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INGENIOUS LITIGATION

Case No: HC-2015-004561

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

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

Date: 3 December 2019

Before :

MR JUSTICE NUGEE

- -

Between :

MR ANTHONY BARNESS & Ors. **Claimants**

- and –

INGENIOUS MEDIA LIMITED & Ors. **Defendants**

- -
- -

Richard Coleman QC and **David Yates QC** (instructed by **TLT LLP**)
for **Coutts & Co** and **National Westminster Bank plc**
Graham Chapman QC and **Mark Vinall** (instructed by **Peters & Peters Solicitors LLP**) for the **Claimants**

Hearing dates: 8 and 11 November 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE NUGEE

Mr Justice Nugee:

Introduction

1. This judgment is given on the application of two of the defendants, Coutts & Co (**"Coutts"**) and National Westminster Bank plc (**"NatWest"**), which I will refer to together as **"the Banks"** (and each a **"Bank"**), to dispose of certain claims pleaded against them either on the basis that they can be struck out as disclosing no reasonable grounds for bringing the claims, or on the basis that summary judgment should be given against the claimants.

2. This is part of the Ingenious litigation. It is not necessary for the purposes of this judgment to give the background to this litigation, of which I am now the Managing Judge, in any detail, but I should give a brief account. From 2002 to 2007 a number of schemes (8 in all) were promoted under the name "Ingenious". The schemes were promoted as tax-efficient vehicles through which individual taxpayers could contribute funds to a limited liability partnership (or **"LLP"**) for investing in films (or in one case video games), and set off their share of the LLP's losses against other taxable income. For the schemes to work as intended it was necessary that the LLPs should be trading with a view to profit, and that the losses should be of an income nature so that what is called 'sideways loss relief' would be available to the individual investors as members of the relevant LLP.

3. But HMRC did not accept that the schemes worked as intended, and disallowed the losses claimed by the LLPs, with the effect that the members could not maintain their claims to sideways loss relief. The LLPs appealed to the First-tier Tribunal, which heard the appeals of three of the LLPs as lead cases, and held that most of the claims to allowable losses failed (largely because the claimed losses were for the most part of a capital nature); on a further appeal to the Upper Tribunal by both the LLPs and HMRC, the Upper Tribunal held that the LLPs were not trading at all. Subject to any further appeal, that means that no loss relief is available to the investors. The outcome for the individual participants in the schemes is that they have not only lost the sums which they invested, but have not obtained the anticipated tax relief either, and have been, or may be, exposed to claims by HMRC for arrears of tax with interest and penalties; there may be other losses as well.

4. A very large number of them (over 500) have issued claims to seek to recover their losses. There are three firms of solicitors acting for them, Stewarts Law LLP, Peters & Peters Solicitors LLP and Mischcon de Reya LLP, and between them they have issued a number of claim forms. These variously seek to recover the investors' losses from a range of defendants, including not only a number of Ingenious entities (and associated individuals) but also intermediaries such as financial advisers. Under an Order made by Morgan J in March 2018 these actions are being managed together, and only a selection of the claimants and defendants have in the first instance been directed to plead their cases. In the event 28 such 'Pleading Claimants' have been identified and have served a single pleading (subsequently amended). The main body of these Amended Particulars of Claim consists of generic allegations relied on by one or more of the Pleading Claimants, with individual schedules annexed for each Pleading Claimant in which allegations particular to him (or in one case her) are made.

5. The Particulars of Claim include what have been conveniently referred to as 'Lender Claims' against the Banks. These are claims advanced by claimants who borrowed from Coutts or NatWest the monies required to invest in the relevant LLP. Four of the Pleading Claimants advance such claims, two (Mr Daniel Murphy and Mr Kevin Campbell) against Coutts, and two (Mr Gary Teale and Mr Anthony Barness) against NatWest. (Mr Campbell's claim is in fact now vested in, and brought by, his trustee in bankruptcy, Mr Steven Wiseglass, but this has no effect on the present application and it is easier to refer to Mr Campbell as if he were the relevant claimant). All of them are represented by Peters & Peters. Those are the claims which the current application seeks to have struck out or dismissed, and in the remainder of this judgment references to the claimants mean the four Pleading Claimants who bring the Lender Claims against the Banks. There are another 36 non-pleading claimants, all again represented by Peters & Peters, who make similar claims against the Banks; I am not directly concerned with their claims and there has been as yet no formal direction as to the effect that decisions in relation to the claims of the claimants will have on those of the non-pleading claimants, although no doubt the Banks hope that if this application succeeds, it will have a consequential effect on whether other similar claims are sustainable.

6. Coutts is also facing claims brought against it as adviser: two of the other Pleading Claimants bring such claims. In those cases Coutts is said to have agreed to provide tax advice, and this application is not concerned with such claims.

7. Three causes of action are relied on in relation to the Lender Claims. I give the detail below but in very brief summary they consist of (i) claims for breach of contract, based on terms that are said to be implied into contracts between each of the claimants and the relevant Bank; (ii) claims for negligence based on duties of care owed in tort (a) concurrent to the contractual duties of care said to have been owed or (b) arising from an assumption of responsibility; and (iii) claims based on the Banks being vicariously liable for breaches of duty by a company now called Formation Asset Management Ltd (**"Formation"**), although it was at the time of the events complained of called Kingsbridge Asset Management Ltd. Formation carried on business as a firm of independent financial advisers (or **"IFA"**) and each of the claimants was a client of Formation and on his own case relied on its advice when investing in the Ingenious schemes.

8. In equally brief summary the Banks' answers to the claims are (i) that there were no contracts between them and the claimants which could have contained the terms sought to be implied; (ii) that they owed the claimants no relevant duty of care in tort because they neither (a) owed the suggested contractual duties nor (b) assumed any such responsibility; and (iii) that there is no basis on which they could be made vicariously liable for Formation's breaches of duty. They say that the relevant claims are neither sustainable on the facts pleaded, nor supported by anything in the evidence, and that they should be struck out or dismissed now.

9. I accept the Banks' submissions and propose to grant their application accordingly, for reasons that I will now try and explain.

Factual basis for the claims

10. I will start with the factual basis relied on by the claimants as they underpin each of

the causes of action pleaded. The facts have of course not yet been found, and it is well established that it is not the function of the Court on an application like this to conduct a mini-trial, but it is necessary to give some account of the facts as they appear to be from the material in evidence to explain the claimants' case.

11. Each of the claimants was at the time of his investment in Ingenious a professional footballer. Each was a client of Formation. Each was introduced to the Ingenious schemes by Formation. In each case the claimant was told that they could borrow all or most of the necessary money for investing into the scheme from Coutts or NatWest as the case may be. Each claimant did borrow the money from the relevant Bank, taking out a loan for each investment and opening a current account into which both the loan, and the anticipated tax refund which would be used to repay it, could be paid.

12. The particular loans made were as follows:

    (1) Mr Murphy

    Mr Murphy was provided by Coutts with a £640,000 loan for investment in an Ingenious scheme known as Ingenious Film Partners LLP (**"IFP"**) in December 2004; and a second loan of £296,000 (secured by a mortgage over his and his wife's home) for investment in Ingenious Film Partners 2 LLP (**"IFP2"**) in October 2005.

    (2) Mr Campbell

    Mr Campbell was also provided with two loans by Coutts, one of £567,813 for investment in Inside Track 3 LLP (**"IT3"**) in March 2004; and one of £525,600 for investment in IFP in February 2005.

    (3) Mr Teale

    Mr Teale was provided with two loans by NatWest, one of £91,000 for investment in IFP in January 2005; and one of £84,000 for investment in IFP2 in March 2006.

    (4) Mr Barness

    Mr Barness was provided with two loans by NatWest, one of £138,000 for investment in Inside Track 1 LLP and Inside Track 2 LLP (**"IT1"** and **"IT2"**) in December 2003; and one of £107,000 for investment in IFP in January 2005.

13. Mr Graham Chapman QC, who appeared for the claimants, relied on four features of the arrangements which he said meant that the relationship between the Banks and the claimants was not a conventional relationship of banker and borrower. The first, which he described as the most significant, was what he called the 'packaging', that is the packaging together of a Coutts or NatWest loan with an Ingenious scheme so that the investor did not have to contribute cash from their own resources. The evidence of Mr Murphy and Mr Teale on this application is that they were presented with a single investment proposition consisting of a loan packaged with an investment into

an Ingenious scheme and that that was how the proposition was sold to them. Mr Chapman says that it is unusual for a bank to bundle together its credit facilities with an investment in a third party made by an IFA in this way. I have some doubts as to how unusual that really is where a scheme for exploiting a perceived tax advantage is promoted to taxpayers, as my experience from other cases suggests that it is not that uncommon for promoters to line up the availability of bank finance for that purpose in advance, but I will assume for present purposes that Mr Chapman is right and that this packaging of loans with third party investments is unusual.

14. Mr Chapman pointed in this context to some of the documents that have been disclosed by the Banks, although he said that it was far from a full picture. They start with an internal Coutts memo in November 2000 to a Mr Ian Turland referring to Kingsbridge (as Formation was then called) contacting Coutts to see if they would consider lending £6m to approximately 20 of their footballer clients in relation to film scheme income tax shelters. An update by Mr Turland in December 2000 referred to Coutts as having confirmed that they could assist with loans for 21 players, and as having made a number of loans totalling over £2.6m (in fact including loans to Mr Murphy and Mr Campbell, although these are not the loans relied on in these proceedings), and to Kingsbridge as being delighted and impressed with what Coutts had done that far. Mr Turland added:

> "The relationship with Kingsbridge is real, working and being handled effectively by the people closest to it.
>
> We would like to do more with them next year and we need to agree how we work together and the lines of demarkation."

He said that he would like to be part of the ongoing relationship with Kingsbridge.

15. There is then a gap in the documentary record available on this application, but in January 2004 there is an internal Coutts document headed "Lending criteria for investment in 'Inside Track' film finance schemes". This shows that the clients were to be premiership footballers and managers, with other sports personalities justified by reference to occupation and employer, that they should be high net worth clients paying UK tax at 40% and that the minimum borrowing was £100,000. This presumably explains why less high earners were offered loans from NatWest rather than Coutts. Under "Nature of client" it also provided:

> "Sophisticated understanding of the tax elements of the product & its risks certified by Coutts Tax Department or independent tax advisors"

and

> "Transactional clients should have a Coutts current account and the prospect of conversion to full relationship clients within 12 months (target 80% conversion rate of transactional clients)"

There are various other criteria such as a requirement that full due diligence procedures be satisfactorily completed; there was also a requirement that the tax rebate be mandated to the client's Coutts account (although under "Security" it also says that there should be no reliance on the receipt of the tax refund as the source of repayment, in order to lend unsecured the client had to have net "means clear" of

twice the loan amount, and the client had to give an undertaking to sell sufficient investments or re-mortgage to clear the loan if outstanding 12 months after the end of the tax year in which the loan was drawn). Under the heading "Disclaimer" it provided:

> "The ABT to contain a disclaimer confirming the client has not received any advice from the Bank concerning the merits of investing in the scheme"

The ABT referred to is a document headed "Advice of Borrowing Terms" (see below).

16. An illustration of how these criteria were applied in practice can be seen in the case of the loan in early 2004 to Mr Campbell of £567,813. A credit submission was completed referring to the loan as a loan to facilitate investment into an Ingenious Media plc Inside Track investment, in accordance with the lending criteria. It then had a lengthy section headed "General Background" which included the following:

> "The ability to lend for the purpose of investing in the Ingenious Inside Track Scheme has been the subject of discussion between RBS Group Tax and Credit Risk since Q1 2003. Final sign off for lending for this purpose has now been given…and being prudent we satisfy ourselves that each client we lend to has alternative means of repayment for the loan other than the anticipated rebate from the Ingenious Inside Track investment.
>
> Whilst we are not relying on the Inside Track tax rebate as the means of repayment for this loan, we think it prudent to provide details of the nature of the Inside Track investment to provide background information. In reality, the client anticipates that the loan will be repaid within the agreed terms via a combination of the tax rebate and income from the investment itself.
>
> With effect from Q4 2003, Coutts Tax Department recommends Inside Track as an investment for Coutts clients having had agreement from both Coutts and RBS Risk Management."

That was followed by an explanation of how the scheme works, including reference to:

> "Tax repayment should be 40% against initial contribution of 37% thus allowing Coutts loan to be repaid."

There was a reference to the tax structure used being conservative and deemed non aggressive, and to both Coutts and Deloittes having taken a tax view that any Inland Revenue challenge was likely to fail. Under "Financial Information" it then sets outs details of Mr Campbell's financial position, including his contract and salary, his assets and liabilities (confirmed and verified by Kingsbridge) and a calculation of his means clear. Under "Proposition" it referred again to the provision of a loan of £567,813 to enable an investment of that amount to be made into the Ingenious Inside Track scheme and added:

> "Under the new guidelines agreed with Credit Risk KC [Mr Campbell] will not become a full banking client of Coutts & Co but he still requires 100% funding with interest and fee roll up. The SCP is aware of the 80% target level to convert such transactional deals to full clients in the fullest sense."

Then under "Repayment" it repeated that Coutts was not relying on the tax rebate as the repayment method "although it is likely that the rebate will be used to repay the loan by April 2005", adding:

> "From discussions with both Ingenious and our own Tax Department, we are told that given the success of the Inside Track product (in terms of pre-sales), then it is expected that 90% of the investment by way of the tax rebate will be received in the Summer of 2004…
>
> …we seek sanction to April 2005 but from all indications provided to us – and we place store from our own Tax Department – in reality it may well be the case that the majority of the loan is repaid by October 2004.
>
> Discounting this however KC has sufficient cash / unencumbered assets which he could sell or raise finance against to cover the loan if it remains outstanding by April 2005."

Finally under "Risk Assessment" it included the following:

> "We have established good working relations with the Kingsbridge Plc since Q4 2000 and our experience to date with previous S48 and S42 Film Finance loans has been very positive in terms of timely provision of accurate information and repayment of the FF loans themselves within agreed terms….
>
> The Bank also has a good working relationship with Ingenious Media PLC and they will be playing a central role in terms of co-ordinating the investment and liaising with the Bank in the initial stages. Thereafter we have robust communication channels with the introducing IFA with regard to monitoring repayment of the loan."

17. That credit submission must have been approved as on 5 February 2004 an Advice of Borrowing Terms (or ABT) for the loan of £567,813 was issued to Mr Campbell. This states that the specific purpose of the loan was to facilitate his investment in the relevant Ingenious scheme(s) (here IT1 and IT2, although this was later switched to IT3) and that the loan represented 100% of his investment. It includes an undertaking by Mr Campbell to instruct the Inland Revenue, and procure, that any repayment of tax in relation to his participation in IT1 and IT2 should be paid to an account held by him with Coutts; and an undertaking by him to transfer money, sell investments or remortgage so as to pay off the loan if it had not been repaid by 30 April 2005. It also contains an acknowledgment that he was not relying on any representation made or information or advice provided by Coutts in relation to IT1 and IT2.

18. Mr Chapman characterised these arrangements as Coutts lending money to Mr Campbell to enable him to invest in a tax avoidance scheme with Coutts looking to him to repay the loan in short order from the tax rebate which it was anticipated that that investment would secure. He said that the packaging was done, if not with Coutts' express agreement, then at the very least with their acquiescence. I have no difficulty in accepting that the evidence suggests that that was the case.

19. So far as NatWest is concerned, one of the documents in evidence is an internal NatWest document called a "Premium/Personal Lending Unit Proposal" in relation to the loan of £107,000 which was in the event made to Mr Barness in January 2005. The proposal was completed by Ms Sarah Wilson, the NatWest manager responsible

for the relationship with Formation and its clients, in December 2004. The purpose of the borrowing was said to be to finance part of Mr Barness's capital contribution to IFP. After listing his assets and liabilities (provided by Mr Langham (of Formation), described as "introducer, adviser and IFA"), it referred to:

> "Alternative repayment source would be re-mortgage over main residential property"

but subsequently said:

> "As per Ingenious 'Inside Track' (the client's previous loan), repayment of this new facility is to come from the tax repayment, pre-sales and sales revenue over the forthcoming 18 months."

It also said:

> "Since the summer we have been working closely in tandem with our colleagues at Coutts & Co and Ingenious Media Plc to arrange lending against this Ingenious product on an exclusive basis. In other words, any capital contributions funding required by any Ingenious clients to be routed through ourselves or Coutts & Co as appropriate…
>
> Coutts & Co agreed to take forward sign-off of the new scheme and they have now confirmed that they are lending against the scheme and are looking to sell the scheme to their clients in the New Year."

Mr Chapman said that that again demonstrated a real prospect of establishing that NatWest agreed or acquiesced in the packaging of its loans with the investments into the Ingenious schemes, and again I accept that.

20. The second feature of the relationship between the Banks and Formation that Mr Chapman relied on was that the Banks relied on Formation for the provision of financial information and due diligence in relation to the clients. Indeed in the case of Mr Barness, the NatWest Credit Unit was happy to accept a letter signed by the IFA (ie Formation) and counter-signed by Ms Wilson in lieu of sight of his contract and latest P60. I accept that the evidence shows that both Coutts and NatWest relied on Formation to provide them with details of the claimants' finances, and that they do not appear to have taken any other steps to verify this.

21. The third feature Mr Chapman relied on, which he described as particularly unusual, was Formation's role in relation to repayment of the loans. He referred to the reference in the credit submission for the loan of £567,813 to Mr Campbell to Coutts having robust communication channels with Formation with regard to monitoring repayment of the loan. He also referred to a practice of Formation giving undertakings to the Banks in relation to repayment. An example is a letter dated 26 February 2004 from Formation to Mr Turland of Coutts in relation to the same loan to Mr Campbell. This contains a number of confirmations by Formation, including a warranty that the financial information provided was true and correct, that each participant had been furnished with and understood information relating to the scheme in question, and understood the merits and risks of participation, and an undertaking in these terms:

> "We undertake to use our best endeavours to procure that, in the event that the Loan is not fully repaid in accordance with the Loan Agreement between you and the

> Borrower, all monies owing in respect of the Loan shall be satisfied by the realisation of assets held by the Borrower or raising of capital by means of charging property of such Partners and payment of the Borrower held with you as specified by you from time to time."

22. Mr Chapman also referred to the credit submission in relation to Coutts' other loan to Mr Campbell, dated January 2005, in which one of the "Positives" listed under the heading "Risk Assessment" was:

> "Part of the Kingsbridge stable with whom the CG has a sound working relationship"

and the proposal was said to carry the authors' recommendation because of, among other things:

> "relationship with Kingsbridge who obviously work with us to make sure conditions of sanction are adhered to."

23. In the case of NatWest he pointed to examples of Formation chasing Mr Teale, and another (non-pleading) client for payments to clear the outstanding balances on their loans.

24. The fourth feature that Mr Chapman relied on was the fact that the Banks, or at any rate Coutts, agreed to pay commission to Formation for the introduction. A business case submitted by Mr Turland in September 2004 referred to a proposal that Coutts pay Formation 25% of any arrangement fee charged by Coutts on loans introduced by Formation. There is in evidence a draft of a detailed Commission Agreement which provided for such commission; no signed copy has been located but the evidence is that such an agreement was formalised. The evidence leaves it unclear if NatWest had a similar arrangement.

25. I now consider the various ways in the claimants' claims against the Banks are put.

Breach of contract

26. None of the claims for breach of contract against the Banks is based on an express term of a contract. They are all based on terms sought to be implied. The implied terms are pleaded at Paragraphs 221 (Coutts) and 249 (NatWest) in similar terms. I will start with the terms pleaded against Coutts. There are 6 of these:

    (1) Paragraph 221.1 pleads that Coutts would provide the relevant claimant with private banking and wealth management services. I do not see that any breach of this term is specifically pleaded. Coutts did provide each of Mr Murphy and Mr Campbell with loans and current accounts. It is not suggested that either of them requested Coutts to provide any banking services which Coutts failed to provide. I think this term can be ignored for present purposes.

    (2) Paragraphs 221.2 to 221.4 plead a number of terms which can be summarised as saying that Coutts would not provide loan finance to a claimant, or introduce banking and investment products to him, or allow a loan to be packaged with an investment product, unless they were suitable for that claimant having regard to their financial position, needs, objectives and attitude to risk. I will refer to these collectively as the 'suitability terms'.

(3) Paragraph 221.5 pleads that Coutts would exercise reasonable skill and care in providing any advice on the Ingenious schemes. There is a plea that in one particular case (a Mr Christopher Powell) Coutts gave an explanation of a film scheme, but he is not one of the Pleading Claimants. It is not suggested that Coutts gave Mr Campbell any advice about the Ingenious schemes at all. The position with Mr Murphy is not quite the same: I give the details below.

(4) Paragraph 221.6 pleads that in providing its services Coutts would exercise the reasonable skill and care of an ordinarily competent private banker and wealth manager, complying with all relevant industry and regulatory rules, guidance and codes. Mr Richard Coleman QC, who appeared for the Banks, said that the term was unobjectionable as far as it goes but does not assist the claimants as the only breaches of duty alleged are by reference to what I have called the suitability terms. Mr Chapman did not suggest the contrary. For present purposes therefore I think this too can be ignored.

27. The implied terms pleaded against NatWest are very similar. There is no equivalent to Paragraph 221.1, but the other terms mirror those pleaded against Coutts. The significant ones are the suitability terms pleaded at Paragraphs 249.1 to 249.3. There are also terms pleaded that NatWest would exercise reasonable skill and care in providing any advice on the Ingenious schemes (Paragraph 249.4) and in providing its services (Paragraph 249.5), but it is not pleaded that NatWest did provide any advice on the Ingenious schemes and no breach of the first of these terms is alleged; and the position with the second of these terms is the same as with Coutts.

28. Subject to the point mentioned at Paragraph 26(3) above in relation to Mr Murphy, the effective case sought to be made against the Banks on behalf of the claimants is therefore based on the suitability terms being implied into the contracts between each of them and the relevant Bank.

29. An implied term must of course be implied into a contract, and it is incumbent on a claimant suing for breach of an implied contractual term not only to identify what the term is but what the contract is into which that term is to be implied. There were of course contracts between each of the claimants and the relevant Bank: each of them took out a loan (in fact two), giving rise to a contract between the Bank as lender and the claimant as borrower; and each of them also opened a current account, giving rise to a normal contract of banker and customer. Mr Murphy also mortgaged his and his wife's house as security for the second of his two loans. I asked Mr Chapman if his case was that the terms sought to be implied were to be implied into these contracts, or into some other overarching or umbrella contract. He said that he put it both ways. That evidently came as a surprise to Mr Coleman who said that that was not how it was pleaded; I tend to agree but will look at both suggested ways of putting the case.

30. The pleaded case does I think suggest that there was in each case an umbrella or overarching contract. In the case of Coutts, it is pleaded as follows. Paragraph 217 pleads that the "Formation AM/Coutts claimants" (that is claimants who were clients of Formation and who took out loans from Coutts), including Mr Murphy and Mr Campbell, entered into a "private banking and wealth management relationship" with Coutts; Paragraph 219 pleads that pursuant to that relationship, Coutts contracted with each Formation AM/Coutts claimant to provide private banking and wealth management services to that claimant:

> "at least in relation to the loan finance that was provided to each Formation AM/Coutts Claimant and as regards other banking and wealth management services in respect of those Formation AM/Coutts Claimants (including the Pleading Claimant Mr Murphy) who had a full banking relationship with Coutts (**"the Coutts Contract"**)."

Paragraph 220 then pleads:

> "It does not appear that that the terms of the Coutts Contract were recorded in writing or at least not recorded fully in writing in the case of every Formation AM/Coutts Claimant. Nevertheless, the Coutts Contract is evidenced at least in part in writing by way of mandates and other banking documents and further evidenced by the private banking and wealth management services in fact provided by Coutts to each Formation AM/Coutts Claimant, including (as applicable) current accounts and loan facilities."

31. These paragraphs are in the generic part of the pleading, and it is therefore necessary to look at the individual schedules to see how they apply to each claimant. Given the terms in which Paragraphs 219 and 220 in particular are pleaded, one might have expected to find in the individual schedules an explanation of how in the case of each of Mr Murphy and Mr Campbell it is said that he entered into a contract with Coutts under which Coutts agreed to provide him with "wealth management services". But this is not so.

32. Mr Murphy's schedule is Schedule 19. Most of it is taken up with the detail of the claim against Formation, and in particular with his relationship with his financial adviser, a Mr David McKee, who latterly provided services through Formation. Paragraph 44 pleads that in or before 2004 Mr McKee advised him to move his main bank accounts to Coutts, which he did. Paragraph 45 pleads that he met Mr Turland of Coutts on one occasion at about the time his accounts were opened, and that thereafter he had no direct contact with Coutts, whether in person or on the telephone, and all his business with Coutts, beyond routine day-to-day banking, was transacted with Formation. Subsequent paragraphs plead the provision to him by Coutts in 2004 of loan finance for his first Ingenious investment, and in 2005 of a secured loan for his second investment. Paragraph 47.5 pleads that in assessing his means for the purpose of the first loan, Coutts referred to him as having become a "full relationship client" as a result of flexible finance it had provided him on another scheme.

33. I do not find anything here which pleads how or when Mr Murphy entered into a contract of the type pleaded in Paragraph 219 of the main pleading, that is a contract under which Coutts undertook to provide not just banking services but "wealth management services". All that is in fact pleaded in terms of a contractual relationship between Mr Murphy and Coutts is that he moved his main accounts to Coutts, signed documentation opening accounts, and was offered and took loan finance on two occasions, the second one involving a mortgage of his home. None of that suggests the entry into an overarching or umbrella agreement, or an agreement by Coutts to provide services other than the banking services (bank accounts and loans and day-to-day banking services) which they did provide. There is admittedly the reference to Mr Murphy having become a full relationship client, but this is not actually an allegation that he entered into a contract (it is a reference to Coutts' internal document), and, more significantly, does not plead that Coutts thereby undertook some further contractual obligations other than those to be found in the

particular services, be they current or other accounts or loans, secured or unsecured, that Coutts provided Mr Murphy with.

34. Mr Campbell's schedule is Schedule 23. This pleads that Coutts made him two loans, one in 2004 and one in 2005. It pleads that he did not meet any representative of Coutts and that the entirety of his business with Coutts was conducted through Formation. There is nothing in it which pleads that he entered into any contract with Coutts other than the two loans (although the evidence is that he also in fact opened a current account with Coutts). Nothing in the schedule suggests that in addition to the loans which Coutts made to him he also entered into a contract for Coutts to provide wider wealth management services. Given that he had no contact with Coutts except through Formation, it is difficult to see how such a contract could have come about except by Formation passing on an offer by Coutts, but no such offer is pleaded or suggested.

35. In the case of NatWest, the pleading of the contract into which the terms are sought to be implied is rather briefer. Paragraph 247 pleads as follows:

> "The NatWest Claimants, including the Pleading Claimants Mr Teale and Mr Barness, opened a current account at the Barnet branch of NatWest, for the NatWest loan to be paid into, as well as taking out the loan itself. Each such Claimant was thus a customer of NatWest."

Paragraph 248 pleads that each such claimant was introduced to NatWest by Formation which had been retained as that claimant's IFA. Paragraph 249 then pleads the implied terms, introduced as follows:

> "It was an implied term of the banker-customer relationship between NatWest and each NatWest Claimant: …"

36. It can be seen that in the case of NatWest it is not even suggested that there was any other contractual relationship than the banker-customer relationship constituted by the claimants opening a current account and taking out a loan. The schedules for the claimants (Schedule 20 for Mr Teale and Schedule 22 for Mr Barness) take matters no further. Each pleads that Mr Teale or Mr Barness as the case may be signed applications for loans from NatWest, but contains no other material directed at the contractual relationship between them and NatWest. Again there is nothing here which pleads, or even hints at, there being some overarching or umbrella contract between Mr Teale or Mr Barness and NatWest.

37. One of the points taken by Mr Coleman is that the Amended Particulars of Claim do not comply with the requirements of the relevant Practice Direction, namely Practice Direction 16 – Statements of Case. Paragraphs 7.3 to 7.5 of the Practice Direction require that claims based on written agreements should have a copy of the contract attached to, or served with, the particulars of claim (para 7.3); that claims based on oral agreements should set out the words used and state by whom, to whom and when and where they were spoken (para 7.4); and that claims based on an agreement by conduct must specify the conduct relied on and state by whom, when and where the acts constituting the conduct were done. Mr Coleman accepted that not every breach of the Practice Direction would lead to a claim being struck out, but submitted that if a claimant cannot comply with the basic requirements regarding pleading the contract

on which a claim is based it may be – and in this case is – because the necessary facts to support such a claim simply do not exist.

38. Simply looking at the pleading, I accept the submission that no facts are pleaded which support the assertion of an overarching or umbrella contract under which Coutts contracted to provide Mr Murphy or Mr Campbell with "private banking and wealth management services"; all that is pleaded is that Coutts agreed to provide Mr Murphy with a number of banking services in the shape of a number of accounts, and with two loans, one of them secured by a mortgage, and agreed to provide Mr Campbell with two loans. Equally there are no facts pleaded which support the assertion of an overarching or umbrella contract between NatWest and Mr Teale or Mr Barness; all that is actually pleaded is that they took out loans with NatWest.

39. I therefore accept the submission by Mr Coleman that there is no pleaded basis for the suitability terms to be implied into an umbrella contract between each Bank and the relevant claimant, for the simple reason that there is no pleaded basis for such an umbrella contract at all.

40. Mr Chapman addressed the contractual claim quite shortly at the end of his oral submissions. He accepted that the contract that had been pleaded was one that was not in writing as such: the pleaded case is that it was partly evidenced in writing (this referring to various terms and conditions which applied for example to the loans). He also agreed that no reliance was being placed on anything said orally. But he said that the claimants did rely on conduct, the conduct being the fact that the Banks offered loans to the claimants as part of a packaged product. I accept that there is evidence that Formation sold the Ingenious investments to its clients, including the claimants, as a package under which Coutts or NatWest as the case may be would in principle be willing to make a loan to them, and I have already said that I accept that there is a respectable case that Coutts and NatWest either agreed to Formation doing this, or at least acquiesced in it. But the difficulty I have is that I do not see that this provides the requisite support for the Banks having agreed to an umbrella or overarching contract with the claimants. The fact that each of the Banks was willing to make loans to participants in the Ingenious schemes, and allowed – or even encouraged – Formation to promote the availability of such loans to its clients as part of a package, does not seem to me to have any logical connection with the suggestion that over and above the particular services which each Bank provided to the claimants (loans and current accounts and in Mr Murphy's case a mortgage), there was an offer by the Banks to undertake an overarching responsibility for management of the claimant's wealth. To my mind it simply does not follow.

41. Mr Chapman made some other points. He said that at this stage there is an information and documentation imbalance between the claimants and the Banks. This may be so (although the Banks say they have provided all the relevant documentation they have). But that does not to my mind answer the point that it is the claimants who allege the umbrella contract, and that a person who sues on a contract ought at least to be able to identify what the contract is and how it came into existence, even if not in detail at least in broad outline. But as I have tried to show, there is nothing pleaded which really seeks to do this.

42. He also pointed to the evidence from Coutts' internal documents which refer to customers as having a "full banking relationship" or the like. Thus the January 2004

lending criteria referred to the conversion of transactional clients to "full relationship clients" within 12 months (paragraph 15 above), and the 2004 credit submission in relation to Mr Campbell referred to him not becoming a "full banking client" and to "full clients in the fullest sense" (paragraph 16 above). There was a further reference to a "full banking client" in the 2005 credit submission in relation to Mr Campbell.

43. These documents undoubtedly indicate that Coutts distinguished between "transactional" clients and "full banking" or "full relationship" clients. But there is nothing in them to suggest that what Coutts meant by a full banking client was one where they would enter into an umbrella or overarching contract to provide a client with not only banking but also wealth management services. They are entirely explicable as referring to the difference between a client who simply takes out a loan for a particular investment in an Ingenious scheme (and associated current account) – as it appears Mr Campbell did – and a client who moves his primary account or accounts to Coutts so that Coutts becomes his day-to-day banker – as Mr Murphy did. But what is more significant than precisely what Coutts meant by referring to a full client is what the pleaded case says about the services Coutts agreed to provide to each of the claimants. For reasons already given, there is nothing in the particular facts pleaded on behalf of Mr Murphy and Mr Campbell that supports an umbrella contract to provide private banking and wealth management services.

44. Finally Mr Chapman had a specific point on the terms applicable to NatWest's current accounts. An example in evidence dated February 2003 provides:

> "**Additional services and charges**
>
> We are entitled to charge for additional services provided to you, whether these relate directly to the account or not."

He said that this expressly contemplated that additional services might be provided, and the same must implicitly be the case with the Coutts terms. I agree that one does not need an express term in a contract to say that if some other service is provided a further charge can be made, but by itself the possibility that further services might be provided takes matters no further forward. In terms of pleading, what needs to be alleged is that further services were requested, or offered and accepted, or at least provided. But nothing along these lines is pleaded.

45. In those circumstances I consider that Mr Coleman's submission that the Amended Particulars of Claim disclose no reasonable grounds for asserting that the suitability terms should be implied into an overarching or umbrella contract is well-founded; and that is sufficient to justify striking out those parts of the claim under CPR r 3.4(2)(a).

46. The next question is whether the suitability terms are to be implied into the particular contracts governing the transactions between the Banks and the claimants, that is in each case the current accounts and loans and in Mr Murphy's case the mortgage. Mr Coleman as I have referred to said that this case was not pleaded, and I tend to agree, but if a defective pleading can be rescued by appropriate amendment, it is not usually appropriate to strike it out, and I will assume that if the only problem were the lack of pleading it could be rectified. The substantive question is whether there is any basis for implying such terms into these agreements.

47. Mr Chapman accepted in terms that duties of this kind would not arise in the usual course of bank lending between a bank and a retail customer. That is borne out by the authorities: see the summary of the applicable law by HHJ Waksman QC (as he then was) sitting as a Judge of the High Court in *Carney v N M Rothschild & Sons Ltd* [2018] EWHC 958 (Comm) at [57ff], and specifically the following:

> "58. First, there is no general obligation on a lending bank to give advice about the prudence or otherwise of the transaction which the loan is intended to fund; that applies with even more force where (as here) the borrowers have their own investment advisers…
>
> 59. Second, and as a corollary to that, a bank does not give advice or assume an advisory role simply because it agrees to lend to the customer for a particular purpose…"

I have omitted the cases on which these principles were founded as I did not understand Mr Chapman to dispute HHJ Waksman QC's summary as a correct statement of the general position.

48. The circumstances under which terms will be implied into a contract are well-known and strict. Given the general position, what are the circumstances relied on here to take this case out of the norm? Mr Chapman relied on the packaging of the loans with the investments. He said that there is – or at least arguably at this stage – a (contractual) duty of care owed by a bank in such a situation not to package its loans with an unsuitable investment.

49. I do not see that this is necessarily implicit in the relationship between bank and customer. It does not spell out in words what would be understood to be an unexpressed part of the bargain between them; it is not needed to make the contract of loan work, or to give business efficacy to it; it does not go without saying.

50. But over and above this I accept the submission of Mr Coleman on this point. This was that it is established by the Court of Appeal decision in *Green v The Royal Bank of Scotland plc* [2013] EWCA Civ 1197 that a bank which sells a product to its customer (in that case an interest rate swap product) is not under a duty to advise as to the nature of the risks inherent in the transaction: that is to blur the distinction between the activity of giving information about and selling a product on the one hand and that of giving advice about it on the other (see at [23] per Tomlinson LJ). If, Mr Coleman submitted, that is the case where a bank itself sells a product to a customer, it must be the same where a bank offers a loan to a customer to enable him to invest in a product sold to him by someone else, even if that is presented to the customer as a packaged or bundled product. I agree.

51. In those circumstances I do not see that there is any sustainable case pleaded, or that could realistically be pleaded, that the suitability terms are to be implied into the contracts of loan between the Banks and the claimants (let alone the current accounts). That is quite apart from a submission by Mr Coleman that examination of the actual terms and conditions applicable to the loans and current accounts shows no basis for implying such terms.

52. That leaves one subsidiary point in relation to Mr Murphy. As already referred to, his second loan was secured by a mortgage of his and his wife's house. The evidence is

that the documentation for that loan includes a written offer by Coutts dated 21 October 2009 to make a loan (referred to as a mortgage), which attached an Offer Document containing the principal terms and conditions of the mortgage. This has a series of boxes and the second, under the heading "Which services did we provide you with?" has a tick against a box containing the following:

> "We have recommended, having assessed your needs, that you take out this mortgage."

The next box confirms that Coutts were aware that the purpose of the mortgage was to enable Mr Murphy to invest in an Ingenious scheme.

53. Mr Coleman accepts that the Mortgage Conduct of Business Rules (**"MCOBs"**) applied to loans secured by a first legal charge over an individual's residence; that under the MCOBs a firm must take reasonable steps to ensure that it does not make a personal recommendation to enter into such a mortgage contract unless it is suitable for that customer; and that under what is now s. 138D of the Financial Services and Markets Act 2000 any contravention of the MCOBs that caused Mr Murphy loss would have been actionable. But no claim is brought under that provision, no doubt because it is time-barred.

54. For the purposes of the present application, Mr Coleman also accepts that it is arguable that, having made a personal recommendation, Coutts were under a duty of care in making it. So on this aspect of the case, Mr Coleman does not seek to strike out the claim that there was an implied term that Coutts would in this respect exercise reasonable skill and care. He relies however on the fact that it is not pleaded that Mr Murphy relied on the recommendation. Paragraph 71 of his schedule pleads the offer document and the recommendation and then continues that he did not understand (and no one explained to him orally) that this loan, unlike the previous loans he had had for film schemes, was secured on his house. That, as Mr Coleman pointed out, suggests that he did not even read the offer document (as it is clear on its face, and repeated in several places, that it is an offer of a mortgage) but whether or not that is so, the key point is that Mr Murphy does not plead that he relied on Coutts' recommendation. Mr Coleman said that even if Coutts owed him a duty of care, and even if Coutts broke that duty, there is therefore no allegation that that caused Mr Murphy any loss.

55. Mr Chapman for his part accepted that Mr Murphy does not assert that he relied on the recommendation. He said that that did not mean the cause of action was not viable, referring back to a submission he made that a duty of care (that is in tort) can arise in special circumstances even if there is no reliance. But that seems to me a different question, namely whether a duty arises at all. Here it is accepted to be arguable that Coutts owed a (contractual and tortious) duty of care; the question is whether any loss has been caused by breach of such a duty. Since Mr Murphy does not suggest that he relied on the recommendation, it follows that he would not have acted any differently had Coutts not ticked the box recommending the mortgage, and hence it is impossible to see that if there were a breach it has caused any loss. I agree with Mr Coleman therefore that no reasonable grounds have been pleaded for a claim based on breach of this duty.

56. That I think covers all the various ways in which contractual claims are sought to be

advanced. For the reasons I have given, there are in my judgment no reasonable grounds for such claims, and I will strike them out.

57. That makes it unnecessary to consider the question of summary judgment on such claims. I will therefore just briefly say that I have seen nothing in the evidence that has been filed to suggest that there are any facts which would support the contractual claims and that I am satisfied that the claimants have no real prospects of succeeding on them. If I had not struck them out I would therefore have given summary judgment against the claimants on them.

Tortious duty of care

58. The allegation that the Banks owed the claimants duties of care in tort is put in two alternative ways. The first is that a duty of care in tort arose concurrently with the like duty in contract. That must stand or fall with the alleged contractual duty of care, and since I have rejected the contractual claims, such a case is not sustainable either.

59. The second is pleaded on the basis that the relevant Bank assumed responsibility towards each of the claimants and consequently owed them a duty of care in tort. The particular contents of that duty which are pleaded correspond with the implied suitability terms.

60. Mr Coleman says that the case based on an assumption of responsibility is not sustainable. For that he referred me to the decision of the House of Lords in *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 in the speech of Lord Steyn (with whom the remainder of their Lordships agreed). At 834G Lord Steyn said that reliance by the other party is necessary to establish a cause of action because otherwise the negligence will have no causative effect. At 835F he said that the touchstone of liability is not the state of mind of the defendant; the primary focus must be on exchanges (statements and conduct) which cross the line between the defendant and the plaintiff. In the case before them, which concerned the question whether the director of a company owed a duty of care personally, he said at 835H that the inquiry must be whether the director, or anybody on his behalf, conveyed directly or indirectly to the prospective franchisees that he assumed personal responsibility to them.

61. Translating that to the present case, Mr Coleman submitted that what was required before the Banks could be found to have assumed responsibility such as to give rise to a duty of care to the claimants was (i) some communication between the Banks and the claimants to the effect that the Banks were assuming responsibility for the tasks in question and (ii) reliance by the claimants on that. He then said that there was no allegation that there was any communication that the Banks were assuming responsibility for the things it was said that they ought to have done; and no allegation of reliance.

62. I accept these submissions. Mr Chapman accepted that there was nothing in terms of advice that crossed the line between the Banks and the claimants. But he said that the way in which the Banks participated in the arrangements, by packaging up the loans with the investments and the like, meant they came under a duty of care. I have great difficulty with this. What is pleaded is an assumption of responsibility. I do not think one assumes a responsibility in the abstract: what one assumes in appropriate

circumstances is a responsibility to a particular claimant. The paradigm case of an assumption of responsibility is where you give the claimant advice, or information, in circumstances where it can be expected that the claimant will rely on it. But where there is accepted to be nothing relevant in the way of advice passing between you and the claimant, how can it be said that you have assumed a responsibility to that claimant? If one starts from the established position that a bank does not "assume an advisory role simply because it agrees to lend to the customer for a particular purpose" (paragraph 47 above), then how can it be said to have assumed an advisory role simply because it has agreed to its loans being packaged together with an investment? That is particularly so if, as is the case here, someone else, namely Formation, is advising the customer. I do not see that there can be said in such a case to be anything crossing the line between the Banks and the claimants that conveyed directly or indirectly to the claimants that the Banks were assuming their own responsibility to them.

63. Even if it were possible to overcome this problem, there remains the question of reliance. It is not pleaded that any of the claimants relied on the Banks, nor did Mr Chapman suggest they had. Instead Mr Chapman's submission was that reliance is not required in every case where a duty of care is found to be owed.

64. For that he referred me to *Richards v Hughes* [2004] EWCA Civ 266. There a claim in negligence was brought by parents and their children. The parents wished to shelter certain payments from tax by setting up an offshore trust for the benefit of the children and had instructed the defendant, an accountant, to advise how to do it. The children's claim was for loss in the value of the trust fund said to be caused by the defendant's negligence, it being asserted that the defendant owed the children a duty of care. The defendant applied to strike out the children's claim, an application that was refused both at first instance and on appeal. Peter Gibson LJ accepted that the general rule is that a professional adviser acting on behalf of a client owes a duty of care (usually contractual and tortious) only to his client and not to others (at [23]). But there were exceptions, such as *White v Jones* [1995] 2 AC 207, where a solicitor instructed by a testator was held to have owed duties in tort to the intended legatees. The question in this case was whether it was clear on the application to strike out that the case was bound to fail. Peter Gibson LJ thought it strongly arguable that no duty of care was owed, but that the claim was not bound to fail (at [28]).

65. As I read the case, that is because he recognised that it could be said to be arguably analogous to *White v Jones*, albeit in an *inter vivos* context. In *White v Jones* the problem was that if the solicitor were negligent, the only person with a contractual claim would be the testator who had suffered no loss, whereas those who had suffered loss, the legatees, had no contractual claim. That is an example of a problem that crops up in a number of areas of law where there is a contract between A and B which is intended to be for the benefit of C. In such a case a breach of contract by B may not damage A but may cause damage to C (see the familiar examples given at [23]). It is not surprising that in those circumstances the Court of Appeal thought the matter should go forward to trial, especially as the underlying issues would be litigated anyway.

66. That seems to me a very different case from the present case. In cases such as *White v Jones* and *Richards v Hughes* the defendant admittedly owes a contractual duty of reasonable skill and care, and the question is whether that can be said to be owed not

only to the client but also to the person intended to benefit from the advice. The Court is not therefore imposing a different standard of care on the defendant, but widening the class of people who can sue for breach of the duty. But in the present case, the question is whether the Banks are under a relevant duty at all. If they are not under any contractual duty, and if they have not done anything to assume a duty, it is difficult to see on what basis the Court can impose such a duty on them; and impossible to see how anyone can bring a claim based on an assumption of responsibility when they have not relied on it.

67. In these circumstances I agree with Mr Coleman that the Amended Particulars of Claim do not disclose reasonable grounds for bringing claims against the Banks based on a tortious duty of care, and I will strike out those claims accordingly. Again it is not necessary to consider the application for summary judgment, but if I had not struck them out I would have held that the claimants have no real prospects of success on such grounds.

Vicarious liability

68. That leaves the claim that the Banks are vicariously liable for breaches of duty by Formation. No difficulty arises over Formation owing the claimants contractual and tortious duties, nor over the allegations of breach; the question however is whether there is any sustainable case that the Banks were vicariously liable for those breaches.

69. Vicarious liability is pleaded against the Banks on the basis of agency. In Paragraph 228 it is pleaded that Coutts constituted Formation as its agent for various purposes. The relevant one – and the only relevant one it seems to me – is in Paragraph 228.3 which is for the purpose of:

> "introducing, explaining and advising upon the packaged investment (including the loan finance)."

Paragraph 254.3 makes a similar plea against NatWest.

70. Mr Coleman pointed out that agency in this context is not being used in the classic sense to describe a relationship where a principal appoints an agent to contract on his behalf. I agree that that is not suggested, but I do not think this particular point carries the weight Mr Coleman sought to place on it, or indeed any weight at all. A can give B authority to do any number of things on his behalf even if that does not include authority to contract. What is legally significant is whether B is acting on behalf of A or not. In the present context that means that the question is whether Formation, who undoubtedly advised the claimants on the Ingenious schemes, was doing so on behalf of the Banks.

71. But where I do agree with Mr Coleman is that what needs to be shown to make this particular plea good is either that the Banks told the claimants that Formation was advising on their behalf, or otherwise held Formation out as doing so (which is not suggested – indeed, as referred to above, the Banks went to some lengths to say the contrary: see the Advice on Borrowing Terms provided to Mr Campbell which required him to acknowledge that he was not relying on any representation made or information or advice provided by Coutts in relation to IT1 and IT2 (paragraph 17 above)); or that the Banks used Formation to discharge a duty to advise that they

otherwise owed to the claimants (which is a case that I have already rejected). There does not seem to me to be anything pleaded to support a case, nor anything in the evidence to suggest, that when Formation gave advice to the claimants it was doing so *on behalf of the Banks* rather than on its own behalf.

72. That is in a sense sufficient to show that the vicarious liability claims are unsustainable. But I will consider the various points that were argued under this head.

73. Mr Coleman said that there are two relevant grounds in law on which vicarious liability may attach, traditionally categorised as employment and agency. So far as employment is concerned, vicarious liability attaches to an employer for the torts of his employee committed in the course of his employment. Recent case-law has made it clear that such liability can extend beyond an employment relationship: see *Cox v Ministry of Justice* [2016] UKSC 10 at [23]-[31] per Lord Reed JSC, analysing the previous cases, and applying in particular the approach adopted by the Supreme Court in *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56. At [24] Lord Reed summarised the modern law as follows:

> "The result of this approach is that a relationship other than one of employment is in principle capable of giving rise to vicarious liability where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party), and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question."

I will refer to this as "the *Cox* test." See also at [30] where Lord Reed said:

> "It is sufficient that there is a defendant which is carrying on activities in the furtherance of its own interests. The individual for whose conduct it may be vicariously liable must carry on activities assigned to him by the defendant as an integral part of its operation and for its benefit."

74. So far as agency is concerned, Mr Coleman recognised that there is a question whether the *Cox* test should be applied in an agency case as well: see *Frederick v Positive Solutions (Financial Services) Ltd* [2018] EWCA Civ 431 where this point was left open by Flaux LJ at [67]. He did not suggest that I should seek to decide that point, as he said that whether one applied the *Cox* test, or the more stringent agency test, nothing is pleaded which could satisfy either.

75. Applying first the *Cox* test, the question is whether the advice given by Formation to each of the claimants was an integral part of the business activities carried on by the Banks, rather than its activities being entirely attributable to an independent business of its own. I have summarised the particular features of the relationship between the Banks and Formation relied on by Mr Chapman. I agree with Mr Coleman that none of these are capable of supporting a case that the advice given by Formation was part of the Banks' activities. I accept entirely that what is pleaded is a close commercial relationship between the Banks and Formation. I am prepared to assume that the features relied on by Mr Chapman are unusual. But none of them seem to me to affect the fundamental facts that although the two were working closely together, they each had their own business and carried out their own functions as part of their own independent businesses. The business of each of the Banks was to provide banking

services and in that capacity they made loans to the claimants. Formation's business was to provide services as an IFA and in that capacity it advised the claimants. I do not see how it can be said that in doing so it was doing something that was an integral part of the Banks' businesses; it seems to me that on the pleaded case there is nothing to dislodge the prima facie position that Formation's activities were indeed entirely attributable to the conduct of a recognisably independent business of its own.

76. Taking the features relied on by Mr Chapman, what they amount to in summary is this. Formation, to the knowledge and with the agreement or acquiescence of the Banks, advised its clients to invest in the Ingenious schemes on the basis that they would not have to put their hands into their own pockets as the investments could be wholly or largely funded by loans which Formation had arranged with the Banks. The Banks made available to Formation pro forma documentation which enabled the claimants to be signed up for such loans in a streamlined way, although it is not suggested that Formation had any authority to enter into the loans on behalf of the Banks and the Banks in fact made their own decision on each loan. In return for these introductions the Banks (or at least Coutts) agreed to share 25% of their fee income with Formation as a commission. In deciding on the granting of the loans the Banks were prepared to rely on Formation for financial information about their clients rather than carrying out their own due diligence (although there is evidence that at least Coutts required Formation to warrant the accuracy of the information). And the Banks (or at least Coutts) required Formation to give an undertaking to procure that the claimants realise or remortgage assets to clear the loans if necessary, and there is evidence that Formation did take steps to chase the claimants for payment of outstanding balances. All of this shows a close commercial relationship between the Banks and Formation, for their mutual benefit. But what to my mind it does not show is anything that can amount to an arguable case that when Formation gave advice to its clients to invest in the Ingenious schemes it was doing so as an integral part of the Banks' business activities, or as anything other than as part of its own business activities as an IFA.

77. Mr Chapman's submissions on this aspect of the case were as follows. He said first that whether or not Formation was acting as agent was a question of fact; that there is nothing in principle to prevent the agent of one party also acting as the agent of another party; and that how parties describe themselves is not determinative. I do not have any difficulty with any of those as statements of general principle. He then said that applying the *Cox* test, the activities of Formation, including the advice that they gave, were an integral part of producing and selling the package, and that producing and selling the package was an integral part of the business of Coutts and NatWest.

78. This I think elides two different questions. One is whether what the claimants were presented with was a single package under which they would be able to invest in the Ingenious schemes with a loan from one of the Banks, that being for the benefit of the Banks. The other is whether when the Banks left it to Formation to find and sign up the claimants and give them advice on the schemes, Formation was doing so on behalf of the Banks as part of the Banks' business. I do not see that the latter follows from the former. Indeed Mr Chapman accepted that it did not necessarily follow, but I do not think it even arguably follows. I see no reason to conclude that because the opportunity was presented to the claimants as a single package, the activities of the Banks in granting loans (an activity typical of a banking business) and the activities of

Formation in giving financial advice to its clients (an activity typical of an IFA) are somehow to be conflated as if Formation was giving advice as part of the Bank's activities. On the pleadings, and on the evidence, there is in my judgment no material to support such a case, and no reason to think that there might be any such material. Everything points to Formation giving advice to its clients as part of its business as an IFA, and the Banks granting loans to the claimants as part of their banking businesses. I do not think the first limb of the *Cox* test is satisfied, or arguably so, or that there is any real prospect of showing that it is.

79. As to the second limb of the *Cox* test, Mr Chapman said that the Banks left it to Formation to give advice. That I accept, but that is not enough. What is required is that Formation must have been carrying on activities assigned to it by one or other of the Banks "as an integral part of its operation and for its benefit" (see paragraph 73 above). It was no doubt for the benefit of the Banks that Formation should persuade its clients to take out loans with the Banks. But I do not see that it was, or arguably was, or that there is a real prospect of showing that it was, an integral part of the Banks' operations for Formation to give advice to its clients.

80. It is common ground that if the *Cox* test does not apply to cases of vicarious liability on the basis of agency, the agency test is a narrower one, so is unlikely to be fulfilled where the *Cox* test is not. But for the sake of completeness I should briefly deal with it.

81. Mr Coleman relied on Article 90 of *Bowstead & Reynolds on Agency* (21st edn, 2018) as a statement of the relevant principles. This is headed "Liability of principal for torts committed by agent". Art 90(1) deals with torts committed by employees and partners; art 90(3) deals with non-delegable duties. It is not suggested that either applies here. Art 90(2) reads as follows:

> "A principal is liable in tort for loss or injury caused by his agent, whether or not his servant, and if not his servant, whether or not he can be called an independent contractor, in the following cases:
>
> (a) if the wrongful act was specifically instigated, authorised or ratified by the principal.
>
> (b) (semble) in the case of a statement made in the course of representing the principal within the actual or apparent authority of the agent: and for such a statement the principal may be liable notwithstanding that it was made for the benefit of the agent alone and not for that of the principal.
>
> (c) where the principal can be taken to have assumed a responsibility for the actions of the agent."

82. Mr Coleman said that so far as Art 90(2)(a) was concerned there was no allegation that the Banks had specifically instigated, authorised or ratified any breaches of duty by Formation; nor was it alleged, so far as Art 90(2)(c) was concerned, that the Banks had assumed a responsibility for Formation's advice. I did not understand Mr Chapman to contend that there were any such allegations.

83. That leaves Art 90(2)(b). Mr Coleman said that it was not suggested in the pleading that Formation was giving advice in the course of representing the Banks.

Mr Chapman said however that it was pleaded that the Banks had constituted Formation its agent for the purpose of introducing, explaining and advising on the packaged investment (including the loan finance). That is indeed pleaded, and I therefore do not think it can be said that there is no allegation in the pleading that Formation was giving advice while representing the Banks. But what I think can be said is that the matters relied on by Mr Chapman in support of this allegation – the four features he referred to – do not to my mind support the pleaded allegation. For similar reasons to those I have given above when discussing the *Cox* test, these features do not in my judgment begin to make a case that when Formation was giving advice to its clients, it was doing so on behalf of the Banks, or as representing the Banks. Using traditional agency analysis, there is nothing to suggest that the Banks had either in fact authorised Formation to act as their representative to give advice on their behalf, or that the Banks had held Formation out as authorised to do so. Nor is there any reason to think that any further material might be forthcoming which would mean that any such case had a real prospect of success at trial.

84. I am satisfied therefore that this application is well-founded and that the claims based on the vicarious liability of the Banks, as well as the claims based on direct contractual and tortious duties, are unsustainable and should not be permitted to go forward to trial. I do not think I need decide the technical question whether the vicarious liability claims fall to be struck out as disclosing no reasonable grounds for the claims (on the basis that although there is a plea that the Banks constituted Formation as their agent for the purpose of giving advice, the matters relied on in support of that plea do not in fact support it), or fall to be dismissed on the grounds that they have no real prospects of success. It is sufficient to say that there is nothing pleaded, nor any factual material adduced, nor any reason to think that any factual material will be available at trial, to support the allegation that the Banks constituted Formation their agent for this purpose, and in those circumstances I propose to grant summary judgment against the claimants in relation to those claims.

Conclusion

85. I was referred by Mr Chapman to some of the authorities on the caution that should be exercised before striking out, or granting reverse summary judgment on, a claim, particularly in an area of developing jurisprudence or a novel factual situation. I do not need to refer to them in detail as the principles are well established and were not in dispute. It is also well established however that the Court should use the powers it has to prevent a claim going forward to trial if it is confident that there is in truth nothing in it; that is particularly so if the effect is to remove a defendant, or a discrete area of factual enquiry, from the proceedings entirely.

86. For the reasons I have given I am indeed satisfied that there is nothing in the Lender Claims. I will strike out the contractual and tortious claims pursuant to CPR r 3.4(2)(a), and would have granted summary judgment against the claimants on these claims pursuant to CPR r 24.2 had I not struck them out; I will also grant summary judgment against the claimants on the vicarious liability claims pursuant to CPR r 24.2. For the sake of completeness I should record that it was not suggested that if, as I have found, there is no real prospect of success on any of these claims, there was any other compelling reason for a trial.

87. I will leave it to counsel to agree if they can the relevant parts of the Amended

Particulars of Claim which are affected, and will hear from counsel on that, and any other matters consequential on this judgment.