs Mason to Ms Johnson. At the same time, he arranged finance for the Masons from RBS. The transfer documents and completion statements show that the land was conveyed on 11 September 2007 for a total of £590,000, (£295,000 from Ms Johnson and £295,000 from Mr and Mrs Mason). Part of the contribution of Mr and Mrs Mason and Ms Johnson came from a loan secured by mortgage from RBS. 80% of Mr Balm's fee (£52,640) was paid at that stage to Mr Balm or one of his corporate entities. There was a dispute about the remaining 20%, which was never paid.

18. As I have said, Mr Mason was not able to remember with precision the dates or order of events. His diary was, however, in evidence and it contains a careful record of what happened when. It records that preparatory works at the site began in December 2007. At the same time, Mr Mason spoke to Mr Balm about a remortgage. By context, this must have been a remortgage of the Masons' home in Egham. Mr Balm accepted in cross-examination that he advised Mr and Mrs Mason in relation to the mortgage and was not acting for Godiva.

19. Mr Balm must have made the initial application online on behalf of Mr and Mrs Mason: there is an internal email dated 31 December 2007 which confirms that Mr and Mrs Mason's application had been received; and on the same day, Godiva wrote to Mr and Ms Mason thanking them for their mortgage application, which had been received from Martyn Balm of ABF, informing them that the application was now being processed. The advance amount was stated as £500,799, the estimated value of the property £700,000 and the term 5 years. The product was described as "GSC25 – Self Cert Flexx for Term". The letter concluded with these words: "If you need further information or have any questions, please phone your financial advisor – Martyn Balm, Access Business Finance Ltd".

20. Godiva has retained a copy of the application form submitted online, as later amended. It contains details of the intermediary who submitted it, namely Martyn Balm of ABF. The contact details are those of his wife Alison. The form records that the total mortgage required was £487,500, the current balance outstanding was £350,000 and that the purpose of the loan was "to purchase other property". (The amount was amended because Godiva was not willing to lend the full amount sought in the light of advice from their valuer.) To the question "How do you intend to repay the loan at the end of the mortgage?" the answer "sale of the property or other property" was given. In the section headed "Employment", Mr and Mrs Mason were each described as a "director" and "property investor". It was said that each of them had received a share of profit for the last year of £100,000.

21. Having considered the application, Godiva must have asked Mr Balm for confirmation that Mr and Mrs Mason had no plans to retire before the age of 75, because on 3 January 2008, Mr Mason wrote to Godiva in these terms: "Further to a telephone conversation today with Mr Martyn Balm of Access Business Finance Ltd, I write to confirm that neither myself nor Mrs Mason plan to retire before we are 75 years of age." That tallies with an entry in Mr Mason's diary.

22. On 4 January 2008, Alison Balm for ABF wrote to Mr and Mrs Mason inviting them to send various documents directly to Godiva. These included an application declaration, which was to be signed. She enclosed a pre-paid envelope. On 9 January 2008, Mr and Mrs Mason signed and dated the application declaration and sent a copy by post to Godiva. The statements they were affirming included the following:

> "1. The information given in this application and supporting sheets (if any) is true and correct and shall form the basis of any contract between me/us and Godiva Mortgages Limited.
>
> …
>
> 10…
>
> For intermediary introduced applications only
>
> (b) I/We have been provided with information on the mortgage scheme indicated in the 'Mortgage Scheme' section of this application form by the Intermediary. I/We understand that the Intermediary is not an agent of the company. I/We have not been given any advice by the Godiva Mortgages Ltd. [sic]
>
> …
>
> 17. I/We confirm that, taking into consideration my/our current and known future circumstances, I/we believe this mortgage commitment is affordable."

23. By context, "this application" must refer to the online application that had been submitted on Mr and Mrs Mason's behalf by Mr Balm. Mr Mason confirmed in evidence that he would have appreciated that by signing the declaration he was confirming the contents of the application were true and that the mortgage was affordable.

24. On 14 January 2008, Alison Balm for ABF sent Godiva a completed checklist on which the following were ticked: "Ask your client(s) to check the application form and sign the Declaration and Direct Debit mandate", "Obtain certified copies of your client's ID" and "Include the booking fee and/or valuation fee as applicable".

25. On 21 January 2008, Godiva wrote to Mr and Mrs Mason enclosing a mortgage offer. This made clear that it was ABF which had recommended that they take out the mortgage and that Godiva was "not responsible for the advice or information you received". On the same day, Godiva wrote to the solicitors who were to act for both Godiva and Mr and Mrs Mason enclosing instructions to act. The instructions incorporated the second edition of the Council of Mortgage Lenders' Handbook for England and Wales, which requires solicitors to explain to each borrower his responsibilities and liabilities under the mortgage. Although Mr Mason could not specifically remember receiving such advice, he accepted that it must have been given.

26. The sum of £487,500 (minus fees and disbursements) was released by Godiva to Mr and Mrs Mason's solicitors on 1 February 2008. £346,895 was applied to repay the TMB loan. Bank statements show that £138,640 was paid to the Masons.

27. It is agreed that the Masons did not default on the interest payments during the 5-year term of the mortgage with Godiva. However, in 2011 RBS demanded repayment of its loan facilities from Rebecca Johnson and Mr and Mrs Mason. Receivers were then appointed under the Law of Property Act 1925 in respect of the property at Bredons Norton and the property was sold, leaving a shortfall which was written off. This left the Masons without any means to repay Godiva on 31 January 2013, when the loan became repayable.

In what circumstances was the application to Godiva submitted?

28. Mr Mason's evidence was as follows. Mr Balm mentioned that he had stated an income of £100,000 per annum for each of Mr and Mrs Mason in the application form that he had submitted. Mr Mason queried that figure because Mr and Mrs Mason did not, in fact, draw any income from Mason Homes Ltd. Mr Balm had told him that they would in the future earn the amount stated from the development. Mr Balm also said that he had removed the figure from the application form. Mr Mason did not check that he had done this. His evidence was that he did not remember seeing any copy of the application form at the time when it was submitted. He clearly received a copy at some point, because he included a version of it with the Particulars of Claim. It may be noted, however, that in this version of the form the box marked "Applicant's share of profit last year" was blank.

29. Mr Balm was asked about this conversation. His response was that he could not remember Mr Mason telling him that the figure of £100,000 was false and he could not remember telling Mr Mason that he had removed the figure from the application form.

30. I consider it more likely than not that Mr Mason is telling the truth on this point. It is clear from the documents that the application form was submitted online by Mr Balm of ABF on Mr and Mrs Mason's behalf. Mr Mason did not and does not use computers. As the intermediary checklist shows, Godiva relied on Mr Balm/ABF to check with his client that the details in the online application were correct. Mr Mason's recollection of the conversation with Mr Balm about the £100,000 figure was clear and precise. His recollection of the answer Mr Balm gave (that Mr and Mrs Mason would make this sum from the development in due course) rings true. Mr Balm had a financial incentive to ensure that the mortgage application succeeded: he stood to gain a substantial sum by way of commission under the terms of his agreement with Mr and Mrs Mason if the mortgage application succeeded. Mr Balm's answers under cross-examination by Mr Fell were evasive and unimpressive.

31. I accordingly find as facts: first, that Mr Mason told Mr Balm that he and his wife did not derive any income from Mason Homes Ltd, so the £100,000 income figure for each of them stated in the application form was false; second, that Mr Balm told Mr Mason that he changed the online application form to remove the income figure of £100,000; third, that Mr Balm had not in fact done this but had instead left the form in its original state; fourth, that ABF then confirmed to Godiva that their clients (Mr and Mrs Mason) had been asked to check the application form; fifth, that when Mr Mason

signed the declaration described in paragraph 22 above, he understood that he was affirming the truth of the application form submitted online on his behalf by Mr Balm/ABF; sixth, that when he did so he believed that the income details on that form had been changed and were now true.

Did Godiva as lender owe the Masons as borrowers a duty of care or an implied contractual duty to exercise reasonable care and skill in assessing the suitability of the mortgage?

32. The Masons' pleaded case is that Godiva owed a "a duty of care to not act negligently" (Particulars of Claim §13) and that it was "an implied term of the Mortgage that by entering into and administering the mortgage the Defendant agreed to act with all due skill and care to be expected of a reasonably competent lender and act in the best interests of the Claimant" (§14). The particulars of breach (§18) make clear that the duty alleged is a duty to assess and advise on the suitability of the mortgage in the light of the Masons' financial circumstances.

33. However, in *Williams and Glyn's Bank v Barnes* [1981] Com LR 205, 207, Ralph Gibson J considered and rejected a claim that the relationship of banker and customer was one which gave rise to an obligation in the bank to consider, and advise upon, the prudence of a loan for which the customer asked. He said this:

> "in such circumstances, no duty in law arises upon the Bank either to consider the prudence of the lending from the customer's point of view, or to advise with reference to it. Such a duty could only arise by contract, express or implied, or upon the principles of assumption of responsibility and reliance stated in *Hedley Byrne*, or in cases of fiduciary duty. The same answer is to be given to the question even if the Bank knows or ought to know that the borrowing and application of the loan, as intended by the customer, are imprudent…
>
> The essential reason why the principle in *Donoghue v Stevenson* cannot be extended to the transaction of lending in the way contended for by the Defendant is that, in this case, the Defendant asked for the loan, the Bank lent the money; and the Bank did no act other than that which the Bank was asked to do… The suggestion that a Bank, dealing with a businessman of full age and competence, without being asked, or assuming the responsibility to advise, must consider the prudence from the point of view of the customer of a lending which the Bank is asked to make, as a matter of obligation upon the Bank, and in the absence of fiduciary duty, is impossible to sustain."

34. The correctness of this statement of law has not been doubted. Indeed, it has recently been affirmed: *Marz Ltd v Bank of Scotland plc* [2017] EWHC 3618 (Ch), [195] (Mr M.H. Rosen QC, sitting as a Deputy High Court Judge). It is consistent with an observation made by Lord Jauncey of Tullichettle in *Smith v Bush* [1990] 1 AC 831, 872E: "the fact that A is prepared to lend money to B on the security of property owned by or to be acquired by him cannot *per se* impose upon A any duty of care to B. Much more is required".

35. The only gloss that is required on the passage I have cited from *Williams and Glyn's Bank v Barnes* is that of Mance J in *Bankers Trust International v PT Dharmala Sakti Sejahtera* [1996] 1 CLC 518, 533:

> "In short, a bank negotiating and contracting with another party owes in the first instance no duty to explain the nature or effect of the proposed arrangement to that other party. However, if the bank does give an explanation or tender advice, then it owes a duty to give that explanation or tender that advice fully, accurately and properly. How far that duty goes must once again depend on the precise nature of the circumstances and of the explanation or advice which is tendered."

36. The latter passage was cited with approval in *Property Alliance Group Ltd v Royal Bank of Scotland plc* [2016] EWHC 3342 (Ch), [175] (Asplin J).

37. These principles make it impossible to contend that any duty to exercise care and skill arose in advising on the suitability of the mortgage, whether in tort or as an implied term of the contract. Godiva never in fact offered any such advice. It made it clear in its offer that it was not doing so. Mr and Mrs Mason confirmed in writing that they had not been given any advice by Godiva. In those circumstances, no duty of care arose and no term importing any such duty can be implied, because it would be inconsistent with the express terms of the contract. In short, it was ABF, and not Godiva, whose responsibility it was to advise on the suitability of the mortgage. The claims for breach of a common law duty of care and for breach of an implied term of the contract must therefore be dismissed.

What duties did Godiva owe the Masons under MCOB?

38. In order to identify the statutory duties owed by Godiva to the Masons it is necessary to consider the relevant statutory provisions as they were in force between 31 December 2007 and 1 February 2008, the period during which the mortgage application was made and processed.

39. At the relevant time, s. 150(1) of the Financial Services and Markets Act 2000 provided that a contravention by an authorised person of a rule was actionable at the suit of a private person who suffered loss as a result of the contravention. Section 150(2) provided that if rules so provided s. 150(1) did not apply to a contravention of a specified rule.

40. The "rules" in question include those in MCOB, which was introduced in 2004 and has been amended on various occasions since then. In interpreting the MCOB rules, it is legitimate to have regard to the purpose for which such rules could be made, namely "protecting the interests of consumers" (s. 138(1) of FSMA 2000) and of the "regulatory objectives", which include, so far as relevant, the protection of consumers (s. 2 of FSMA 2000). Section 5(2) provided that, in considering what degree of protection may be appropriate, the FSA (now the FCA) must have regard to (a) the differing degrees of risk involved in different kinds of investment or other transaction, (b) the differing degrees of experience and expertise that different consumers may have in relation to different kinds of regulated activity, (c) the needs that consumers

may have for advice and accurate information and (d) the general principle that consumers should take responsibility for their decisions.

41. It is also legitimate to have regard to the statutory consultation which preceded the introduction of the relevant MCOB rules to identify the mischief at which those rules are directed, but not for any other purpose: *Lehman Bros International (Europe) (in administration) v CRC Credit Fund Ltd* [2011] Bus LR 277, [36] (Arden LJ). The consultation paper which presaged the introduction of the relevant rules, published in November 2000, was entitled *Mortgage Regulation: The FSA's high level approach*. That document refers to the general principle contained in the then applicable OFT Guidelines that "there should be responsible lending, with all underwriting decisions subject to a proper assessment of the borrower's ability to repay and taking full account of all relevant circumstances". At para. 5.26, it refers to the need to strike a balance:

> "On the one hand, any restrictions to lending practice introduced by the FSA may simply limit access to the mortgage market by encouraging the use of restrictive credit scoring techniques etc. On the other hand, the OFT's past experience suggests that – in the absence of some restriction – a few mortgage lenders might seek to exploit consumers by lending in circumstances where it was self-evident that they would be unable to re-pay through income and did not plan to re-pay through realising the security."

42. Having considered consultation responses, the FSA said this in a policy statement in June 2001:

> "The FSA has no intention of preventing legitimate self-certification lending and the rules in MORT 9, whilst requiring lenders to show that they have taken account of the consumer's ability to repay the loan, make it clear that lenders may undertake the kind of lending to which respondents referred."

43. The rules relating to responsible lending and responsible financing of home purchase plans were at the relevant time to be found in MCOB 11.3. Under the heading "Customer's ability to pay", MCOB 11.3.1R provides as follows:

> "(1) A firm must be able to show that before deciding to enter into, or making a further advance on, a regulated mortgage contract or home purchase plan, account was taken of the customer's ability to pay.
>
> (2) A mortgage lender must make an adequate record to demonstrate that it has taken account of the customer's ability to repay for each regulated mortgage contract that it enters into and each further advance that it provides on a regulated mortgage contract. The record must be retained for a year from

> the date at which the regulated mortgage contract is entered into or the further advance is provided."

44. MCOB 11.3.2R, headed "Self-certification of income", provides:

> "In taking account of a customer's ability to repay, a firm may rely upon self-certification of income by the customer in circumstances where the firm considers it to be appropriate, having regard to the interests of the customer, and where the firm has no reasonable grounds for doubting the information provided."

45. Guidance as to the interpretation of that rule is given in MCOB 11.3.3G as follows:

> "(1) Examples of the circumstances where the firm may consider self-certification of income to be appropriate for the purposes of MCOB 11.3.2R include:
>
> (a) where the customer is an existing customer of the firm, with an established and good payment history;
>
> (b) where proof of income is not readily available by virtue of the nature of the customer's employment, the basis of their remuneration, or the sources of their income; or
>
> (c) where the customer has a deadline for entering into the regulated mortgage contract (for example, in an auction sale) and there is insufficient time for the firm to complete its usual enquiries.
>
> (2) The examples in (1) are not exhaustive. There may be other circumstances in which a firm may consider self-certification to be appropriate. It will depend on the circumstances of each case. However, in considering whether self-certification is appropriate, a firm should have regard to its responsibilities to its customers and, in particular, should guard against taking any action that would be contrary to Principle 6 and in breach of MCOB 11.3.1R and MCOB 11.3.2R."

46. Under the heading "Responsible lending policy", MCOB 11.3.4R provides:

> "(1) A mortgage lender must put in place, and operate in accordance with, a written policy setting out the factors it will take into account in assessing a customer's ability to repay.
>
> (2) A mortgage lender must make and keep up-to-date an adequate record of the policy in (1). When the policy is changed, a record of the previous policy must be retained for a year from the date of change."

47. The guidance for interpreting that rule, in MCOB 11.3.5G, provides:

> "(1) In determining the written policy in accordance with MCOB 11.3.4R(1), a firm should assume (in the absence of evidence to the contrary) that any regular payments under a regulated mortgage contract will be met from the customer's income. A firm should therefore take account of the customer's actual or reasonably anticipated income, or both, in reaching a decision on whether to enter into a regulated mortgage contract with that customer or make a further advance.
>
> (2) Other factors that the FSA would expect to be considered by a firm in taking account of the customer's ability to repay include:
>
> > …(b) whether the customer has the ability to, and intends to, repay, either wholly or partly, from resources other than income. Such resources could include the realisation of investments or the planned sale of the mortgaged property as in the case of a regulated lifetime mortgage contract."

48. MCOB 11.3.7G provides:

> "Where MCOB 11.3.5G(2)(b) applies, the firm should be able to demonstrate the customer's ability to repay (for example, by reference to information given by the customer on an application form or to correspondence with the customer)."

49. MCOB 11.3.8G provides:

> "The record maintained in accordance with MCOB 11.3.1R(2) should include or provide reference to matters such as:
>
> > (1) what checks, if any, the firm has carried out, regarding the customer's ability to repay; or
> >
> > (2) evidence that demonstrates the customer's ability and intention to repay the loan, from resources other than income."

50. These provisions must be read in the light of MCOB 2.5.2R, which provides:

> "A firm will be taken to be in compliance with any rule in MCOB that requires a firm to obtain information to the extent that the firm can show that it was reasonable for it to rely on information provided to it by another person."

51. The evidential provision relevant to the application of that rule (MCOB 2.5.3E) provides:

> "(1) In relying on MCOB 2.5.2R, a firm should take reasonable steps to establish that the other person providing the information is:

> (a) not connected with the firm; and
>
> (b) competent to provide the information.
>
> (3) Compliance with (1) may be relied on as tending to establish compliance with MCOB 2.5.2R.
>
> (4) Contravention of (1) may be relied on as tending to establish contravention of MCOB 2.5.2R."

52. In the light of these provisions, Godiva had the following obligations: first, to be able to show that, before deciding to enter into the mortgage, account was taken of the Masons' ability to pay (MCOB 11.3.1R(1)); second, to enter into a self-certification mortgage only where they considered it appropriate, having regard to the interests of the customer, and had no reasonable grounds for doubting the information provided (MCOB 11.3.2R); third, to have in place, and operate in accordance with, a written policy setting out the factors it will take into account in assessing a customer's ability to repay (MCOB 11.3.4R(1)).

53. When assessing Godiva's compliance with the first of these obligations, it was entitled to rely upon self-certification of income by the customer if it considered it to be appropriate to do so, having regard to the interests of the customer, and had no reasonable grounds for doubting the information provided (MCOB 11.3.2R). One circumstance in which the guidance suggests it may consider self-certification appropriate is where proof of income is not readily available given the basis of the customer's remuneration or the sources of their income (MCOB 11.3.3G(1)(a)). In taking into account a customer's ability to repay, a firm would be expected to consider whether the customer has the ability and intention to repay from sources other than income, including from the planned sale of the mortgaged property (MCOB 11.3.5(2)(b)).

Did Godiva comply with these duties?

54. Godiva's principal evidence relevant to its compliance with these obligations was given by Mr King. He said that, at the relevant time, when an application was submitted, it would be scored electronically. The Masons were given an "A" credit rating. Because the product they had applied for was a self-certified one, Godiva would not itself have verified the level of income declared. But there were certain things Godiva did to check that a self-certified product was appropriate. Godiva did not offer self-certified mortgages to first-time buyers. Mr and Mrs Mason had an existing mortgage of £350,000, for which the monthly payment was £2,342, only slightly less than the £2,522 which would be payable here; they had not defaulted on their previous mortgage. Godiva's fraud detection system would flag cases where a customer had previously applied for and been refused a product requiring verification of income; no such flag was raised in relation to the Masons. As to the declared income figure, there was nothing implausible about this: the business had started in 2002; the Masons had obtained a mortgage of £350,000 in 2003 or 2004, which would have required their income to be verified; the business from which this income was said to be derived (property development) was one which could plausibly generate income in that amount, especially at the relevant time, before the financial crash. Godiva did have concerns about the Masons' age, which is why they requested

written confirmation that they intended to continue working beyond the age of 75; that was given.

55. Mr King's evidence was that, when an application was submitted online, Godiva assumed that the person for whom it was submitted would have seen and checked the information in it. In a case such as the present, where the information was submitted on an applicant's behalf by an intermediary, the latter had to complete a checklist indicating that he had asked his client to check the application form and sign the declaration and direct debit mandate; ABF had indicated in writing that that had been done.

56. Godiva's first obligation was an obligation to show that *account was taken* of the Mason's ability to repay. On the evidence I find that Godiva complied with that obligation. The documents I have seen, read together with the evidence of Mr King, establishes that what was said in the application form was considered. Godiva was entitled to assume that ABF (a regulated intermediary) was telling the truth when it confirmed that Mr and Mrs Mason had been asked to check the application form and confirm the truth of its contents. They were also entitled to understand that, by signing the declaration, Mr and Mrs Mason were affirming the truth of the income figures stated. They had no reason to suspect that, as I have found, Mr and Mrs Mason had told Mr Balm to remove those figures. The fact that a question was asked as to whether the Masons' intended to continue working beyond the age of 75 demonstrates that the application was not simply waved through. The application form itself provided evidence that the Masons intended to repay the advance through sale of the dwelling "or other property". There was a valuation of the property which showed that it was worth considerably more than the sum advanced. MCOB 11.3.5G(2)(b) shows that mortgage lenders were entitled in principle to lend on the basis that the advance would be repaid from sources other than income. When offering a mortgage without advice, Godiva was entitled to consider that the Masons' plans for repaying the advance might include downsizing or selling other investment properties or some combination of these two. In circumstances where advice was being provided by an authorised intermediary, it was not their role to consider in any detail whether those plans were prudent or realistic.

57. Initially, I had some concerns about whether the income figures themselves (£100,000 for each of Mr and Mrs Mason) were so implausible that they should have set alarm bells ringing. But, having considered the evidence as a whole, I do not think they were such as to demonstrate any breach by Godiva of its obligation to show that it had taken account of the Masons' ability to repay. The Masons were no doubt older than the average investors, but it would have been wrong to assume that this alone made the income figure they had given, or their stated intention to continue in the business to the age of 75, implausible. It is important to recall that the Masons applied for their mortgage before the financial crash of 2008 had given rise to serious effects in the property market. Although round figures had been included, that was not itself a cause for suspicion, because property investors whose business was carried on through a limited company could choose how much to take from their company. I accept Mr King's evidence that it was plausible that a property development company might in 2007 have made a sufficient profit to enable each of its owners to draw £100,000 in income per year. The problem was that – as Mr Balm knew but Godiva did not – the

Masons' company had not made such a profit and the Masons had not drawn such an income, or anything like it.

58. In her written submissions filed after the hearing, Ms Mason invited me to draw the inference that Godiva's system of checks was more relaxed than those applied by other lenders. There was, however, no evidence to support that inference. She also invited me to conclude that, in the circumstances, Godiva should have contacted Mr and Mrs Mason directly, rather than relying on an intermediary. I do not accept that it was improper to rely on an intermediary such as ABF where (as here) it was authorised by the FSA. In any event, in relation to the one point on which it was particularly concerned (how long the Masons intended to work for) Godiva did request and receive a direct communication from them.

59. I turn then to Godiva's second obligation (to enter into a self-certification mortgage only where they considered it appropriate, having regard to the interests of the customer, and had no reasonable grounds for doubting the information provided). As to this, Godiva did not offer self-certification mortgages to first-time mortgagors. The Masons had a previous mortgage with a similar monthly repayment on which they had not defaulted. They were to Godiva's knowledge being advised by an authorised intermediary who could properly be assumed to have given competent advice. For the reasons I have already given, there was nothing in the information submitted to Godiva that was, in and of itself, implausible. In these circumstances, Godiva considered a self-certification product appropriate. I find no basis for concluding that that was in any way improper.

60. The third obligation owed by Godiva was to have in place, and operate in accordance with, a lending policy setting out the factors it will take into account in assessing a customer's ability to repay. Godiva had such a policy. It had at pp. 117ff a section dealing in particular with rules applicable to self-certification loans. The main substantive rules deal with matters such as a loan-to-value ratio, income multipliers etc. The Masons' application was within these limits. Another rule limited self-certification products to those who hold a current mortgage in respect of their main residence. The Masons fell within this category. There was a prohibition on lending in order to raise capital for investment in a business, but on a fair reading this does not seem to be intended to apply where the purpose of the lending was to invest in other property.

61. Under the heading "General underwriting requirements", the policy stated as follows:

> "Although proof of income is not required, underwriters must satisfy themselves as to the viability and reasonableness of income information that is supplied. This is particularly relevant where the application is at maximum or near maximum income multiples.
>
> …
>
> Underwriters must document the steps they have taken, and the evidence that has been gathered, to satisfy themselves that the stated income is reasonable, the business exists, or the customer works where they say they do. In the case of employed

> applicants, the underwriter must also document why the customer is suited for a self-certification mortgage."

62. Godiva was unable to point to a document recording in one place all the steps taken and evidence gathered to satisfy itself that the income stated was reasonable. But in the circumstances of this case I do not consider that this was a breach of Godiva's obligation to comply with its own lending policy. Although it might have been better if there were a single record documenting the steps taken, the language of the requirement to "document" steps taken does not necessarily entail such a record. In a case where the applicant is self-employed and self-certification is considered appropriate, Godiva could in my judgment comply with that procedural obligation by keeping a record of the income stated, together with the Masons' signed declaration and their authorised adviser's checklist indicating that they had been asked to check the application form. In these circumstances I find that there was no breach by Godiva of the obligation to keep, and comply with, a written lending policy.

63. For these reasons, I find that there was no breach by Godiva of any of the relevant MCOB rules.

Causation, loss and damage

64. In the light of my conclusions, it is not strictly necessary to consider whether, if I had found a breach by Godiva of any common law, contractual or statutory duty, Mr and Mrs Mason would have been able to show loss or damage flowing from that breach. Nonetheless, in case it becomes relevant, I make the following findings, which in the circumstances I can express briefly.

65. The Claimant's pleaded case on causation is that "but for the conduct of the Defendant… the advance of £487,500 would not have occurred" (Particulars of Claim §19), in which case they say "they would have redeemed the TMB mortgage by sale of the property and acquired a new place to live" (§20). The losses claimed included the full amount of the advance (£487,500) plus fees (£800) and interest (£104,726.84). Initially, credit was given for the amount paid to TMB to redeem the first mortgage (£346,895.26), but by a proposed amendment, it was indicated that Mr and Mrs Mason no longer accept such credit should be given and also claim a higher sum by way of interest (£146,741) and an additional £85,631.76 in respect of Ms Mason's time in dealing with this case.

66. Losses of these kinds would not have been claimable even if I had found Godiva in breach of their common law, contractual or statutory duties. In the first place, the purpose of any award of damages for breach of statutory duty would be to put the Masons in the position in which they would have been had the breach not occurred. As they accept at §20 of their Particulars of Claim, if the income figure stated in the application form had been queried and found to be false, they would not have been offered a mortgage at all and they would have had to sell their house to redeem their existing mortgage. On no view would it be appropriate to make an award of damages which had the effect of writing off the entirety of the loan. Second, the evidence shows that the Masons were in fact never in default on interest payments during the term of the mortgage. Although Ms Mason told me that they suffered other privations in order to ensure that their obligations were met, there is no evidence that they suffered specific financial loss in order to meet these interest payments. Third, the

claim for Ms Mason's time is not recoverable in an action for damages by Mr and Mrs Mason. Even if the sums claimed could be said to be a fair reflection of the value of the time she has spent on this claim (which I accept must have been considerable), Ms Mason is not a claimant and there is no evidence that Mr and Mrs Mason were ever liable to pay the notional costs claimed.

Conclusion as to the claim

67. For the reasons set out above, this claim must be dismissed. If losses were suffered by the Masons as a result of entering into this mortgage contract, they did not flow from any breach by Godiva of any common law, contractual or statutory duty. However, because I have made certain findings of fact concerning the conduct of Mr Balm and ABF, I direct that a copy of this judgment be sent to the Financial Conduct Authority.

The counterclaim

68. Godiva counterclaims two forms of substantive relief: first, an order for possession; second, a money judgment for the amount outstanding under the mortgage contract (comprising the capital sum, charges and interest accruing since it became due). As I indicated at the hearing, I shall hear further submissions in the light of my conclusions on the Masons' claim before deciding what relief, if any, to grant on the counterclaim.