Neutral Citation Number: [2019] EWHC 2501 (QB)
Appeal No: QB/2018/0282

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

On appeal from the order of Deputy Master Bard
dated 17 September 2018 in Claim No. HQ17X03613

Rolls Building
7 Rolls Buildings, Fetter Lane, London, EC4A 1NL
Date: 25 September 2019

Before :

MR JUSTICE WALKER

- -

Between :

Ms Monique TRAINER	Claimant and Respondent
- and -	
CRAMER PELMONT (a firm)	Third Defendant and Appellant

- -

- -

Mr Tom Asquith (instructed by Kennedys Law LLP) for the third defendant and appellant

Mr Simon Wilton (instructed by The Specter Partnership) for the claimant and respondent

Hearing dates: 21 February and 21 May 2019

- -

Approved Judgment

Mr Justice Walker:

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A. Introduction:

A1 The appeal, Limitation Act 1980 & proceedings below

A1.1 The appeal and the ordinary time limit

1. This appeal from an order of Deputy Master Bard ("the master") dated 17 September 2018 concerns section 14A of the Limitation Act 1980 ("the 1980 Act"). Normally, under section 2 of that Act, a claimant saying that a defendant is responsible in the tort of negligence for damage to the claimant may not bring an action more than six years after the date that the damage occurred. The reason is that section 2 sets an ordinary time limit of six years after a cause of action in tort accrues, and a cause of action in the tort of negligence accrues when real damage, as distinct from minimal damage, is suffered: see paragraph 3 of the speech of Lord Nicholls in *Haward v Fawcetts* [2006] UKHL 9, [2006] 1 WLR 682 ("*Haward*").

A1.2 Special three-year time limit: section 14A alternative starting point

2. In cases to which it applies, however, section 14A of the 1980 Act enables a person claiming for the tort of negligence to benefit from a special time limit of three years from what I shall call "the section 14A alternative starting point". The section 14A alternative starting point is the earliest date when a person whom I shall call "a vested person" first had both what I shall call "section 14A cumulative knowledge" and a "section 14A right".

3. On the appeal it is said that questions arise as to the position where an individual was a vested person, ceased to be such a person when assets were transferred to a trustee in bankruptcy, and became such a person again pursuant to an assignment of rights from the trustee. The main questions, however, concern section 14A cumulative knowledge.

A1.3 Section 14A cumulative knowledge

4. There are in section 14A three essential knowledge requirements, all of which must be met before time can start to run under the section 14A alternative limitation period. This means that, on the assumption that there is a vested person who has a section 14A right, time will start to run only when such a person has actual or constructive knowledge of all three things. In certain circumstances knowledge may be needed of additional things, but those circumstances do not arise in the present case.

5. It is common ground that as regards relevant "knowledge" provisions, time will not start to run merely on the basis of suspicion. As stated by Lord Nicholls at paragraph 9 of his speech in *Haward*, "knowledge" for this purpose means that:

> … the claimant must know enough for it to be reasonable to begin to investigate further.

A1.4 Material facts knowledge, causation knowledge, identity knowledge

6. The three things needed in the present case for section 14A cumulative knowledge are:

   (1) knowledge of the material facts about the damage in respect of which damages are claimed ("material facts knowledge");

   (2) knowledge that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence ("causation knowledge"); and

   (3) knowledge of the identity of the defendant ("identity knowledge").

A1.5 Proceedings below

7. The proceedings below were begun by the claimant ("Mrs Trainer"), who is the respondent to the appeal, on 4 October 2017. On that day her claim form in Claim Number HQ17X03613 was issued against six named defendants. The first defendant, Mr Nicholas Trainer, is a solicitor and was Mrs Trainer's husband prior to their divorce by decree absolute on 28 September 2010. I shall refer to the proceedings leading to this divorce as "the matrimonial proceedings". The second defendant, Downs Solicitors LLP ("Downs"), acted as Mr Trainer's solicitor in certain property matters, and on certain occasions as solicitors for Mrs Trainer. The four other defendants do not call for specific mention at this stage.

8. The present appellant Cramer Pelmont, through Mr Paul Cramer and Mr Eric Charnley, acted as Mrs Trainer's solicitors in certain property matters and in the matrimonial proceedings. It also acted for Mr Trainer on occasion. However it was not named as a defendant when the claim form was issued.

9. On 31 January 2018, the claim form was amended so as to remove the original third to sixth defendants. In their place Cramer Pelmont was added as third defendant. The claim form as so amended was served on Cramer Pelmont on 5 February 2018. It stated that particulars of claim would follow. In the meantime it gave "brief details of claim", with underlining and crossing out to show changes from the original version:

> Claim for damages in tort <u>and/ or equitable compensation and/ or account for breach of trust and/ or</u> breach of contract and/ or breach of fiduciary duty and/ or pursuant to the Misrepresentation Act 1967 and or for other relief arising from the circumstances leading to the

> claimant entering into a Deed of Variation to a sale contract and other documentation, on ~~10~~ 5 October 2011 resulting in the claimant receiving significantly less consideration on the sale of the properties known as and situate at Wildwood Lodge, 9 North End, London, NW3 7HH and 4 North End, London NW3 7HL than she was originally entitled to, and undermining her entitlement to receive an equal share in such pursuant to an order of DJ Robinson of the Family Division dated 28 September 2010, given that the first defendant ultimately received a greater share following a separate secret agreement for deferred consideration.

10. The amended brief details specified an important date: they said that it was on 5 October 2011 that Mrs Trainer entered into "documentation" which resulted in loss to her. When the original claim form was issued on 4 October 2017, it was just within the six-year time limit normally applicable to an action founded on tort. But at that stage Cramer Pelmont had not been named as a defendant. Under s 35(1) of the 1980 Act the effect of the amendment, unless set aside, would be that the claim against Cramer Pelmont must be treated as having been made when the proceedings were issued on 4 October 2017 – a stage at which the claims against Cramer Pelmont would have been within the normal 6 year time limit. However Cramer Pelmont contended that relevant claims were, at the time of the amendment on 31 January 2018, time barred, not only under the normal 6 year time limit but also under s 14A.

11. Cramer Pelmont accordingly made an application under CPR17.2 asking the court to disallow the amendment naming it as an additional defendant. This application, along with others, was argued before the master at a hearing on 17 July 2018. It is common ground that the critical question for the master was whether, at the date of the amendment on 31 January, it was reasonably arguable that the claim against Cramer Pelmont was time barred. If so, allowing the amendment would deprive Cramer Pelmont of a potential limitation defence. It is well established that the right

course in those circumstances would be to disallow the amendment. This would leave Mrs Trainer to fall back on fresh proceedings in which the court could determine whether or not she was indeed entitled to the benefit of section 14A.

12. Mrs Trainer has, on a precautionary basis, already begun such proceedings. I shall refer to them as “the precautionary proceedings”.

13. In a detailed twenty-five page judgment, the master set out reasons for concluding that it was not reasonably arguable that Mrs Trainer’s claim against Cramer Pelmont was time barred: on the contrary, she had effectively shown she was entitled to judgment on any issue that might have arisen in fresh proceedings concerning her ability to avail herself of section 14A. He accordingly refused Cramer Pelmont’s application to disallow the amendment. In the present appeal against that conclusion Mr Tom Asquith, instructed by Kennedys Law LLP, appears for Cramer Pelmont, and Mr Simon Wilton, instructed by the Specter Partnership, appears for Mrs Trainer. On both sides the representation is identical to the representation below. I am grateful to the legal teams on both sides for the care with which written material has been assembled and oral arguments have been presented.

A2 Key events and claims

A2.1 Wildwood Lodge, 4 North End and the matrimonial consent order

14. The brief details of claim, set out in section A1.5 above, mentioned two properties. I shall refer to them as “Wildwood Lodge” and “4 North End”. They, along with two adjacent properties, were jointly owned by Mr and Mrs Trainer.

15. On 28 September 2010 a consent order (“the matrimonial consent order”) was made in the matrimonial proceedings. It provided, among other things, for each of the four

properties to be "sold forthwith on the open market", and for the proceeds of sale to be used for certain specified payments, after which the balance was to be paid out to Mr and Mrs Trainer in equal shares.

16. On 31 March 2010 Mr and Mrs Trainer had in fact contracted to sell all four properties to Allanton Limited ("Allanton"), a company with two shareholders, Mr Dodi and Mr Niemiec. Each property was the subject of a separate contract. Cramer Pelmont acted on behalf of both Mr and Mrs Trainer for the purpose of exchange of each of the contracts. All involved appear to have proceeded on the basis that these contracts would fulfil the requirements of the matrimonial consent order.

17. Mr and Mrs Trainer envisaged that the Wildwood Lodge sale would give each of them a net benefit of £1.45 million. However the Wildwood Lodge contract included special condition 9:

> 9. Completion shall take place 28 days after the sellers have obtained planning permission in respect of the proposed development at 4 North End, London NW3 7HL which for the avoidance of doubt is for the demolition of the house at 4 North End and for permission to erect 2 new houses at 4 North End being of not less than a total of circa 10,000 sq ft.
>
> If the said consent is not obtained within 18 months of the date of this agreement the buyer will have the right of… rescinding this agreement…

18. Thus, if Mr and Mrs Trainer wanted to ensure that Allanton could not disrupt the Wildwood Lodge sale by relying on special condition 9, it was essential that the 4 North End planning permission should, as stated in special condition 9, be for not less than a "total of circa 10,000 sq ft". On 7 February 2011 planning permission was secured for two new houses at 4 North End, comprising what was described as

10,113 sq ft gross and 9,612 sq ft net. Later in February 2011, Allanton completed the purchase of 4 North End.

A2.2 Renegotiation: Terms of Contract & Mrs Trainer's asserted lack of knowledge

19. In Mrs Trainer's particulars of claim assertions are made:

(1) in para 21, that unbeknown to her Mr Trainer had also agreed with Allanton, as an inducement to exchange contracts, that he would be paid a further £50,000 by way of a separate and undisclosed payment, to be paid to him by Allanton four months after the date of exchange, and to be credited against the sums due on completion of the sale of Wildwood Lodge;

(2) in para 25, that in October 2010 Allanton completed its purchase of the two adjacent properties, that Cramer Pelmont acted for Mrs Trainer in those respects, and that the previously negotiated £50,000 and a further undisclosed £25,000 advance payment were made available to Mr Trainer by Allanton in respect of the sale of Wildwood Lodge on terms that they, or at least the first £50,000 and £12,500 of the second £25,000, would be deducted from the sums payable on completing the sale;

(3) that (paras 28 to 30) if (which Mrs Trainer denied) the planning consent for 4 North End had to be at least 10,000 sq ft measured by net internal area, then there were contractual provisions which regulated the parties' rights in the events which had happened;

(4) that (para 31) notwithstanding those contractual provisions, Allanton sought to renegotiate the terms of the Wildwood Lodge sale contract, "initially via Mr Trainer alone";

(5) that (para 32) an email of 25 March 2011 from Mr Trainer to Mr Dodi attached a document which I shall call "the Terms of Contract" and which the particulars of claim summarised as:

> … indicating that the sale price could be *"£5,300,000 (or as agreed to accommodate new agreement)*", that Mr Trainer would receive £1.5 million, that Mr Trainer would take £295,000 on completion of the sale, and that Mr Trainer was prepared to accept deferred consideration referable to the proceeds of an onward sale by Allanton on completion of the development in that he would receive 15% of the gross sale proceeds above £3 million, less £37,500, plus £75,000 every 6 months if the development was not complete within 2 years.

(6) that (para 33) Mrs Trainer was not privy to or bound by the negotiations between Allanton and Mr Trainer, the objective of which was to reduce the amount payable by Allanton on completion, principally at Mrs Trainer's expense;

(7) that (para 34) on 30 March 2011 Mr Trainer emailed his solicitor, Ms Baldwin of Downs:

> "If you're ok with it we can complete on a sale price of some amount in excess of £4.5m which will cover the mortgages, my £1.5m and Monique's £600k. Avi [Mr Dodi] is confident Monique [Mrs Trainer] will not argue on the figures. Remember our agreement is obviously secret from her and Cramer".

(8) that (para 35) Mr Trainer and Allanton's shareholders agreed that Mr Trainer would become a shareholder and director of Allanton after completion of the sale of Wildwood Lodge;

(9) that (para 36) in August 2011 Mrs Trainer was told by Mr Dodi that Allanton was not obliged, or prepared, to complete its purchase of Wildwood Lodge because the planning permission for 4 North End was less than 10,000 sq ft, and after some negotiation told Mrs Trainer that the most she could have on completion was £300,000;

(10) that (para 37) Mrs Trainer:

> … discussed all this with Mr Trainer and he gave an account of what he said he had agreed with Allanton (albeit without disclosing the payments of £50,000 and £25,000), he suggested that the contractual position was difficult and that there would be difficulties in taking legal action against Allanton, which was a shell company, for not completing on the originally agreed terms, and that he was getting much the same as [Mrs Trainer] by way of a small payment on completion and that there was only a possibility that he would get more, but only because he was prepared not to insist on payment of his entire share upon completion and instead would receive payment of the remainder, but only if and when the development was completed successfully.

(11) that (para 38) Mrs Trainer, who was not offered a deferred consideration:

> … understood she had no alternative but to agree to the terms proposed on the footing they were the best available given the legal rights of the parties, and, absent a proper understanding of what was proposed or any advice from a solicitor, she was prepared to proceed on the basis proposed.

(12) that (para 39) Mrs Trainer:

> … was not assisted in any of these respects by the fact that she was in a vulnerable position, having been recently divorced and separated from her former husband and family, having been obliged to leave the former matrimonial home, in respect of which Mr Trainer had the benefit of an occupation order and a residence order for the children, and also drinking heavily.

A2.3 Mrs Trainer's 15 Sep 2011 "taking advice from Cramer Pelmont" email

20. On 15 September 2011 Mrs Trainer sent an email via her daughter to Ms Baldwin of Downs saying "*I authorise you to act for me on the completion of Wildwood Lodge, I'm taking advice on all commercial and matrimonial matters from Cramer Pelmont*". In paragraph 43 of her particulars of claim Mrs Trainer said she sent this email at the request of Mr Trainer.

A2.4 Ms Baldwin's 22 Sep 2011 "enclose documentation" email to Mr Cramer

21. On 22 September 2011 Ms Baldwin of Downs emailed Mr Paul Cramer:

> We are hopeful of an exchange and simultaneous completion very shortly on this matter. I enclose the documentation as it currently stands, and as it affects Monique:
>
> 1. A copy of the latest (5th) version of the Deed of Variation, an updated version is anticipated shortly which I will forward to you. The amendments to be made do not actually affect Monique's position under this Contract.
>
> 2. I also enclose a copy of the draft Transfer. The figure in the Transfer varies slightly from that in the Deed of Variation but they will of course coincide when the exact date for completion is known.
>
> Monique has also paid to me the sum of £3,600.00 on account of costs, these include my firm's costs and Counsel's fees. Her share of these fees will be deducted from her figure of £275,000.00. Please let me have the bank details to which Monique's share should be forwarded on completion.

22. It will be seen that Ms Baldwin's email said that she enclosed the draft Deed of Variation and the draft Transfer. It is not, however, clear whether these documents were in fact attached to the email.

A2.5 The Buswell 22 Sep 2011 "on behalf of Monique" email to Mr Cramer

23. Also on 22 September 2011 an email was sent from an email address of a person called Matt Buswell. The subject line stated, "sent on behalf of Monique". The email was sent to Mr Paul Cramer of Cramer Pelmont:

> Dear Paul,
>
> affidavit should read as follows, we agreed the consent order of the 7 October will now be varied in unequal terms of future financial interests which will be beneficial to me, which is related to the sale of the matrimonial home as a matter of urgency.
>
> Monique

A2.6 The matrimonial variation deed, distinct from the Deed of Variation

24. The matrimonial aspects of the new arrangements were handled for Mrs Trainer by Mr Eric Charnley of Cramer Pelmont. What was envisaged was that the Family Court would approve proposed amendments to the matrimonial consent order. On 23 September 2011 Mr Charnley reported to Downs that the court had refused to amend that order. In accordance with a suggestion made by the Family Court, Mr Charnley drew up a proposed document which I shall refer to as "the matrimonial variation deed". Under this deed Mr and Mrs Trainer would agree that as regards the sale of Wildwood Lodge the matrimonial consent order would not apply. Instead, the proceeds of sale of Wildwood Lodge should, after being used to discharge relevant mortgages, be used to pay the conveyancing costs and disbursements of Downs, and to pay barrister's fees in connection with the sale, after which they would be distributed by making a payment to Mrs Trainer of £300,000 and making payment of the balance to Mr Trainer.

25. The proposed matrimonial variation deed is to be distinguished from the proposed Deed of Variation. The former would, in its final version, be an agreement which concerned Mr and Mrs Trainer only. The latter, which was referred to in Ms Baldwin's 22 September 2011 "enclosed documentation" email to Mr Cramer (see section A2.4 above), would in its final version be an agreement affecting both Mr and Mrs Trainer, on the one hand, and Allanton on the other.

A2.7 Events on 5 October 2011 and their consequences

26. On 5 October 2011 Mrs Trainer went to the office of Allanton's solicitors, and executed a deed of variation of the sale contract for Wildwood Lodge ("the Deed of Variation"), the matrimonial variation deed, and a deed of transfer.

27. The particulars of claim (para 50) said that Mrs Trainer:

> … was unattended by any solicitor and she executed the documents without having received any advice from Downs or Cramer Pelmont, without a proper understanding of the documentation, and simply believing that it reflected what she had previously been told was agreed, that the revised terms were the best available, that she and Mr Trainer were receiving similar sums on completion, and that she had no alternative but to execute the documents in the form proposed.

28. In her first witness statement ("Mrs Trainer 1") dated 30 April 2018 Mrs Trainer said at paragraph 16 that she did not have "the opportunity to read through the transactional documentation" and instead "just signed them" together with the matrimonial variation deed.

29. As to the effect of the documentation signed by Mrs Trainer on 5 October 2011, paragraphs 51 to 57 of the particulars of claim stated:

> 51. By the Deed of Variation… it was agreed:

> 51.1 that the sale price payable for Wildwood Lodge would be varied from £5.3 million and that in addition to the £150,000 deposit and £158,000 paid by way of instalments under the Bank of Scotland charge, for which credit would be given, Allanton would pay a sufficient sum to discharge the charges to the Bank of Scotland and the Nationwide Building Society (now c.£2.4 million), and pay £300,000 to [Mrs Trainer] and £400,000 to Mr Trainer;
>
> 51.2 that a further £100,000 would be payable to Mr Trainer on 5 February 2012 or, if earlier, upon his vacating Wildwood Lodge (in which he had continued to reside with the couple's children);
>
> 51.3 that Mr Trainer would also be entitled to receive deferred consideration after an onward sale by Allanton once the development was complete, or on 2 January 2015 if no onward sale had occurred by that date, the deferred consideration being calculated as (the onward sale price - £3 million) x 15%, less £137,500.
>
> …
>
> 55. Neither the Deed of Variation nor the Transfer Deed, when executed by the claimant identified the total sum payable on completion.
>
> 56. However, on the face of the documentation it was implicit that the total consideration payable by Allanton at the point of completion was approximately £3.5 million not £5.3 million (£150,000 deposit plus £40,000 contribution to fees plus £158,000 mortgage payments plus £2.4million redemption figure plus £300,000 plus £400,000), and that Allanton was also obliged to pay a further £100,000 and the deferred consideration to Mr Trainer as detailed in the Deed of Variation.
>
> 57. Further, although not stated in either the Deed of Variation or the Transfer Deed, Allanton and Mr Trainer also remained intent on treating Allanton as having advanced a total of £75,000 of which £62,500 (£50,000 plus £12,500) was notionally to be deducted from the sums due on completion: those payments remained undisclosed payments in respect of Wildwood Lodge for the exclusive benefit of Mr Trainer.

A2.8 Mr Charnley's 7 October 2011 "To whom it may concern" document

30. On 7 October 2011 Mr Charnley on behalf of Cramer Pelmont signed a document headed "TO WHOM IT MAY CONCERN". The document stated:

> Re: Monique Trainer

> I hereby certify that I have explained the terms and implications of the Deed which my client, Monique Trainer anticipates entering into with her former husband Nicholas Trainer in relation the sale of the former matrimonial Home, Wildwood Lodge, 9 North End, London NW3 7HH.
>
> In particular I have drawn her attention to the fact that the lump sum of £300,000.00 she proposes to accept on the sale of the property is potentially much less than she would be entitled to under the terms of the Consent Order entered into and approved by the court in her divorce.
>
> Having considered the above my Client wishes to enter into the deed in consideration of the accelerated receipt by her of the lump sum, which she wishes to utilise in another transaction.

A2.9 Completion, bankruptcy and the Ebgui commission, freezing order & trial

31. On 10 October 2011 the sale of Wildwood Lodge was completed. Paragraph 63 of the particulars of claim states that Mrs Trainer received £300,000 in addition to the £75,000 which she had received as her share of the deposit.

32. When contracts were exchanged in March 2010, and at the time of the matrimonial consent order in September 2010, it was envisaged that Mr and Mrs Trainer would use the completion monies in order to pay to Mr Joseph Ebgui a commission of up to £67,500. Within days of completion occurring, Mr Ebgui brought proceedings against Mr and Mrs Trainer seeking sums he said were owing to him, and in support of his claim obtained an order freezing assets of Mr and Mrs Trainer. In those proceedings Mr and Mrs Trainer were represented by Bolt Burdon Solicitors ("Bolt Burdon"), a firm in which Mr Trainer was an assistant solicitor. On 17 October 2011 HCLS LLP ("HCLS"), solicitors for Mr Ebgui, wrote to Bolt Burdon solicitors on a number of matters relating to Mr Ebgui's claim. The third to last paragraph of their letter stated:

> We have been presented with evidence… that Nicholas Trainer has, without Monique Trainer's knowledge or consent, conducted negotiations and obtained for himself…further payments of £50,000 and £25,000 in respect of the purchase of the properties.

33. On 28 September 2012 Mrs Trainer was made bankrupt. The official receiver was appointed as trustee in bankruptcy: see section A3 below.

34. In June 2014 Mr Ebgui's claim against Mr and Mrs Trainer came on for trial before His Honour Judge Gerald. For the purposes of the trial Mr Trainer made a witness statement in October 2011 which exhibited the Terms of Contract. Mrs Trainer also made a witness statement in October 2011. In it she said that she had:

> read the witness statement of [Mr Trainer] and confirm that insofar as it relates to matters in my knowledge… it [is] true.

35. Each of Mr and Mrs Trainer gave evidence at the trial. Passages cited to the master from a transcript of Mr Trainer's evidence are set out in section A7 below.

A2.10 Mrs Trainer's allegations against Mr Trainer, Downs and Cramer Pelmont

36. On the basis of events and assertions described above, among others, the particulars of claim made allegations of liability against Mr Trainer, Downs and Cramer Pelmont:

    (1) in relation to Mr Trainer:

        (a) it was alleged that he held on trust for Mrs Trainer and/or was obliged to account for and/or pay to Mrs Trainer 50% of any sums received on account of or in connection with Wildwood Lodge and/or its intended eventual sale, insofar as such sums were received by him prior to entering into the Deed of Variation and matrimonial variation deed;

(b) the sums in respect of which Mrs Trainer was said to be entitled to a half share in this regard were described as:

> the sums of £50,000 and £25,000 (or at least £12,500 thereof) and any such further sums, not yet disclosed, as Mr Trainer may have received prior to … entry into the Deed of Variation and [matrimonial variation deed];

(c) it was additionally or alternatively said that, insofar as there was any further agreement, not disclosed to Mrs Trainer or referred to in the Deed of Variation or matrimonial variation deed, Mr Trainer was obliged to account for all sums received on account of or in connection with Wildwood Lodge and/or its intended eventual sale, whenever such sums were received; and

(d) it was further alleged that in addition or in the alternative Mrs Trainer had suffered loss:

> in the like sums for which Mr Trainer is obliged to pay equitable compensation to [Mrs Trainer].

(2) in relation to Downs:

(a) it was alleged that Downs was retained by Mrs Trainer in relation to the Deed of Variation and the matrimonial variation deed and the completion of the sale of Wildwood Lodge, and that Downs owed her obligations in contract and tort to exercise reasonable skill and care in the conduct of the retainer;

(b) if there were no such retainer, then it was alleged that Downs owed Mrs Trainer a free-standing tortious duty of care to advise her as required in relation to the Deed of Variation and the matrimonial

variation deed and in respect of the completion of the sale of Wildwood Lodge;

(c) what I shall call "general" breaches of these duties were asserted, involving, in summary, failure to give adequate advice to Mrs Trainer on her rights and those of other parties, failure to impress upon her the disadvantages, consequences and inequities of the Deed of Variation, failing to advise her to enter into various alternative courses, and failure to ensure that she understood the proposed terms for completion;

(d) there were also specific allegations against Downs that it failed to ensure Mrs Trainer knew about the £50,000 and the £25,000 and any other sums advanced and/or to be credited to Mr Trainer, to ensure that Mrs Trainer and Cramer Pelmont were aware of ancillary agreements and arrangements to be entered into by Mr Trainer, and to ensure that Cramer Pelmont were provided with all relevant information to enable it to advise Mrs Trainer.

(3) as against Cramer Pelmont, it was asserted:

(a) that either as a result of a retainer or otherwise, Cramer Pelmont owed similar duties to those allegedly owed by Downs to Mrs Trainer;

(b) that as regards the general breaches of duty alleged against Downs, Cramer Pelmont was in breach of its duties to Mrs Trainer in similar respects; and

(c) specifically in the case of Cramer Pelmont, that it had been in breach of duty by writing the "to whom it may concern" document giving the misleading impression that Mrs Trainer had been properly advised by an independent solicitor in relation to relevant matters, and, if Cramer Pelmont did not have a complete set of documents or all the information it needed to advise, by failing to ensure that it had all relevant documentation and a full understanding of the situation in which Mrs Trainer found herself.

37. Taken at face value, both the amended "brief details of claim" and Mrs Trainer's particulars of claim included allegations of breach of contract. The master noted, however, at paragraph 14 of his judgment that allegations against Cramer Pelmont asserting breach of contract must be disallowed. This was accepted by Mrs Trainer. The reason is that the benefits given by section 14A apply only to claims for the tort of negligence. There is no comparable provision assisting claimants who sue for breach of contract. Prior to issue of the amended claim form all contractual claims by Mrs Trainer against Cramer Pelmont had become statute barred under section 5 of the 1980 Act. The consequence is that Mrs Trainer cannot now maintain those contractual claims.

A3 Bankruptcy discharge, Sears Tooth and the assignments

38. As noted in section A2.9 above, Mrs Trainer was made bankrupt on 28 September 2012. On that day all her assets became vested in the official receiver as her trustee in bankruptcy.

39. On 23 December 2015 Mrs Trainer was discharged from bankruptcy. This did not, however, mean that assets which vested in the official receiver automatically re-vested in Mrs Trainer.

40. Mrs Trainer says that after her discharge from bankruptcy she attended the Citizens Advice Bureau at the Royal Courts of Justice in the hope of finding out what she might be able to do, and they suggested that she return to a firm of solicitors, Sears Tooth, which had previously advised her on matrimonial matters. According to a letter written by the official receiver on 4 May 2017, solicitors for Mrs Trainer had approached the official receiver in March 2016 with a proposal for taking an assignment, and this was followed by a letter supported by a bundle of background papers.

41. What was proposed in March 2016, however, did not involve an assignment of any claim against Cramer Pelmont.

42. On 15 September 2017 Sears Tooth wrote to Mr Cramer. I set out the body of the letter with paragraph numbers inserted in square brackets:

> [1] Monique Trainer is a former client of yours.
>
> [2] We are assisting Monique Trainer in seeking to establish the sequence of events which led her to receiving the sum of £300,000 from the sale of Wildwood Lodge and associated properties in circumstances where her former husband, also the joint owner of properties received a substantially greater sum. He received circa £400,000 on exchange of contracts and £100,000 for vacating the property plus a further £75,000 after the expiry of a period of two years from the date of sale.
>
> [3] We appreciate that you did not advise our client in relation to any arrangements reached with Avi Dodi/Allanton and Nick Trainer.
>
> [4] You may recall that you were instructed by Monique to act for her alone up to and including the exchange of contracts on Wildwood and

the associated properties whereas Mr Trainer had instructed Alison Baldwin of Down's solicitors.

[5] We are aware that just prior to completion Monique Trainer moved her instructions to Alison Baldwin. We assume this was because only one solicitor can complete for joint beneficial owners of a property.

[6] Our client has now had the opportunity to review some of the files from Alison Baldwin and also files relating to an action brought against Mr and Mrs Trainer by Joseph Ebgui.

[7] On reviewing these files she read for the first time the enclosed Deed of Variation (tab 1). It transpires that the Deed of Variation was drafted by Christopher Cant of Counsel on the instruction of Alison Baldwin. Our client was charged for the drafting as detailed on the enclosed bill from Alison Baldwin (tab 2).

[8] Alison Baldwin maintains, as we understand it, that she acted for our client on the conveyance but not in relation to commercial matters in respect of which she maintains that you acted for our client. By this we understand that it is sought to suggest that you acted for our client in relation to a deed of variation entered into by the parties which was drafted by Christopher Cant of Counsel.

[9] We find this hard to understand as the copy of the file our client retrieved from yourself does not include any correspondence with Alison Baldwin in relation to the Deed of Variation or in fact any correspondence (to my knowledge on Alison Baldwin's files).

[10] Further she has of course been charged for the drafting of the same by Counsel in which case presumably Alison Baldwin would have had to have put forward our client's Instructions to Counsel in relation to the Deed.

[11] There was an email exchange between you and Alison Baldwin concerning which of you had been retained to advise Monique (tab 3). Of particular concern to us is the email dated 1 March 2011 from Nick Trainer to Alison Baldwin which states that:

"*If you are ok with it we can complete on a sale price of some amount in excess of £4.5m, which will cover the mortgages, my £1.5m and Monique's £600k. Avi is confident Monique will not argue on the figures. Remember our agreement is absolutely secret from her and Cramer.*

[12] It is clear to our client that you also were not aware of monies being advanced to Nick Trainer were not being advanced to our client as this fact was specifically kept secret from you. There are further emails from Nick Trainer to Alison Baldwin concerning an advance of £50,000 which specifically says *'don't tell Paul Cramer'*.

> [13] We seek confirmation from yourself that you agree that you did not advise Monique Trainer in relation to the enclosed Deed of Variation. Further that you did not have sight of this Deed of Variation and it has never been forwarded to you by Alison Baldwin or any other person including Simon Lazarus who acted for Avi Dodi or Christopher Cant of 5 Stone Buildings who was the barrister involved for Alison Baldwin or indeed any other person. Further if you had seen it you would have advised Monique that she should receive the same funds from the sale of the property as Mr Trainer.
>
> [14] Our client undoubtedly should have been advised by a solicitor on the contents of and the net effect of the Deed as it provided Nick Trainer with substantially more on completion than our client.
>
> [15] We should be grateful if you would confirm that our understanding of the situation and sequence of events is correct.

43. Mr Cramer replied by email on 27 September 2017. He said that he "at no time was… ever advised as to the Deed of Variation referred to in your letter being in existence …".

44. Mrs Trainer said that it was in these circumstances that the claim form was issued 4 October 2017 against the original defendants but not against Cramer Pelmont. In November 2017 Downs forwarded to West London Law, new solicitors acting for Mrs Trainer, email correspondence which was said to make it "beyond question" that Cramer Pelmont acted for Mrs Trainer with regard to advising her upon the terms of the Deed of Variation and with regard to the matrimonial consent order. After an exchange of correspondence with Mr Cramer steps were taken on behalf of Mrs Trainer to bring about an assignment from the official receiver of Mrs Trainer's rights to bring further claims, including claims against Cramer Pelmont. Those rights were assigned on 31 January 2018, and the amended claim form was issued that day.

A4 Limitation Act 1980

45. So far as material, the 1980 Act provides:

14A. Special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual

(1) This section applies to any action for damages for negligence, other than one to which section 11 of this Act applies, where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued.

(2) Section 2 of this Act shall not apply to an action to which this section applies.

(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) below.

(4) That period is either -

> (a) six years from the date on which the cause of action accrued; or
>
> (b) three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph (a) above.

(5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.

(6) In subsection (5) above "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both-

> (a) of the material facts about the damage in respect of which damages are claimed; and
>
> (b) of the other facts relevant to the current action mentioned in subsection (8) below.

(7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(8) The other facts referred to in subsection (6)(b) above are-

> (a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and
>
> (b) the identity of the defendant; and
>
> (c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.

(9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.

(10) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire;-

> (a) from facts observable or ascertainable by him; or
>
> (b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;

but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

A5 Approach of the appeal court

46. Under CPR 52.21(1), so far as material, the appeal is limited to a review of the decision of the master unless the court considers that in the circumstances of the appeal it would be in the interests of justice to hold a rehearing. Neither side suggests that the interests of justice require a rehearing. I proceed accordingly on the basis that the appeal is limited to a review. On this basis, CPR 52.21 provides that the appeal court will allow an appeal where the decision of the lower court was:

(a) wrong; or

(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

47. It is not suggested that there was any relevant irregularity in the proceedings before the master. Accordingly, proceeding by way of review, the question I must decide is whether the master's decision was wrong. In the present case there has been an evaluative judgment by the master. In those circumstances, I proceed on the basis that the appeal court is reluctant to interfere with such a decision, but will do so where the decision below has taken into account immaterial factors, omitted to take into account material factors, erred in principle or come to a decision that was either impermissible or "plainly wrong": see the notes in *Civil Procedure 2019* at page 1824. Additionally, on the present appeal each side has, without objection from the other, advanced submissions differing from those below. This has led me to reach conclusions on material factors which were not highlighted in submissions before the master.

48. There is a particular feature to mention here. This is a case where the master's task was only to decide whether there was a reasonable argument that the claim against Cramer Pelmont was time-barred. If there is such an argument, then the question whether the claim is indeed time-barred is to be determined in the precautionary proceedings: see section A1.5 above.

49. On the appeal the role of this court is to confine itself to determining whether the master was right to conclude that there was no reasonable argument that the claim against Cramer Pelmont was time-barred. If, on an issue relevant to that question, there may be a reasonable argument open to Cramer Pelmont, it is important that this court should not pre-judge the eventual determination of that issue in the precautionary proceedings.

A6 Procedural history, including disappointing events

A6.1 Events prior to 15 July 2018

50. Cramer Pelmont's application notice was issued on 26 February 2018. It sought to dispose of the claim against Cramer Pelmont by a number of different routes. I am concerned with only one of these routes: the application to disallow the amendment to Mrs Trainer's claim form introducing Cramer Pelmont as an additional defendant (see section A1.5 above). This application was made under CPR 17.2. Matters relied on in that regard were set out in a first statement of Mr Patric Rouendaal, the solicitor at Kennedy's Law LLP with conduct of the matter on behalf of Cramer Pelmont. Mrs Trainer 1 (see section A2.7 above) was made on 30 April 2018 in response to the application. It was supplemented by a second statement on 3 July 2018 ("Mrs Trainer 2") and by a third statement made on 13 July 2018 ("Mrs Trainer 3"). This was followed by a second statement of Mr Rouendaal on 13 July 2018 ("Rouendaal 2"). Exhibited to Rouendaal 2, among other things, was the email of 22 September 2011 sent from Mr Buswell's email address (see section A2.5 above).

A6.2 Disappointing events: 15, 16 and 17 July 2018

51. In response to Rouendaal 2 Mrs Trainer made a fourth witness statement on Monday 16 July 2018 ("Mrs Trainer 4"). Paragraph 10 of Mrs Trainer 4 referred to the email of 22 September 2011 and stated:

> I do not understand that email because it seems to indicate that the variation to the consent order would lead to unequal interests which would be "*beneficial to me*" rather than indicating that I understood I would get less than Mr Trainer. However, I confirm that I have never seen that email before and I do not know who Mr Buswell is. Whatever it may purport to be it was not an email sent on my behalf.

52. This passage in Trainer 4 formed part of what the master described as “a surprising, and highly disappointing, sequence of events”. The remainder of the sequence was described by the master in paragraph 35(b) and (c) of the master’s judgment:

> (b) Mr Rouendaal found a way to contact Mr Buswell, who was in South Africa, and after a telephone call they had an exchange of emails, in which Mr Buswell explained that he had around summer /autumn 2011 spent time with C, who was a friend, and had indeed stayed in her spare room for some while. He confirmed that the email address was his, that he had a distant memory of having sent some three emails for C, and that he had been out of touch with her for some years;
>
> (c) Mr Buswell also explained, however, that he had very recently heard from C, and he forwarded to Mr Rouendaal a string of emails between himself and C, which I summarise as follows;
>
> (i) 15 July 2018, 2:23 pm C asked “*Can you call me*” and gave her number;
>
> (ii) 16 July, 10:38, Mr Buswell replied “*My god! Tapper! How the devil are you. I’ll call this evening.*”
>
> (iii) 16 July 12:08, C responded “*Please call ASAP. PLEASE.*”;
>
> (iv) 16 July 11:56 [there being a one-hour time difference] Mr Buswell – “*I can’t. Till later. I’m at the navy base. I’m not allowed to use my phone here. What’s up?*”
>
> (v) 16 July 13:20 – C: “*Will let you know when you call. Xx”*
>
> Mr Buswell then spoke to C (who by that time had signed her witness statement) and told her he had been in touch with, and spoken to, Mr Rouendaal;

53. The submissions that were made concerning this sequence of events, along with comments by the master, were set out by the master in the remainder of paragraph 35 and in paragraphs 36 and 37. For convenience, I record them in three stages. The first stage is in paragraph 35(d):

> (d) on 17 July, at the hearing, Mr Wilton offered an apology on behalf of C, and an explanation that I did not altogether understand. He

suggested that at first C had not recollected Mr Buswell, and that everything in the case was "*free-wheeling, fast-moving and lastminute*" (and it was indeed true that copious evidence emerged just before the hearing, as described above). She suggested that her eventual recollection of him proceeded "*in parallel*" with the preparation of the new (4th) witness statement in which she had denied such knowledge. But it seems clear that she allowed her witness statement to be signed and served after she had made her first approach to contact Mr Buswell by email.

54. The second stage comprises a concluding section of paragraph 35, which for convenience I shall call paragraph [35A], along with paragraph 36:

> [35A] Mr Asquith pressed the point that C had clearly attempted to contact her old friend in order to warn him what she was saying, and to interfere with a (potential) witness. He contended that for her to have professed no knowledge of Mr Buswell in a witness statement on Monday afternoon, when she had sent an email to him on Sunday and exchanged emails with him during Monday, could only have one explanation, which was that she was trying not only to mislead the court into disregarding the initial email which Mr Buswell had sent on her behalf, but also to subvert Mr Buswell into supporting her narrative (or at the very least to warn him about her proposal to disown him and the email he had sent so as to secure some co-operation).
>
> 36. It is hard to dissent from this proposition. Mr Asquith then suggested that, on the basis of this material, I should consider striking out the entire claim – at least as against D3 – as an abuse of process, but I made it clear that I was not prepared to consider such a step on a peremptory basis, and that if D3 wished to pursue that path then an application on notice, and proper argument, would be required. Following this indication D3 sought a short break, and then decided to press on with the instant application.

55. The third stage comprises paragraph 37:

> 37. Mr Asquith submits further that this sequence of events suggests that C may not have an altogether trustworthy approach to historical accuracy, and that I should view all the direct evidence that she gives about the history with a particular degree of caution. I have some sympathy with this. His Note goes further, and makes the point that "*If C cannot be trusted, then there is obviously (at least) a real chance that her date of constructive knowledge is not when she says it was*". Whilst I understand this point all too well, I do consider that – as Mr Wilton submits – it is necessary to avoid broad generalisation if possible, and I should rather drill down into the facts and the evidence;

> and I do consider that there is a wealth of contemporaneous documentation which assists me in getting to a conclusion.

A6.3 Judgment, corrected judgment & clarification response: 25 July to 20 Sep 2018

56. After conclusion of argument on 17 July the master reserved judgment. His initial judgment was given on 25 July 2018. It was in favour of Mrs Trainer: see section A1.5 above. A corrected judgment was handed down on 17 September 2018.

57. Cramer Pelmont made a request for clarification of the judgment. This was the subject of a response by the master on 20 September 2018. I summarise the judgment, and the master's response to the request for clarification, in section A7 below.

A6.4 Appellant's notice, appeal skeleton, grant of permission: 5 Oct to 4 Dec 2018

58. Cramer Pelmont's appellant's notice was filed on 5 October 2018. It included applications for expedition and for permission to rely upon new evidence. A skeleton argument in support was filed on 18 October 2018.

59. By an order dated 4 December 2018 Dingemans J granted Cramer Pelmont permission to appeal, and ordered a speedy hearing.

A6.5 Respondent's notice & Mrs Trainer's February skeleton: 8 & 15 February 2019

60. On 8 February 2019 Mrs Trainer filed a respondent's notice. The notice asked the appeal court to uphold the master's order on an additional ground. I set out that additional ground, with paragraph numbering added by me in square brackets for convenience:

> [1] If, which is denied, the [master] found that it was reasonably arguable that [Mrs Trainer] knew (actually or constructively) that she had suffered damage more than 3 years before amending the claim to add [Cramer Pelmont], then he was wrong in law and/or in fact to do so.

> [2] In the circumstances of this case, and on a correct application of section 14A of the Limitation Act 1980, it was only when [Mrs Trainer] knew (actually or constructively) both the precise terms she and [Mr Trainer] had agreed and that things could have been different that she knew she had suffered damage.
>
> [3] Furthermore, on the evidence before the [master] it was not reasonably arguable that [Mrs Trainer] discovered or could have been expected to discover more than three years before joining [Cramer Pelmont] either (1) the precise varied contractual terms upon which the sale of Wildwood Lodge had completed or (2) that [Mr and Mrs Trainer's] contractual rights had been such that [Mrs Trainer] had had an alternative and could have insisted on Allanton completing on the original terms or negotiating a different but more favourable outcome.

61. A skeleton argument ("Mrs Trainer's February skeleton") responding to the appeal was filed by Mrs Trainer on 15 February 2019.

A6.6 Appeal hearing, 21 Feb 2019: refusal of further evidence application

62. The appeal, for which a single day had been allocated, came on for hearing before me on 21 February 2019. On that day I heard argument for Cramer Pelmont in support of its application to adduce new evidence. I gave an oral judgment refusing that application, essentially because it seemed to me that the new evidence could reasonably have been obtained prior to the hearing before the master.

A6.7 Appeal hearing, 21 Feb 2019: Mrs Trainer's submissions on GOA4

63. On 21 February 2019, after giving my reasons for refusing Cramer Pelmont's application to rely on fresh evidence, I gave a case management direction that I should proceed that day to hear oral submissions for Mrs Trainer seeking to answer ground of appeal 4. That ground of appeal relied upon Mrs Trainer's willingness to lie in the face of the court and to seek to interfere with a potential witness in advance of the hearing: see section A8 below. It asserted that this conduct on her part had the

consequence that Cramer Pelmont had a real prospect of establishing a limitation defence.

64. My reasons for taking this course were twofold. First, there seemed to me to be little prospect of completing oral argument on all grounds of appeal in the time that remained on 21 February. There was thus a strong likelihood that time for a further day of argument would need to be found. Second, I had doubts whether ground of appeal 4 could be answered by Mrs Trainer. Those doubts seemed to me sufficient to justify exploring a short cut. If, after hearing Mrs Trainer's submissions, I were to conclude that she could not answer ground of appeal 4, then the appeal would inevitably be allowed and it would not be necessary to hear argument on grounds of appeal 1 to 3. In that event there would be a considerable saving of court time.

65. In the event, however, oral submissions for Mrs Trainer in answer to ground of appeal 4 occupied almost all the remaining hearing time allocated on 21 February. Those submissions persuaded me that I was not in a position to allow the appeal on ground of appeal 4 without calling on Cramer Pelmont.

66. In those circumstances I gave directions for the case to be restored for further argument as soon as possible after 15 March 2019, along with procedural directions designed to ensure efficient preparation for the restored hearing.

A6.8 Further procedural steps and resumed hearing on 21 May 2019

67. Prior to adjourning on 21 February, I expressed concern that the parties had not thus far identified with sufficient clarity the real issues that divided them. At my request Mrs Trainer on 25 February 2019 filed a revised list of issues.

68. On 28 February 2019 Cramer Pelmont filed a further skeleton argument ("Cramer Pelmont's reply skeleton"). It was accompanied by a further revised list of issues ("Cramer Pelmont's reply list of issues").

69. On 5 March 2019 Mrs Trainer filed a skeleton argument in response to new points in Cramer Pelmont's reply skeleton. I shall refer to it as "Mrs Trainer's rejoinder skeleton".

70. A note filed by Cramer Pelmont on 16 May 2019 ("the May 2019 Cramer Pelmont note") comprised two parts. Part A concerned issue 1(2), and is dealt with in section B2 below. Part B concerned issue 1(1), which does not arise: see section D below.

71. The resumed hearing ("the May hearing") took place on 21 May 2019, when judgment was reserved.

72. At the May hearing I was informed that Mr and Mrs Trainer had, by agreement, discontinued their claims against each other. It was not suggested by either side in the present appeal that this affected the issues arising on the present appeal.

A7 The master's judgment

A7.1 The master's introduction, and the complication he identified

73. The master's judgment began with an introduction in paragraphs 1 to 15. In that introduction paragraph 11 recorded common ground that (see section A1.5 above) Mrs Trainer had the burden of establishing that, as a result of section 14A, the claim was not brought out of time, and for this purpose she had to establish that on the material before the court the prospective limitation defence had no real prospect of success.

74. Immediately prior to paragraph 11, however, the master made observations in paragraphs 9 and 10. When setting them out below I have, for ease of reference, divided paragraph 9 into subparagraphs [9.1] and [9.2] and paragraph 10 into subparagraphs [10.1] to [10.4]:

> 9. [9.1] The initial burden is on C to show that D3 would have no real prospect of establishing a limitation defence. As the current White Book puts it, at note 24.2.5:
>
> *In ED&F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472, it was said that under r.24.2 the overall burden of proof rests on the applicant to establish that there are grounds to believe that the respondent has no real prospect of success and that there is no other reason for a trial. The existence of this burden is indicated by para.2(3) of the Practice Direction supplementing Pt 24; the applicant must (a) identify concisely any point of law or provision in a document on which they rely, and/or (b) state that the application is made because the applicant believes that on the evidence the respondent has no real prospect of succeeding on the claim or issue or (as the case may be) of successfully defending the claim or issue to which the application relates, and in either case state that the applicant knows of no other reason why the disposal of the claim or issue should await trial. The essential ingredient is the applicant's belief that the respondent has no real prospect of success and that there is no other reason for a trial.*
>
> *If the applicant for summary judgment adduces credible evidence in support of their application, the respondent becomes subject to an evidential burden of proving some real prospect of success or some other reason for a trial. The standard of proof required of the respondent is not high. It suffices merely to rebut the applicant's statement of belief. The language of r.24.2 ("no real prospect ... no other reason ...") indicates that, in determining the question, the court must apply a negative test. The respondent's case must carry some degree of conviction: the court is not required to accept without analysis everything said by a party in his statements before the court (ED&F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472; [2003] C.P. Rep. 51 at [10]). In evaluating the prospects of success of a claim or defence judges are not required to abandon their critical faculties (Calland v Financial Conduct Authority [2015] EWCA Civ 192 at [29]).*
>
> [9.2] This suggests that there is at least a modicum of potential burden-shifting, if C can produce credible evidence in support of her contention that there is no good limitation defence.

> 10. [10.1] The effect of all this is that if by 31 January 2015 (i.e. the date three years before the amendment) the "starting date" had passed in relation to C's claim against D3, then there would be a reasonably clear limitation defence.
>
> [10.2] I thus need to keep in mind the point at which C came to "know" (within the extended meaning provided for by section 14A):
>
> > (a) about the damage which she had suffered, i.e. the significant reduction in the part of the purchase price compared to what D1 had acquired (undoubtedly enough to warrant a claim against a defendant who admitted liability for the purposes of sub-section 14(A7));
> >
> > (b) that the damage was attributable in whole or in part to the relevant act or omission which is alleged to constitute negligence; and
> >
> > (c) the identity of D3, i.e. as the party responsible for that relevant act or omission which was alleged to constitute negligence.
>
> [10.3] The complication here is that – on her case – C knew that she was getting much less than she was expecting, but need not have realised that this was because others were conniving behind her back.
>
> [10.4] Thus, knowledge of the fact of damage is not quite the same as knowledge of any relevant act or omission constituting negligence, let alone knowledge of the identity of D3 as a putative tortfeasor.

75. Subparagraphs [10.3] and [10.4] indicate that what the master regarded as a "complication" arose from the distinction between material facts knowledge and each of causation knowledge and identity knowledge. As to his consideration of these distinctions, I examine in section B below whether the master applied the correct legal tests under section 14A.

76. I stress here a feature which I mentioned in section A.5 above. When read with paragraph 11 of his judgment, what the master needed to bear in mind for the purposes of paragraph 10 of his judgment was not the point at which Mrs Trainer actually came to have material facts knowledge, causation knowledge and identity

knowledge. What needed to be kept in mind was the point at which Cramer Pelmont had a reasonable argument that Mrs Trainer had such knowledge.

A7.2 The master's summary of background facts and issues

77. Paragraphs 15 to 53 were headed "Summary of Background Facts and Issues". I have already set out (in section A6.2 above) observations by the master which formed part of this section. In addition I note here that, in relation to Mr Trainer's witness statement and its exhibits in the Ebgui proceedings, the master said at paragraphs 41 to 44:

> 41. Thereafter, later in October 2011, witness statements in response were provided by D1 and C. In his witness statement, D1, whilst contending that the eventual deal was different from that which Mr Ebgui had promoted, also explained the outcome of the transaction and Mr Ebgui's involvement. He said at paragraph 4(b):
>
> *"at meetings during March 2011, I met with the buyers [Messrs Dodi and Niemiec] and the applicant [Mr Ebgui] in several occasions. During these meetings, the applicant and buyers tried to persuade me to a accept a different deal from what had been agreed in the exchanged contracts otherwise they would not complete at all. The applicant was plainly a good acquaintance of the buyers, and would often step out of meetings to speak with them privately. At a meeting on 22 March 2011, and having spoken privately with the buyers, the applicant told me that if I accepted a new deal structure (which was less advantageous), I would not have to pay my half of the commission. … I considered the buyer's revised deal, the applicant's position on not seeking commission, and agreed to it on that basis. I confirmed this to Avi Dodi and the applicant separately by email on 25 March 2011 (pages 6 and 8), which included an attachment (pages 7 and 9). The matter was also referred to my solicitor Alison Baldwin (page 10) …"*
>
> His email of 25 March 2011 to Mr Dodi read (so far as relevant):
>
> *"Hi Avi*
>
> *Further to our telephone conversation of a couple of hours ago I'm attaching the draft terms which incorporate what we agreed on Tuesday evening and the terms I had typed on the sheet you read when we were all together on Tuesday evening …"*

The attachment, headed "*Terms of Contract*", is the one referred to above.

42. C's witness statement made clear that she had *"read the witness statement of [D1] of today's date and confirm that insofar as it related to matters in my knowledge that it true" (sic)*. She did not specifically say that she had also perused the exhibits, and she says now that she did not so. Had she done so, she would have seen the contract, which – inevitably – would have started a trail of enquiry in relation to D1 and perhaps D2, because it indicated the prospect of Deferred Consideration, a topic which (on her case) had never been mentioned to her other than in the vaguest terms. On the other hand, again, nothing in it would have pointed her in the direction of D3.

43. C became bankrupt in September 2012. The Ebgui claim came on for trial in June 2014, and was defeated. I am told that this was because Mr Ebgui had actually been acting for (and claiming commission from) both sides in the transaction. C was a witness in those proceedings (even though, as a bankrupt she personally was not participating – that was a matter for the trustee in bankruptcy), and my attention was drawn to one passage of the transcript, where D1 was being asked about the circumstances in which D2 had come to represent C, just immediately prior to the sale. He said:

> *"She did, yes, but Downs – that's because I had complicated transaction to remain in the project and she didn't, so my solicitor negotiated that very complicated deed of variation that was maybe 20 pages long and a substantial transfer."*

[Asked about the connection with moving to Downs]

> *"My solicitor has done all the work on it. I had a solicitor, she had a solicitor. My solicitor did all the work. If we went to her solicitor, her solicitor would have had to review a 20-page deed of variation that was sufficiently complicated that it was done by leading junior counsel, it was that complicated that it was done through my solicitor, her solicitor would have had to go through the whole thing with counsel all over again to get to a completion and that's her solicitor, not my one."*

I read this as a confirmation – which may or may not been heard by C – that D1 and his solicitor had seen no point in sending the Deed of variation or its drafts to D3, since it would merely have caused more work to be done by D3 by way of review. C was contending here that it was unnecessary; but on one view of the facts, if D1 was indeed seeking to keep the extent of his financial expectations secret from C, this would have been another reason for not sending over the Deed of Variation. It will be remembered that he had insisted on the earlier "*Heads of Contract*" being kept secret from C and her solicitor Mr Cramer, and indeed that there had been a suggestion that – according

> to Mr Dodi – C would not argue over the figures if she was going to receive the £600,000 that was then proposed.
>
> 44. C also alleges in paragraph 66 of her amended particulars of claim that at this trial, D1 also stated that:
>
> > *"Monique took a massive financial hit going out at the end that has maybe cost her £1 million. I wasn't offered to go out apart from if I took that massive financial hit, so we were put completely over a barrel where she came out of it with virtually nothing and I would come out with virtually nothing or be stuck in it for three years. That was the proposal and it was totally – it was totally bad proposal, but it was the best of the remainder which was that they went away and we were left with [Mr Dodi] to start from scratch."*
>
> (The way that D1 pleads to this averment in paragraph 40 of his defence is equivocal). It is not clear that his description of these arrangements as "totally bad" is consistent with his view of them as set out in emails of 25 and 30 March 2011, although in fairness that headline price appears to have fallen from the original £5.3m to £4.5m, and then to the eventual £3.483m.

A7.3 The master's comments on difficulties faced by Mrs Trainer

78. As to Mrs Trainer's ability to think about and investigate potential claims, the master said at paragraph 45 of his judgment:

> 45. C explains the difficulties that she encountered during this period. She had spent time homeless, and had lived in a hostel for a while; she had had to go and live with her parents in Cyprus; she had lost custody of her children. I accept that these matters will have, at least to some extent, impeded her ability to think about or investigate any potential claims. (Later on, around summer 2016, her daughter died, and she became ill in March 2017; but, as Mr Asquith points out, by this time her investigations were on foot, and D contends that by then she had or should have had the relevant knowledge).

A7.4 The master's "Conclusions" section in his judgment

79. The remainder of the judgment, comprising paragraphs 54 to 73, was headed "Conclusions". This section began with an introductory observation in paragraph 54:

> 54. I recognise that C, as a property developer, could have been troubled by the approach of Allanton in seeking to alter the arrangements for purchase, but in circumstances where her husband – a

> solicitor – was explaining that a renegotiation was necessary, and no-one was telling her anything different, I do not regard it as surprising that she did not challenge or investigate these matters at the time.

80. In paragraphs 55 to 57 the master dealt with section 14A knowledge of "damage". The master did not expressly refer at this stage to section 14A(6) and (7). However it is convenient to recall here that (see sections A1.3 and A4 above) under subsection (6) one of the essential requirements for s 14A cumulative knowledge is knowledge of the material facts about the damage in respect of which damages are claimed. Subsection (7) provides that the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify instituting proceeding damages against a defendant who did not dispute liability and was able to satisfy a judgment. At paragraph 55 the master said:

> 55. I have asked myself whether a party may have suffered "*damage*" for the purposes of section 14A of the 1980 Act in circumstances where something has gone wrong, but it is not evident that it is anyone's fault (so as to make it worth bringing an action), and the other prospective co-contractor, who on the face of it may stand to lose pretty much the same, and is himself a solicitor (and so knowledgeable about such matters) accepts that this is inevitable. I am not sure that in such circumstances damage has necessarily been suffered.

81. In paragraph 56 the master cited, among other things, observations of Lord Brown of Eaton-under-Heywood at paragraph 90 of his speech in *Haward*:

> 90. What the claimant must know to set time running is the essence of the act or omission to which his damage is attributable, the substance of what ultimately comes to be pleaded as his case in negligence. That essence or substance here could no doubt be characterised in either of two ways: either as the act of recommending investment in the company (or omitting to caution against it-on the particular parts of this case these are two sides of the same coin), or, with greater particularity, the act of recommending investment without first carrying out the investigations necessary to justify such positive advice. Having at first preferred the latter characterisation, I have come

> to prefer the former. True, under the former the claimant knows nothing beyond the fact that his advisers led him into what turned out to be a bad investment; he does not know, as under the latter characterisation he would, that he has a justifiable complaint against his advisers. But he surely knows enough (constructive knowledge aside) to realize that there is a real possibility of his damage having been caused by some flaw or inadequacy in his advisers' investment advice, and enough therefore to start an investigation into that possibility, which section 14A then gives him three years to complete.

82. The master added:

> See also paragraph 5-096 of *Jackson & Powell on Professional Liability:*
>
> > If a person is to know that damage is attributable to the act or omission of a third party, he needs to know that he has suffered damage. In some cases this will be obvious, but in others it will not be. For example, a client may rely upon the advice of his professional adviser and make a payment. He will know immediately that he parted with money and so is worse off. But he will only know that he has suffered damage when he discovers that the advice was incorrect and that the payment should not have been made...

83. The master then said in paragraph 57:

> 57. I suspect that this leads to the conclusion that C knew that something had gone wrong, i.e. that she had suffered "damage", at a comparatively early stage. Indeed, on her own case, she knew that D1 had the prospect of further sums. Furthermore, even if the arrangements may have been kept secret at first, their deployment at an early stage in the Ebgui litigation suggests that D1 was prepared to risk C finding out that he had obtained the prospect of significant deferred consideration in the future.

84. The master then turned to knowledge of other facts required for section 14A cumulative knowledge. In the circumstances of the present case, those facts were, as set out in s 14A(8)(a) and (b):

> (a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence;
>
> (b) the identity of the defendant.

85. In paragraph 59 the master said:

> 59. I accept that what counts here is the actual or imputed knowledge of [Mrs Trainer] – save to the extent that the [official receiver] (her trustee in bankruptcy) may have acquired further relevant knowledge during the period between the bankruptcy and the assignment of the cause of action; but there is no suggestion that the [official receiver] did acquire any such knowledge.

86. At paragraph 60 the master said that on present material, unlike in *Haward,* Mrs Trainer's case was not put forward as a case of Cramer Pelmont giving bad advice about entering into the Deed of Variation. Rather, the nature of the case put forward by Mrs Trainer against Downs and Cramer Pelmont was that they both:

> … were, at times at least, acting for [Mrs Trainer] in respect of the sale of [Wildwood Lodge] and yet in relation to the varied contractual arrangements and completion neither solicitor provided any worthwhile advice to [Mrs Trainer] whatsoever, either about Allanton's contention that it did not have to complete on the original contractual terms or about the proposed varied contractual terms or even so as to ensure [Mrs Trainer] had a proper opportunity to review and comprehend the proposed varied contractual terms before signing up to them.

87. This being the nature of the case that he was considering, the master said at paragraph 61:

> 61. … I am not persuaded that C knew at the time (October 2011), or indeed for some time afterwards, that she had suffered damage which was attributable to negligence at all. On any view, however, it is clear that by early 2016, she did have in mind investigation of what had gone wrong, and prospective pursuit of a claim if possible.

88. In the opening words of paragraph 62 the master said:

> 62. I accept, on the material before me, that there is no evidence that C had actual knowledge of any prospective claim against D3, or that "*the damage was attributable in whole or in part to the act or omission*" of D3, until late in 2017.

89. As regards this conclusion on actual knowledge, the master identified three features:

(1) in paragraph 62, that Mrs Trainer had taken assignments of the official receiver's cause of action against Mr Trainer and Downs in December 2016, but did not at that time seek an assignment of any cause of action against Cramer Pelmont;

(2) in paragraph 63, that the letter written to Cramer Pelmont on 15 September 2017 by Mrs Trainer's then solicitors Sears Tooth evidenced a belief that Cramer Pelmont had been misled every bit as much as she claimed she had been misled;

(3) in paragraph 64, that none of the documents from September and October 2011 which had been produced "comes anywhere near" showing knowledge on the part of Mrs Trainer of Cramer Pelmont knowing of or being involved with the various "extra" payments to Mr Trainer.

90. Turning to imputed knowledge for the purposes of s 14A(10), the master dealt in paragraphs 65 and 66 with the Ebgui proceedings:

> 65. … I do not see that there was anything in the Ebgui proceedings – whether in 2011 or in 2014 – which made it reasonable for her to acquire knowledge about the damage being attributable to any negligence, let alone about D3's potential responsibility for it. This was not what was in issue in the Ebgui proceedings, and the text of D1's witness statement provided early in those proceedings did not go into detail of the extra payments at all. However, even if perusal of the "*Terms of Contract*" document would have shown C what had been going on, it would not have led her to understand, or even suspect, that D3 had been privy to these matters.
>
> 66. The observations of D1 as shown in the one-page transcript of the Ebgui trial actually support the suggestion that the details of the Deed of Variation were not provided to D3. D1 may or may not have been telling the truth when he gave this explanation of how it would have been a waste of money for C's solicitors to go through the Deed of Variation documentation; but it seems that this is what he said, and it seems to me that that (if heard by C) would have diverted C away from any suspicion about D3's role, by apparently confirming that D3 had not seen any of the relevant provisions.

91. As to other matters relied on by Cramer Pelmont as showing there was an arguable case of imputed knowledge, the master said in paragraphs 67 to 69:

> 67. Mr Asquith contends that C had been vague about what she considered D3's role to have been in 2011. But there is nothing unusual in this. Nor do I read the generalised rubric of her observation

> that "*I'm taking advice on all commercial and matrimonial matters from [D3]*", or that a (comparatively modest) bill was rendered, as indicating any substance about what the advice was, or for that matter should have been. One can understand why D1 may have told her to provide this to D2 (C alleges he did), so as to allow D2 to distance itself from any potential conflict of interests.
>
> 68. Similarly, I do not see anything significant about either the "To Whom It May Concern" letter, or about C's response to it. D3 may or may not have given C that advice at the time – and it would have been innocuous if they did (bearing in mind that Mr Charnley was dealing only with the departure from the Matrimonial Consent Order, not with what D1 would actually be getting). But even if they did, that would not automatically entail C knowing about the existence or purpose of the "To Whom It May Concern" letter. (I would add that, given that it appears to have told C little that she did not already know, it would not be surprising if by the time C saw this – apparently in 2016 – she had forgotten a fairly insignificant conversation about the Matrimonial Variation Deed in late September or early October 2011).
>
> 69. I am not impressed by Mr Asquith's point that if C had investigated earlier, then D2 would have asserted to her or her solicitors that C had been obtaining advice at the time from D3. The simple observation by D2 in a letter of 15 September 2017 to Sears Tooth that "*your client was obtaining advice from Cramer Pelmont*" would not suffice to set the trail running (and in any event was less than a year before the amendment). During periods of bankruptcy and significant personal difficulties, there is a limit to what investigations were commenced in 2016, corresponding to the time that C emerged from bankruptcy. I am not persuaded that D3, on the material before the court, would have any real prospect of showing that C obtained, or ought reasonably to have obtained, any knowledge about D3's involvement sufficient to start a train of enquiry running before late 2017, when documentation started to emerge from D2 and D3.

92. Not only did the master dismiss Cramer Pelmont's case on imputed knowledge, he went on in paragraphs 70 and 71 to add:

> 70. There is in my judgment credible evidence in support of the contention that C's starting date, in relation to the claim against D3, could not have been before February 2015 – and may well not have been until after September 2017. I say this despite the clear caution with which is necessary to approach the narrative evidence given by C, in the light of her recent attempt (as I perceive it) to try and pull the wool over the court's eyes in relation to the Matt Buswell email (a matter which may well come back to haunt C as and when the matter

> comes to cross-examination at a contested trial). It is the contemporaneous documents which show a clear picture.
>
> 71. I have observed above that it is hard to see how any reasonably arguable case could be put forward that C acquired relevant knowledge about a claim against D3 before February 2015. There is scope for speculation, but the material deployed by D3 must carry "*some degree of conviction*" if it is to carry weight. The various matters raised by D3 do not, upon scrutiny, amount to a reasonably arguable case. I am, effectively, invited to draw inferences from some evidential material that C must or should have known that D was, or may well have been, negligent, and to treat those inferences as constituting a reasonably arguable case. I cannot do so. It does not seem to me that these points amount to anything more than speculation, or that there is any material from which the inference can be drawn that either C's actual knowledge or her imputed knowledge of a claim against D3 preceded February 2015, or probably did so – or even "*reasonably arguably*" did so.

A7.5 The request for clarification and the master's response

93. I noted in section A6.3 above that the master had been asked to clarify his judgment. The request came from Cramer Pelmont, and sought clarification of paragraph 57 of the judgment in four respects:

> i. Please confirm the earliest date when the court considered D3 could reasonably arguably show C had imputed knowledge of iniquity between her and D1.
>
> ii. Please confirm whether the basis for this imputed knowledge is the potential reading of the Deed of Variation (it was executed on 5 October 2011 – see para 26 of the judgment) and/or the potential reading of the exhibits to D1's witness statement in the Ebgui proceedings (both D1's and C's statements in that matter were dated 25 October 2011 – see "later in October" at para 41 of the judgment) and/or otherwise.

iii. Please confirm the earliest date when the court considered D3 could reasonably arguably show C had actual knowledge of iniquity between her and D1.

iv. Please confirm the basis for the date of actual knowledge.

94. The master's response dated 20 September 2018 noted that the requests relied upon what was said by the Court of Appeal in *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409. The master set out in eight paragraphs his reasons for concluding that the principles in that case did not make a response desirable. Paragraphs 1 and 2 stated:

> 1. I rejected the application on the ground that D3 had no reasonably arguable case that C's "starting date" for the purposes of section 14A of the Limitation Act 1980, in respect of a prospective claim against D3, was more than three years before the amendment to the claim form whereby D3 was added as a defendant. These requests are not connected with that finding, but with other aspects of the relevant facts referred to in section 14A(6)(b) and (8) of the Limitation Act 1980.
>
> 2. Any other observations or comments that I made (such as in paragraph 57 of the judgment) were thus *obiter*, and were not – and did not need to be – findings of fact. Such observations are not uncommon; but I do not consider that clarification of *obiter* observations ought to become the norm.

95. In paragraphs 3 to 7 the master analysed various observations in *English v Emery*. The master's conclusion was set out in paragraph 8:

> 8. I do not consider that there is any uncertainty as to the reason for my decision, or that I have failed to give a clear explanation for my order. The third defendant firm knows why it has been unsuccessful. The reasons given for that are not inadequate; if they are wrong or misguided then an appeal court can so determine. As stated above, I do not consider that clarification of parts of a judgment that are commentary, and *obiter*, is either required or desirable.

96. As to Mrs Trainer's ability to think about and investigate potential claims, the master said at paragraph 45 of his judgment:

> 45. C explains the difficulties that she encountered during this period. She had spent time homeless, and had lived in a hostel for a while; she had had to go and live with her parents in Cyprus; she had lost custody of her children. I accept that these matters will have, at least to some extent, impeded her ability to think about or investigate any potential claims. (Later on, around summer 2016, her daughter died, and she became ill in March 2017; but, as Mr Asquith points out, by this time her investigations were on foot, and D contends that by then she had or should have had the relevant knowledge).

A8 Grounds of appeal and issues

A8.1 Cramer Pelmont's four grounds of appeal

97. Cramer Pelmont relies on four grounds of appeal:

GOA 1

1. If the court considers the Judgment contains no such finding, the Master was wrong in law and/or fact not to find that C was fixed with knowledge (s.14A(10) of the 1980 Act) of the contents of the Deed of Variation and/or the Terms of Contract exhibited to D1's witness statement in the Egbui Freezing Injunction proceedings.

GOA 2

2. The Master was wrong in law and/or fact to dismiss the indications C already had or may have had that D3 might be responsible for the damage of which she (at least reasonably arguably) was aware. Had they not been dismissed, the Master would have found that D3 had a reasonably arguable case that she had the relevant knowledge prior to February 2015.

GOA 3

3. The Master was wrong in law and/or fact to reject D3's argument that if it was reasonably arguable that C gained knowledge of damage in 2011/12 then it was reasonably arguable that she would have gained knowledge of D3's alleged responsibility for it within a year or so, not least because on her case that was what had happened (albeit 5 years later), and therefore she should be fixed with knowledge of the same for the purposes of s.14A(10).

GOA 4

4. Given C's willingness to lie in the face of court and seek to interfere with a potential witness in advance of the hearing, her evidence should have been treated with more caution, such that the only available conclusion was that she

had not discharged the burden on her to show D3 had no real prospect of establishing a limitation defence. In this regard the judge was wrong in fact.

A8.2 The initially agreed issues

98. In advance of the hearing before me I asked the parties to seek to agree on the issues which arose from the grounds of appeal (set out above) and the respondent's notice (set out in section A6.5 above). So far as material, the parties agreed that there were two such issues. Below I set out those initially agreed issues, and summarise aspects of them identified by the parties:

Issue A: On the evidence before the master, was his 'decision' (if there was one) flawed on the question of whether it was reasonably arguable that the claimant or her trustee in bankruptcy knew (actually or constructively) the claimant had suffered damage more than 3 years before 31 January 2018 i.e. before 31 January 2015, and/or should the Master have found that it was not/was not reasonably arguable that the claimant/her trustee in bankruptcy had such (actual or constructive knowledge) before 31 January 2015.

On this issue the parties identified that:

(A1) the master addressed this issue at paragraphs 10a, 42 and 57;

(A2) this issue arises in the notice of appeal at grounds of appeal 1 and 4, and the respondent's notice: single ground.

Issue B: On the evidence before the master, was his decision that it was not reasonably arguable that the claimant/her trustee in bankruptcy knew (actually or constructively) before 31 January 2015 that damage was attributable to acts or omissions of the third defendant 'flawed', and, if so, should he have found that it was/was not reasonably arguable that the claimant/her trustee in bankruptcy had such knowledge before that date.

On this issue the parties identified that:

(B1) the master addressed this issue at paragraphs 58-72.

(B2) this issue arises in the notice of appeal at grounds of appeal 2 to 4, and the respondent's notice: single ground.

99. These initially agreed issues reflected the cumulative knowledge requirements in section 14A:

- issue A was concerned with the material facts knowledge requirement (see section A1.4 above in relation to this term);

> - issue B was concerned with the causation knowledge requirement and the identity knowledge requirement (see section A1.4 above in relation to these terms).

A8.3 The revised agreed categories of issues

100. In due course both sides formulated revisions to the initially agreed list of issues. They have now agreed that the issues fall into two categories. Agreed category 1 concerns issues of law/mixed fact and law as to the application of section 14A. In this category Mrs Trainer identifies three issues.

A8.4 Issue 1(1): knowledge acquired after bankruptcy

101. I shall refer to the first issue in agreed category 1 as issue 1(1). It is set out by Mrs Trainer in this way:

> Issue 1(1): if [Mrs Trainer] had not acquired the knowledge required for bringing her claim against [Cramer Pelmont] before her bankruptcy, does section 14A(5) have the effect that from that date until the assignment of rights on 31 January 2018 it is the actual or constructive knowledge of [Mrs Trainer's] trustee in bankruptcy ("the trustee") which is material when inquiring whether and when such knowledge was acquired.

102. Cramer Pelmont submit that this issue does not arise. I agree, for reasons explained in section D below.

A8.5 Issue 1(2): what suffices for material facts knowledge?

103. The second issue in category 1 is dealt with in section B2 below. It concerns material facts knowledge. I shall call it issue 1(2). A degree of common ground has been reached on issue 1(2). This enables it to be expressed in this way:

> Issue 1(2): While it is agreed that there must be knowledge that things could and should have been different, would it have been sufficient for Mrs Trainer to acquire actual or constructive knowledge of the inequitable apportionment between her and Mr Trainer, or was it also necessary to know that Allanton had no contractual right to insist on

> the varied terms and/or that there was no contractual warrant for the inequitable apportionment;

A8.6 Issue 1(3)(a): constructive knowledge from pre-damage facts

104. The third issue in category 1 contains two sub-issues. Both concern the constructive knowledge provisions in section 14A(10). The first sub-issue is dealt with in section B3 below. I shall call it issue 1(3)(a):

> Issue 1(3)(a): Under section 14A(10), can knowledge be imputed to a claimant in respect of observable or ascertainable facts she might reasonably have been expected to acquire (such as of the content of the unexecuted Deed of Variation) *prior* to the occurrence of the damage founding the claim in negligence;

A8.7 Issue 1(3)(b): trail of inquiry from one defendant to another

105. The second sub-issue is dealt with in section B4 below. I shall call it issue 1(3)(b):

> Issue 1(3)(b): Under section 14A(10) can knowledge be imputed to a claimant in respect of the claim and damage in issue on the footing that she might reasonably have been expected to acquire knowledge of facts material to a potential claim against a different party (Mr Trainer) in respect of different damage, which might then have led to a trail of enquiry ultimately implicating Cramer Pelmont.

A8.8 Issue 2(1),(2): Agreed category 2 – inferences & conclusions as to damage

106. Agreed category 2 concerns the inferences and conclusions drawn by the master. In this category the parties identified 4 issues. What I shall call issues 2(1) and (2) are two sides of the same coin. They are dealt with together in section C1 below:

> Issue 2(1): was the master right to find, or, if he did not do so, should he have found, that it was reasonably arguable that Mrs Trainer knew (actually or constructively) the 'material facts about the damage' at an early stage, and in any event prior to 31 January 2015, because:
>
>> (a) she has always known (there being no issue about this) that she was significantly worse off under the varied contractual arrangements than under the original arrangements; and/or,
>>
>> (b) on the basis that there is a real possibility she also knew about the inequitable apportionment as she may have read the

Deed of Variation prior to executing it or the Terms of Contract document exhibited to Mr Trainer's 2011 statement, alternatively because she had constructive knowledge because she might reasonably have been expected to read the Deed of Variation and/or the exhibit and/or to investigate further in the light thereof; and/or,

(c) on the basis that there is a real possibility that she knew about at least one of the alleged secret payments to Mr Trainer by reason of the reference to it in solicitors' correspondence in 2011;

Issue 2(2): conversely, should the master have found it was not reasonably arguable that Mrs Trainer (or her trustee) knew of the 'material facts about the damage' until after 31 January 2015 because it was necessary for her to know, and there is no evidence she knew and it was not reasonable to expect her to have discovered:

(a) the terms of the Deed of Variation and/or the inequitable apportionment; and,

(b) that Allanton was not contractually entitled to insist on the renegotiated terms and/or that there was no contractual warrant for the inequitable apportionment;

A8.9 Issue 2(3),(4): inferences & conclusions on causation and identity knowledge

107. What I shall call issues 2(3) and 2(4) are two sides of a similar coin. They are dealt with in section C2 below:

Issue 2(3): should the master have found that it was reasonably arguable that Mrs Trainer (or if need be, from 28 September 2012, her trustee) had actual or constructive knowledge prior to 31 January 2015 that the damage in issue was attributable in whole or in part to the acts or omissions of Cramer Pelmont because:

(a) if she knew or should have discovered the terms of the Deed of Variation and/or the Terms of Contract document and/or had been informed of the solicitors' correspondence referring to one of the 'secret payments' to Mr Trainer in 2011, and knew as a result she had suffered damage, that should have started a train of enquiry in relation to the potential culpability of Mr Trainer and/or Downs, which in turn would have led to the discovery of the potential culpability of Cramer Pelmont; and/or, as

(b) on her own case, she already knew that Cramer Pelmont was involved 'in the matrimonial side of things' (Mrs Trainer 2, para 8) and had attempted to persuade the Court in

September 2011 to vary the matrimonial consent order; and/or, as

(c) she also knew she had sent the 15 September 2011 email to Downs stating "I authorise you to act for me on the completion of Wildwood Lodge. I'm taking advice on all commercial and matrimonial matters from Cramer Pelmont"; and/or, as,

(d) she may also have received advice from Cramer Pelmont as referred to in the 'To whom it may concern' letter, that is, that under the Deed of Variation of the Consent Order she would only receive £300,000 which was potentially much less than she would be entitled to under the matrimonial consent order; and/or, as,

(e) she may also have received the bill dated 30 September 2011 (or been informed of its contents) (Judgment para 21); and/or, as

(f) if need be, she and/or her trustee could have continued investigations of the matters in issue (and she could have communicated as necessary to her trustee) during her bankruptcy;

Issue 2(4): conversely, was the master right to find that it was not reasonably arguable that Mrs Trainer had actual or constructive knowledge prior to 31 January 2015 that the damage in issue was attributable in whole or in part to the acts or omissions of Cramer Pelmont:

(a) for the reasons he gave; and/or, as,

(b) Mrs Trainer did not have actual or constructive knowledge prior to 31 January 2015 that she had suffered damage; and/or, as

(c) even if Mrs Trainer had actual or constructive knowledge prior to 31 January 2015 that she had suffered damage:

(i) in the circumstances confronting her in 2011-12 she did not know and could not reasonably have been expected to discover prior to her bankruptcy the potential culpability of Cramer Pelmont; and,

(ii) she/her trustee could not reasonably have been expected to discover Cramer Pelmont's potential culpability prior to 31 January 2015 either.

B. Application of section 14A

B1 Introduction: issues 1(1), 1(2) and 1(3) and Haward

B1.1 Issues 1(1), 1(2) and 1(3)

108. As noted in section A8 above, section B of this judgment deals with two of three issues falling under agreed category 1. This category concerns issues described by the parties as being issues of law, or mixed fact and law, as to the application of section 14A of the 1980 Act.

109. As also noted in section A8 above, I deal in sections B2 and B3 below with issues 1(2) and 1(3). Issue 1(1) is dealt with in section D below.

B1.2 The House of Lords decision in *Haward:* knowledge of negligence irrelevant

110. I referred in sections A1.1, A1.3 and A7.4 above to the House of Lords decision in *Haward*. It is convenient in this section to summarise the nature of the dispute in *Haward*, and to set out observations in the speeches of members of the Appellate Committee about the irrelevance of knowledge that there had been negligence. In section B1.3 I set out observations in those speeches concerning material facts knowledge. In section B1.4 I set out observations in those speeches on causation knowledge.

111. The nature of the dispute in *Haward* is conveniently set out in the first paragraph of the headnote to the report in the Weekly Law Reports:

> On 9 December 1994, in reliance on the professional advice of a partner [Mr Austreng] in the first defendants [Fawcetts], a firm of accountants, the first claimant [Mr John Haward] and/or the second claimant [W.J. Haward Ltd] acquired a controlling interest in a company [Kings Stagg Engineering Ltd, later renamed Haward Agriculture Ltd] by subscribing for 60,000 newly issued £1 shares at par. In addition, the third claimant [W.J. Haward Family Trust No. 1]

> acquired the freehold of the company's leasehold premises for £100,000. It was forecast at the time of the acquisition that some £100,000 would have to be invested in the company during 1995 to bring it to reasonable profitability. The forecast, however, turned out to be mistaken in that substantial further sums had to be invested by the first, second or third claimants in 1995, 1996, 1997 and 1998 but still failed to bring the company to profitability. In 1998, the first claimant asked a specialist in corporate rescues to investigate the company's losses, and on 6 December 2001 the claimants brought an action against the first defendants in contract and tort for damages for professional negligence. The defendants denied negligence and pleaded that the claims based on breaches of contract or losses prior to 6 December 1995 were statute-barred. In reply, the claimants relied on the three-year limitation period in section 14A of the Limitation Act 1980 and pleaded that the earliest date on which they had had the knowledge referred to in section 14A(5) was 17 December 1999, subsequently modified to May 1999. The defendants did not, in response, plead reliance on section 14A(10). The issues of limitation were ordered to be tried as preliminary issues. The judge decided the preliminary issues in favour of the defendants. The Court of Appeal allowed an appeal by the claimants.

112. The members of the Appellate Committee agreed as to the outcome: Fawcett's appeal from the decision of the Court of Appeal was allowed. They arrived at that outcome, however, by routes which differed in certain respects. One such respect concerns the approach the speeches took to section 14A(7), concerning the material facts knowledge required before the section 14A alternative limitation period starts to run. Lords Nicholls and Scott did not discuss this to any great extent. However Lords Walker, Brown and Mance gave speeches which made observations in relation to material facts knowledge.

113. Turning to the particular question of the lack of any need for the claimant to have knowledge of negligence before the alternative limitation period began to run, it is convenient to begin by referring two earlier cases, *Dobbie v Medway Health Authority* [1994] 1 WLR 1234 and *Hallam-Eames v Merrett Syndicates Limited* [2001] Lloyd's Reports PN 178. Relevant aspects of those cases are conveniently

summarised in paragraph 45 of Lord Scott's speech in *Haward*, and paragraph 62 of Lord Walker's speech.

114. In paragraph 45 Lord Scott stated:

> 45. *Dobbie v Medway Health Authority* [1994] 1 WLR 1234 was a case in which a patient had had a lump on her breast. The surgeon, without first subjecting the lump to a microscopic examination in order to determine whether it was cancerous or benign, removed the breast. This was in 1973. The lump was subsequently found to be benign. The patient knew very soon after the operation that the lump was benign but did not know until 1988 that that meant her breast need not have been removed. She began proceedings for negligence in 1989. Sir Thomas Bingham M.R. (as he then was) referred to the "knowledge" test formulated by Lord Donaldson of Lymington M.R. in *Halford v Brookes* [1991] 1 WLR 428 at 443 and continued at 1240:
>
> > "This test is not in my judgment hard to apply. It involves ascertaining the personal injury on which the claim is founded and asking when the claimant knew of it."
>
> and, at 1243, expressed this conclusion
>
> > "The personal injury on which the plaintiff seeks to found her claim is the removal of her breast and the psychological and physical harm which followed. She knew of this injury within hours, days or months of the operation and she at all times reasonably considered it to be significant. She knew from the beginning that this injury was capable of being attributed to, or more bluntly was the clear and direct result of, an act or omission of the health authority. What she did not appreciate until later was that the health authority's act or omission was (arguably) negligent or blameworthy. But her want of that knowledge did not stop time beginning to run."
>
> And in *Hallam-Eames v Merrett Syndicates* [2001] LlR PN 178, in which a number of members of Lloyd's facing re-insurance underwriting liabilities were alleging negligence on the part of the active underwriter, their members' agents and their syndicates' managing agents and where limitation defences had been raised, Hoffmann LJ (as he then was) emphasised the statutory words "attributable … to the act or omission which is alleged to constitute negligence" and gave this explanation at 181 (left hand column)
>
> > "In other words the act or omission of which the plaintiff must have knowledge must be that which is causally relevant for the purposes of an allegation of negligence … It is this idea of

> causal relevance which various judges of this court have tried to express by saying the plaintiff must know 'the essence of the act or omission to which the injury is attributable' (Purchas LJ in *Nash v Eli Lilly & Co* [1993] 1WLR 782 at 799) or 'the essential thrust of the case' (Sir Thomas Bingham M.R. in *Dobbie* [1994] 1WLR 1238) or that 'one should look at the way the plaintiff puts his case, distil what he is complaining about and ask whether he had in broad terms knowledge of the facts on which that complaint is based' (Hoffmann LJ in *Broadley* [1993] 4 Med LR 328, 332)".

115. Paragraph 62 of Lord Walker's speech gave a fuller citation from *Hallam-Eames*:

> 62. *Hallam-Eames v Merrett Syndicates* ... was another claim for pure economic loss. Hoffmann LJ delivered the reserved judgment of the Court (Sir Thomas Bingham MR, Hoffmann and Saville LJJ). It merits quotation at some length (at p 181):
>
> > "In our judgment this [the judge's view of what the claimants had to know] is an over-simplification of the reasoning in *Broadley* and *Dobbie*. If all that was necessary was that a plaintiff should have known that the damage was attributable to an act or omission of the defendant, the statute would have said so. Instead, it speaks of the damage being attributable to the act or omission which is alleged to constitute negligence. In other words, the act or omission of which the plaintiff must have knowledge must be that which is causally relevant for the purposes of an allegation of negligence. There may be many acts, omissions or states which can be said to have a causal connection with a given occurrence, but when we make causal statements in ordinary speech, we select on common sense principles the one which is relevant for our purpose. In a different context it could be said that a Name suffered losses because some member's agent took him to lunch and persuaded him to join Lloyd's. But this is not causally relevant in the context of an allegation of negligence.
> >
> > It is this idea of causal relevance which various judges of this court have tried to express by saying the plaintiff must know the 'essence of the act or omission to which the injury is attributable' (Purchas LJ in *Nash v Eli Lilly & Co* [1993] 1 WLR 782, 799) or 'the essential thrust of the case' (Sir Thomas Bingham MR in *Dobbie* [1994] 1 WLR 1234, 1238) or that 'one should look at the way the plaintiff puts his case, distil what he is complaining about and ask whether he had in broad terms knowledge of the facts on which that complaint is based.' (Hoffmann LJ in *Broadley* [1993] 4 Med LR 328, 332).

> If one asks on common sense principles what Mrs Dobbie was complaining about, the answer is that the surgeon had removed a healthy breast. It would in our view be a seriously incomplete statement of her case to say that it was simply that the surgeon had removed her breast. This is not a matter of elaborating the detail by requiring knowledge of precisely how he had come to do the act complained of, such as this court rejected in *Broadley*. It was part of the essence of her complaint. Nor is it requiring knowledge of fault or negligence. The court's emphatic rejection of such a requirement is entirely consistent with characterising the act complained of (and of which knowledge was therefore required) as the removal of a healthy breast. But the judge, as it seems to us, has read *Dobbie* to mean that knowledge that the surgeon had removed her breast would have been enough.
>
> If one asks what is the principle of common sense on which one would identify Mrs Dobbie's complaint as the removal of a healthy breast rather than simply the removal of a breast, it is that the additional fact is necessary to make the act something of which she would prima facie seem entitled to complain. She was suspected of having a cancerous lump and if this had been the case, the removal of her breast would not have been a matter for complaint. Likewise Mrs Broadley's complaint was the surgeon had caused damage to her foot when he was supposed to be mending her knee. Mr Clarke QC, for the auditors, and Mr Toulson QC, for the members' agents, protested that such a principle was a back-door way of introducing a requirement that the plaintiff must have known that the defendant had been negligent (which section 14A(9) expressly declares to be irrelevant) or was by some other criterion at fault (which this court rejected in *Broadley* and *Dobbie*.) We do not agree. The plaintiff does not have to know that he has a cause of action or that the defendant's acts can be characterised in law as negligent or as falling short of some standard of professional or other behaviour. But, as Hoffmann LJ said in *Broadley*, the words 'which is alleged to constitute negligence' serve to identify the facts of which the plaintiff must have knowledge. He must have known the facts which can fairly be described as constituting the negligence of which he complains. It may be that knowledge of such facts will also serve to bring home to him the fact that the defendant has been negligent or at fault. But this is not in itself a reason for saying that he need not have known them."

116. As to the general principle that knowledge of negligence is irrelevant, it is convenient at the present stage to set out paragraphs 12 to 14 from the speech of Lord Nicholls:

12. Difficulties may sometimes arise over the interaction of these ‘knowledge’ provisions and the statutory provision rendering ‘irrelevant’ knowledge that, as a matter of law, an act or omission did, or did not, amount to negligence: section 14A(9). By the latter provision Parliament has drawn a distinction between facts said to constitute negligence and the legal consequence of those facts. Knowledge of the former (the facts) is needed before time begins to run, knowledge of the latter (the legal consequence of the facts) is irrelevant. As Sir Thomas Bingham MR said in the clinical negligence case of *Dobbie v Medway Health Authority* [1994] 1 WLR 1234, 1242, knowledge of fault or negligence is not necessary to set time running. A claimant need not know he has a worthwhile cause of action.

13. A linguistic point, which can give rise to confusion, should be noted here. Sometimes the essence of a claimant's case may lie in an alleged act or omission by the defendant which cannot easily be described, at least in general terms, without recourse to language suggestive of fault: for instance, that ‘something had gone wrong’ in the conduct of the claimant's medical operation, or that the accountant's advice was ‘flawed’. Use of such language does not mean the facts thus compendiously described have necessarily stepped outside the scope of section 14A(8)(a). In this context there can be no objection to the use of language of this character so long as this does not lead to any blurring of the boundary between the essential and the irrelevant.

14. This point is exemplified in *Dobbie v Medway Health Authority* [1994] 1 WLR 1234. The judge held the claimant had ‘broad knowledge of sufficient facts to describe compendiously [1] that her breast had been unnecessarily removed, [2] that something had gone wrong, and [3] that this was due to the defendant's negligence’: [1994] 1 WLR 1234, 1243. In the Court of Appeal this part of the judge's reasoning was criticised. These matters, it was said, were irrelevant. In my respectful view the Court of Appeal's criticism was well directed so far as it related to the third of these three matters, but not so far as it related to the other two. The essence of the claimant's case was that she had suffered injury by the removal of a healthy breast, that is, her breast had been removed unnecessarily and something had gone wrong. These were the acts and omissions she alleged constituted negligence. Under the statute time did not begin to run until she knew of these acts or omissions. Until she was aware of these matters she could not know her injury was attributable to them. I agree with the observations to this effect made by the Court of Appeal in *Hallam-Eames v Merrett Syndicates Ltd* [2001] Lloyd's Rep PN 178, 181.

B1.3 The House of Lords decision in *Haward:* material facts knowledge

117. The main question in *Haward* concerned causation knowledge. Lord Nicholls in paragraph 15 identified a problem which might have been capable of analysis by reference to material facts knowledge:

> 15. In many cases the distinction between facts (relevant) and the legal consequence of facts (irrelevant) can readily be drawn. In principle the two categories are conceptually different and distinct. But lurking here is a problem. There may be difficulties in cases where a claimant knows of an omission by say, a solicitor, but does not know the damage he has suffered can be attributed to that omission because he does not realise the solicitor owed him a duty. The claimant may know the solicitor did not advise him on a particular point, but he may be totally unaware this was a matter on which the solicitor should have advised him. This problem prompted Janet O'Sullivan, in her article 'Limitation, latent damage and solicitors' negligence', 20 Journal of Professional Negligence (2004) 218, 237, to ask the penetrating question: unless a claimant knows his solicitor owes him a duty to do a particular thing, how can he know his damage was attributable to an omission?

118. It will be seen from the last sentence of paragraph 15, however, that Lord Nicholls adopted Ms O'Sullivan's characterisation of the relevant question as being concerned with knowledge that "damage was attributable to an omission". This characterisation carries the implication that it is on the question of attributability (causation knowledge), and not in relation to material facts knowledge, that there may need to be an appreciation on part of the claimant that there has been an omission on the part of the solicitor.

119. At paragraph 40 of his speech Lord Scott said:

> 40. It is to be noted that subsections (6)(a) and (7) refer to … "… the material facts about the damage". The limited character of the reference is underlined by the definition of the expression in sub-

> section (7). What is wanted is knowledge of "such facts about the damage" as would be expected to lead to the institution of a claim against a solvent defendant who had no defence to the claim. This demonstrates that the sub-section (6)(a) "material facts" of which knowledge is needed do not include any facts about the acts or omissions of the defendant that allegedly constitute the negligence.

120. At paragraph 46 Lord Scott applied this to the facts of *Haward*:

> 46. What was the "damage" allegedly caused by Fawcetts' negligence of which the respondents complain? The damage was the investment of the Haward money first in acquiring the Company and its business premises in 1994 and subsequently in trying to bring the Company to profitability. The damage, as I think was common ground, was the making of a bad investment. The measure of the loss depended on the eventual worth of the Company but the damage allegedly caused by Fawcetts' negligence was the making of the investment. Mr Haward plainly had knowledge that the investment of Haward money in 1994 and 1995 had taken place. He knew the exact amount of money that had been invested. But, on the footing that it was indisputable that Fawcetts' advice in respect of the investment had been negligent, at what date did Mr Haward know that the investment was a sufficiently seriously bad one to justify suing them? Mr Haward needs to establish that he did not have this knowledge until after 6 December 1998. This is the sub-section (6)(a) issue.

121. It can be seen from these passages that Lord Scott did not consider that material facts knowledge would require that the claimant had any knowledge about the acts or omissions of the defendant that allegedly constitute the negligence.

122. Lord Walker stated at paragraphs 59 to 61:

> 59. … considering the matter for the present simply by reference to the statutory text, I think that it is clear that although section 14A(9) has the effect just mentioned, it cannot go so far as to free the section entirely of any hint of legal technicality. There are three pointers to this, all of which I have already mentioned: the word "damage" (which must in this context mean actionable damage, or at any rate what the claimant believes to be actionable damage, the cause of action being negligence); the words "attributable to" which are concerned in some way with causation, in the context of what becomes (once proceedings have been commenced and the claim pleaded) an allegation of negligence; and the words "acts or omissions alleged to constitute negligence." So although the claimant need not, at the starting date, know anything about the tort of negligence (not even its name) his or

her state of knowledge cannot be assessed, with hindsight, without some reference to legal concepts, including what is causally relevant in the context of a negligence action.

60. This point can be illustrated by the facts of a reported case which was discussed before your Lordships, *HF Pension Trustees Ltd v Ellison* [1999] Lloyd's Rep PN 489. The background to the case appears from the judgment of Knox J in *Hillsdown Holdings Plc v Pension Ombudsman* [1997] 1 AER 862. The matter arose from the takeover in 1983 of Fatstock Marketing Corp Ltd (FMC) by Hillsdown Holdings Plc (Hillsdown). The trustees of one occupational pension scheme (the FMC scheme), acting on the advice of solicitors, transferred the entire assets of the scheme to another occupational pension scheme (the HF scheme). Soon afterwards the trustees of the HF scheme made a transfer of funds to the principal employer, Hillsdown. That company received about £11.1m and a further sum of about £7.4m (that is 40% tax on the gross sum) was paid to the Inland Revenue. The Pension Ombudsman's decision, upheld by Knox J, was that the first transfer was an improper exercise of a fiduciary power and was therefore invalid. Hillsdown repaid the sum transferred to it but recovery of the tax was uncertain. The trustees of the FMC scheme sued the solicitors for damages for professional negligence. The first transfer was made in November 1989 in reliance on advice given in May 1989. The second transfer was made in two tranches in December 1989 and June 1990. The writ was issued in October 1997. On a striking-out application it was accepted that the claim was statute-barred unless the plaintiff trustees could rely on section 14A. The solicitors argued that the last date on which damage occurred was in June 1990 (when the second tranche of the second transfer was paid) and that the plaintiff trustees then knew all the facts relevant to the pleaded case in negligence. They knew the advice that the solicitors had given, and that they had acted in reliance on it. It was not necessary, the solicitors' counsel argued, for them to know that the advice was wrong. The case seems to have been decided on a concession, recorded (after a reference to *Perry v Moysey* [1998] PNLR 657) at p 495:

> "In the instant case, by contrast, the plaintiff made the payments and thereby (to its knowledge) incurred the damage. The fact that at the time it did not realise that in making the payments it was suffering damage (in the sense of damage recoverable by legal action) is, as [counsel for the trustees] accepted, nothing to the point for present purposes."

61. In my opinion that concession was wrongly made, and should not have been accepted. Until the FMC scheme trustees knew that they had received seriously incorrect advice which overlooked the need for propriety in exercising fiduciary powers, they did not know that the interests of their beneficiaries, the scheme members, were being

> prejudiced. This lack of knowledge did not mean merely that they were ignorant of having a cause of action in negligence against the solicitors; more fundamentally and more relevantly, they did not know that they (on behalf of the beneficiaries) had suffered any damage at all. They did not know that what had happened was not a more or less technical reorganisation of two pension schemes, but an improper abstraction of funds which might (if the tax was not recovered) deprive their beneficiaries of over £7m. In short, they knew the bare facts, but they were ignorant of their real significance. Their ignorance was at a different and more basic level than that addressed by section 14A(9).

123. When discussing material facts knowledge, the master's judgment (see section A7.4 above) cited what had been said by Lord Brown at paragraph 90. It is common ground, however, that paragraph 90 was concerned with causation knowledge, and that relevant parts of Lord Brown's speech dealing with material facts knowledge include paragraphs 87 and 88:

> 87. … Given, however, that Fawcetts' case [on limitation] is based solely on Mr Haward's actual knowledge, to my mind it must fail if anything more is required than that Mr Haward knew that his loss might well have resulted from an investment made on Fawcetts' advice.
>
> 88. Having, I confess, changed my mind upon the point, I have finally come to the conclusion that nothing more is needed. I had earlier been attracted to the view that the analogy here was with *Dobbie v Medway Health Authority* [1994] 1 WLR 1234, as thereafter analysed in *Hallam-Eames v Merrett Syndicates* (1995) [2001] Lloyd's Rep PN 178: unless and until Mrs Dobbie knew that her removed breast had in fact been healthy, time would not start running against her. So too here, it has been suggested: until the investment was known not merely to have been lost but to have been intrinsically unsound when made (i.e. an ill-judged and ill-advised investment from the outset rather merely than one which proved unsuccessful as a result of subsequent events) time should not run. I have come to recognise, however, a critical difference between the two cases. In *Dobbie's* case what was unknown was not the attributability of the damage to the defendant's act but rather the very fact of damage: Mrs Dobbie would clearly have suffered none had her removed breast in fact been unhealthy; she would have been better off without it. Similarly, as Lord Walker has explained, *H F Pension Trustees Limited v Ellison* [1999] Lloyd's Rep PN 489 should have been differently decided, not because of any doubts about attributability but rather on the basis that the trustees there did not know that they had suffered any damage until they

> learned of the impropriety of the payments made and the consequent likelihood of tax losses. In both those cases, however, there could have been no question but that, once the fact of damage was known to the respective claimants, time started running. It was not necessary for Mrs Dobbie also to have known that the reason her healthy breast had been removed was because the surgeon had failed first to carry out a sufficient examination of the lump to be satisfied of its malignancy; nor would it have been necessary for the trustees in the pension case to have known what underlay the incorrect advice they had received when making the payments.

124. Relevant passages in Lord Mance's speech, so far as material facts knowledge is concerned, begin with paragraphs 106 and 107:

> 106. Under s.14A the onus is on a claimant to plead and prove that he first had the knowledge required for bringing his action within a period of three years prior to its bringing. Subsection (6) of s.14A distinguishes two aspects of the knowledge required. The first aspect relates to the seriousness of the damage, the second to "the other facts relevant to the current action" including in particular that such damage was attributable in whole or part to the act or omission alleged to constitute negligence and the identity of the defendant. The seriousness of the damage is relevant because there may be cases where, although it is known that loss has been suffered due to the negligence of another person, the loss may appear for a time so minor that no-one would contemplate instituting proceedings. That is I think more likely in the area of personal injuries and fatal accidents, covered by s.14 on which s.14A(7) to (10) were modelled, than in the area covered by s.14A itself. In both areas, the statutory language assumes that it is known that there has been some injury (under s.14) or damage (under s.14A). But this too can give rise to difficulty. If a doctor advises that it is necessary to operate, or to remove a breast, in order to remove a malignant tumour, one would not usually speak of the patient sustaining an injury until one knew that the diagnosis was misconceived and there was no such tumour. Similarly, if a financial adviser advises in favour of an investment, one would not describe the making of the investment itself as "damage" until one discovered that it had been a bad or unsound investment from the outset.
>
> 107. In such cases, there is an inter-play between knowledge of what would ordinarily be regarded as injury or damage and knowledge regarding the factual circumstances in which the operation or investment occurred. Yet, the first aspect of the knowledge required relates to damage of sufficient seriousness "to justify [the claimant] instituting proceedings", whereas the knowledge required regarding the attributability of such damage to some act or omission of the defendants is, as will appear, not necessarily such knowledge as to

justify proceedings. To maintain a coherent scheme, the better view therefore appears to be to treat the first aspect of knowledge as relating solely to matters of quantum and all questions regarding the evaluation or classification of damage as such as falling within the second aspect of the knowledge required. This is also the view taken in authority: see *Dobbie v. Medway Health Authority* [1994] 1 WLR 1234 , 1241G–1242A, per Sir Thomas Bingham MR. In the present case, the judge said that Mr Haward knew by 6th December 1998 that at any rate part of the large investments which had been made in HAL would not be recovered and had become lost, whatever happened to HAL. But that is not the same as saying that he knew that the investments were bad from the outset.

125. Further relevant passages in Lord Mance's speech are found in paragraphs 114 to 118:

> 114. As Charles J rightly observed, there are tensions arising from the inter-action of subs.(8)(a) and subs.(9) of s.14A . Under subs.(9) if a claimant knows the relevant circumstances, it is irrelevant that he does not appreciate that they, as a matter of law, involve negligence. And the history of the legislation, which I have already recited, shows that the aim was also to eliminate awareness of fault from the knowledge required. Yet in everyday life we may only be prepared to attribute responsibility if and when we appreciate what ought normally or properly to have happened, and so it is not surprising the authorities contain not only clear statements in line with the Law Reform Committee's intention in its 20th report, but also statements showing the difficulty of avoiding terminology which has some flavour of fault-based thinking.
>
> 115. This problem, which can arise most acutely in relation to omissions in professional negligence cases, is closely examined by Janet O'Sullivan in Limitation, latent damage and solicitors' negligence (2004) 20 Journal of Professional Negligence 218, 233–244. It is, as she shows, most acute in a case of alleged negligence on the part of a solicitor or other adviser, where the negligence consists simply in omitting to do something which it was the adviser's duty in law to do (or in doing something that it was his duty not to do) and where the only reason why the client does not attribute any resulting damage to the adviser is that he does not know that the adviser would have been expected so to do (or not to do). Even in such a case, Hart & Honoré, in *Causation in the Law* (2nd Ed.) p. 38, demonstrate that the concepts of causation (dependent on knowing what is factually usual) and reprehensibility (central to the concept of breach of duty) are conceptually distinct, although on the particular facts coincident.
>
> 116. Whatever the position in such case, it is in any event not on all fours with a case where an adviser causes or allows a client to enter into a transaction but the client has no reason to attribute loss suffered

in the transaction to his adviser until he discovers that the transaction was from the outset intrinsically unsound. In such a case there is authority that knowledge that the transaction was from the outset unsound (giving rise to a prima facie right to complain) may be distinguished from the (under s.14A(9) irrelevant) knowledge that the adviser was negligent: see *Hallam-Eames v. Merrett Syndicates [2001] Ll.R. Prof. Neg. 178, decided by a Court of Appeal* consisting of Sir Thomas Bingham MR and Hoffmann and Saville LJJ (as they then were). The distinction may in such a case be narrow, as Hoffmann LJ giving the judgment of the court himself recognised at p.181 (right column) in that case and as Janet O'Sullivan points out in her article at p.236, but it is an important, and I think a just, one.

117. I add that I do not consider that the focus of subss.(6)(b) and (8)(a) on facts and the irrelevance under subs.(9) of knowledge, as a matter of law, that such facts involve negligence mean that the decision in *HF Pension Trustees Ltd. v. Ellison* [1999] Ll.R. Prof. Neg. 489 was correct. The court there treated the impermissibility of transfers, which resulted from advice given by the defendants, as a matter of law. In my view, this impermissiblity should, in context, have been regarded as an (unknown) fact — an aspect of the acts or omissions alleged to constitute negligence — or possibly (as my noble and learned friend Lord Walker has suggested) as unknown damage resulting from such acts or omissions. In either case, it should not have been until the impermissibility was known to the claimants that time started running against them. The distinction between fact and law has never been that rigid (cf e.g *Cooper v. Phibbs* (1867) LR 2 HL 149 and, in the present field, the decision of Judge Raymond Jack QC, as he then was, in *Perry v. Moysey* [1998] PNLR 657), while subs.(9) of s.14A goes no further than to make irrelevant knowledge that acts or omissions involved negligence.

118. For present purposes what matters is that it is, in my opinion, wrong to suggest that all a claimant needs to know is that he has received professional advice but for which he would not have acted in a particular way which has given rise to loss, or that he has not received advice when, if he had received it, he would have acted in a way which would avoided such loss. The defendants' primary contention to that effect was, I think, accepted by the judge at first instance (cf paragraph 103 above), and was advanced again before the House by counsel for Fawcetts. But it is, in my view, untenable, and could lead to unjust results. Mere “but for” causation is insufficient. This was pointed out by Hoffmann LJ in *Hallam-Eames v. Merrett Syndicates* [2001] Ll.R. Prof. Neg. 178, 181. The decision in that case illustrates the point, since it was not the writing of the run off policies or of the reinsurances to close (“RITCs”) or the certification by the auditors of the accounts which were alone regarded as the acts or omissions alleged to constitute the negligence. Rather it was those facts plus the fact that they exposed the Names to potentially huge

> liabilities (and in the case of the accounts also attributed values to incurred but not reported losses — "IBNRs") none of which were capable of reasonable quantification: see especially at p.181 (top right and the whole left column). A claimant who has received apparently sound and reliable advice may see no reason to challenge it unless and until he discovers that it has not been preceded by or based on the investigation which he instructed or expected. A claimant who has suffered financial loss in a transaction entered into in reliance on such advice may not attribute such loss to the advice unless and until he either makes the like discovery about the inadequacy of the work done, or at least discovers some respect in which the transaction was from the outset unsound giving him (as Hoffmann LJ said) prima facie cause to complain. Such a scenario may well occur where there are other causes of loss which appear to him capable of explaining the whole loss.

B1.4 *Haward:* causation knowledge and identity knowledge

126. In the context of causation knowledge Lord Nicholls in paragraphs 10 and 11 examined questions about the degree of detail required:

> 10. Questions about the degree of detail required have mostly arisen in the context of the need for a claimant to know 'the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence': section 14A(8)(a) . Consistently with the underlying statutory purpose, Slade LJ observed in *Wilkinson v Ancliff* [1986] 1 WLR 1352, 1365, that it is not necessary for the claimant to have knowledge sufficient to enable his legal advisers to draft a fully and comprehensively particularised statement of claim. Where the complaint is that an employee was exposed to dangerous working conditions and his employer failed to take reasonable and proper steps to protect him it may well be sufficient to set time running if the claimant has 'broad knowledge' of these matters. In the clinical negligence case of *Hendy v Milton Keynes Health Authority* [1992] 3 Med LR 114, 117, Blofeld J said a plaintiff may have sufficient knowledge if she appreciates 'in general terms' that her problem was capable of being attributed to the operation, even where particular facts of what specifically went wrong or how or where precise error was made is not known to her. In proceedings arising out of the manufacture and sale of the drug Opren Purchas LJ said that what was required was knowledge of the 'essence' of the act or omission to which the injury was attributable: *Nash v Eli Lilly & Co* [1993] 1 WLR 782, 799. In *Spargo v North Essex District Health Authority* [1997] PIQR P235 Brooke LJ referred to 'a broad knowledge of the essence' of the relevant acts or omissions. To the same effect Hoffmann LJ said section 14(1)(b) requires that 'one should look at the way the plaintiff puts his case, distil what he is complaining about and ask whether he

had in broad terms knowledge of the facts on which that complaint is based': *Broadley v Guy Clapham & Co* [1993] 4 Med LR 328, 333.

11. A similar approach is applicable to the expression 'attributable' in section 14A(8)(a) . The statutory provisions do not require merely knowledge of the acts or omissions alleged to constitute negligence. They require knowledge that the damage was 'attributable' in whole or in part to those acts or omissions. Consistently with the underlying statutory purpose, 'attributable' has been interpreted by the courts to mean a real possibility, and not a fanciful one, a possible cause of the damage as opposed to a probable one: see *Nash v Eli Lilly & Co* [1993] 1 WLR 782, 797–798. Thus, paraphrasing, time does not begin to run against a claimant until he knows there is a real possibility his damage was caused by the act or omission in question.

127. Analysing the matter in *Haward*, Lord Nicholls said at paragraphs 19 to 21:

19. I agree with the Court of Appeal. I agree with the Court of Appeal that the judge in the present case fell into the same error as the first instance judge in *Hallam-Eames v Merrett Syndicates Ltd* [2001] Lloyd's Rep PN 178. The language and intent of section 14A(8)(a) are clear. As already noted, in addition to having knowledge of the material facts about the damage, a claimant must know there was a real possibility the damage was caused by ('attributable to') the acts or omissions alleged to constitute negligence. The conduct alleged to constitute negligence in the present case was not the mere giving of advice. The conduct alleged to constitute negligence was the giving of flawed advice: Mr. Austreng did not give the advice appropriate to the true financial state of the company's affairs.

20. This feature of the advice cannot be brushed aside as a matter of detail. Nor can it be treated, as it was by the judge, as a matter going only to particulars. Far from it. This feature is the very essence of Mr Haward's claim. Stated in simple and broad terms, his claim is that Mr Austreng did not do his job properly. Time did not start to run against Mr Haward until he knew enough for it to be reasonable to embark on preliminary investigations into this possibility.

21. There may be cases where the defective nature of the advice is transparent on its face. It is not suggested that was so here. So, for time to run, something more was needed to put Mr Haward on inquiry. For time to start running there needs to have been something which would reasonably cause Mr Haward to start asking questions about the advice he was given.

128. In section B1.2 above I cited at paragraph 45 of Lord Scott's speech, dealing with the *Dobbie* and *Hallam-Eames* cases. Immediately prior to paragraph 45 Lord Scott said in paragraphs 43 and 44:

> 43. The statutory language in sub-section (8)(a) has been considered in a number of cases and raises the question whether a claimant, in order to obtain the extended period of three years, need show no more than a lack of knowledge of an allegedly negligent act or omission that is a link in the causation chain leading to the damage, and regardless of the importance of that link in the chain. In other words, a causative connection is a necessary part of attributability but is it necessarily sufficient to constitute attributability?
>
> 44. In *Nash v Eli Lilly & Co.* [1993] 1 WLR 782 , a personal injuries case, Purchas LJ, giving the judgment of the Court of Appeal, said, at p.799, that
>
> > "It was not … the intention of Parliament to require for the purposes of section 11 and section 14 of the [1980] Act proof of knowledge of the terms in which it will be alleged that the act or omission of the defendants constituted negligence or breach of duty. What is required is knowledge of the essence of the act or omission to which the injury is attributable." (emphasis added)

129. Lord Scott continued at paragraphs 48 and 49:

> 48. The critical issue, therefore, is whether by that date Mr Haward lacked knowledge that the "damage", i.e. the investment of Haward money in 1994 and 1995, "was attributable in whole or in part" to the acts or omissions of Fawcetts alleged to constitute negligence. This is the sub-section (8)(a) issue.
>
> 49. As to this I would, for my part, accept and apply the opinions expressed in *Nash v Eli Lilly* , *Dobbie v Medway Health Authority* and the *Hallam-Eames* case that the requisite knowledge is knowledge of the facts constituting the essence of the complaint of negligence.

130. Lord Scott added at paragraph 54:

> 54. A decision of your Lordships in favour of the respondents, enabling the action to be brought within three years of the discovery by Mr Haward of why it was that the advice he had received from Fawcetts was negligent (if that is what it was), or why it was that Fawcetts had not given him the advice that he alleges they should have

given, would expand section 14A to cover cases that had nothing whatever to do with latent damage or losses. It would expose those who give advice on financial matters to potential liability not simply until the expiry of three years after the loss-making consequences of the advice are known but until the expiry of three years after all the reasons why that advice was negligent are known. This, in my opinion, is an unjustifiable extension of the scope of section 14A, substantially altering the balance between claimant and defendant that Parliament has struck.

131. Lord Walker said at paragraph 67:

> 67. In her article (p 236) Janet O'Sullivan makes this comment:
>
> > "A further problem with the reasoning in Hallam-Eames, as Hoffmann LJ recognised, is that it comes close to saying that which is forbidden by section 14A (9), namely that time does not start to run until the claimant has knowledge that the defendant was negligent."
>
> It is indeed a striking feature of the line of authority in the Court of Appeal that (with the modest exception of the reference in Hallam-Eames to cause for complaint) the Court has firmly rejected any language which suggests, even in the least technical terms, that some fault or mishap has occurred: see for instance Sir Thomas Bingham MR in *Dobbie v Medway Health Authority* [1994] 1 WLR 1234 at p1243 C–D, observing that the judge was open to criticism for using, not only the expression "negligence", but also "unnecessarily" and "something had gone wrong" (the Master of the Rolls nevertheless expressed complete agreement with the judge's conclusion); see also Steyn LJ at p1247H. I respectfully doubt whether the insistence on extremely non-judgmental language is required by section 14A(9) , and I think that it may in some cases ignore the realities of the situation. I respectfully agree with the views expressed on this point by my noble and learned friend Lord Nicholls of Birkenhead in paras 13 and 14 of his opinion. But in any event there is a distinction to be made between two matters: (1) the generality or specificity (see *Nash v Eli Lilly* [1993] 1 WLR 782, 798–799) of the language in which the essence of the claimant's complaint is to be identified and expressed, and (2) the judgmentally colourful or non-judgmentally monochrome character of that language. So long as section 14A(9) is kept well in mind, the level of generality or specificity will often (as in this case) be the more important matter for the Court to address.

132. As noted earlier, paragraph 90 of Lord Brown's judgment dealt with causation knowledge and, as set out by the master in his judgment, will be found in section A7.4 above. Lord Brown added at paragraph 91:

> 91. If the other approach is adopted, time only starts to run once the claimant recognises that a fuller examination of the company's prospects should have been carried out than was in fact carried out, knowledge which Mr Haward only learned here at some unascertained date after the investigation into Fawcetts' conduct had itself begun in May 1999 (when another accountant first suggested to Mr Haward that a negligence claim might lie against Fawcetts). But what if that suggestion and the investigation which it prompted had themselves been made at a later date still, perhaps very substantially later? On this approach the limitation period would appear capable of almost limitless extension and for no sufficient reason: unlike the position in *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1 — the decision which precipitated what is now section 14A of the 1980 Act-there is nothing latent here about the damage or, indeed, about the identity of the prospective defendant. I recognise, of course, that that does not foreclose the argument on attributability: it provides, however, the relevant context in which it falls to be resolved.

133. Lord Mance said in paragraphs 108 to 113:

> 108. The second aspect of knowledge required under s.14A is that the damage was attributable in whole or part to the act or omission which is alleged to constitute negligence. It is clear from both the heading and language of s.14A that this aspect deals with difficulties facing a claimant separate from those which are presented by cases where the fact or quantum of damage itself is latent. The background to s.14A confirms this. The 20th Report of the Law Reform Committee of May 1974 (Cmnd. 5630) led to the definition of knowledge in personal injury cases in the Limitation Act 1975, which became by consolidation s.14 of the Limitation Act 1980. In paragraphs 42, 49 and 54–55, the Law Reform Committee treated the two aspects as independent. In particular in paragraph 49 it said:
>
>> "It has not been suggested to us, and in our view could not reasonably be suggested, that the plaintiff's date of knowledge should arrive until he has knowledge (actual or constructive) both of his injured condition and of its having been caused by an act or omission of the defendant."
>
> 109. The Committee went on to consider whether there should be any further requirement that the plaintiff should know that he had a worthwhile cause of action, or (taking an intermediate possibility suggested, uniquely, by Lord Pearson in *Central Asbestos v. Dodd* [1973] AC 518) that he should at least be aware that his injury was attributable to some fault of the defendant. They rejected both possibilities. At paragraph 55, they therefore accepted as (they believed) "a date capable of precise definition and not presenting any particular difficulties of proof" the date "when the plaintiff has

knowledge, actual or constructive, both of his injured condition and of its having been caused by acts or omissions of the defendant". In the later Law Reform Committee's 24th Report (Latent Damage) of November 1984, which led to the insertion by the Latent Damage Act 1986 s.14A, applying to cases of negligence not involving personal injury, the Committee at paragraph 4.7 preferred to model s.14A on s. 14, rather than on s.11(3) of the Prescription and Limitation Act (Scotland) Act 1973 , because it was arguable that s.11(3)

> "does not cover lack of knowledge of its [the damage's] causation, or the identity of the person (or persons) liable. By comparison awareness of such matters, which could sometimes be difficult to ascertain in a latent damage context, is specifically included in the definition of knowledge contained in section 14 of the 1980 Act".

110. The reference in parenthesis to awareness of causation being "sometimes … difficult to ascertain in a latent damage context" cannot mean that the Committee intended that it should only be where damage remained latent that knowledge of causation was to be relevant. Indeed, so long as damage remains latent, knowledge regarding causation cannot really arise as a problem. Another point in this Report which it is of interest to note is the Committee's recognition at the end of paragraph 4.7 — in contrast with the optimism of the 1974 Report — that an approach adapted from s.14 "does have its disadvantages too" and "is a complicated formulation".

111. Under the terms of s.14A(8)(a) , it is relevant to consider what is meant by (i) "knowledge", (ii) "the act or omission which is alleged to constitute negligence" and (iii) knowledge that damage was "attributable" to such an act or omission. For the moment, I confine myself to actual knowledge.

112. The degree of certainty of knowledge required under s.14 was considered by Purchas LJ giving the judgment of the Court of Appeal in *Nash v. Eli Lilly* (at p. 792C–D and also p. 796C–D. At p 791G–H Purchas LJ also quoted the conclusion of Lord Donaldson of Lymington MR in *Halford v. Brookes* [1991] 1 WLR 428, 443, that knowledge here "clearly does not mean 'know for certain and beyond possibility of contradiction'". Purchas LJ proceeded at p 792 C–D "on the basis that knowledge is a condition of mind which imports a degree of certainty and that the degree of certainty which is appropriate for this purpose is that which, for the particular plaintiff, may reasonably be regarded as sufficient to justify embarking upon the preliminaries to the making of a claim for compensation such as the taking of legal or other advice". In *Broadley v. Guy Clapham & Co.* [1993] 4 Med LR 328, 334, Hoffmann LJ re-phrased the purpose of s.14(1) as being "to determine the moment at which the plaintiff knows enough to make it reasonable for him to begin to investigate whether or not he has a case

against the defendant". This was taken up by Brooke LJ in another case under s.14, *Spargo v. North Essex District Health Authority* [1997] PIQR P235 , P242, where he said:

> "(3) A plaintiff has the requisite knowledge when she knows enough to make it reasonable for her to begin to investigate whether or not she has a case against the defendant. Another way of putting this is to say that she will have such knowledge if she so firmly believes that her condition is capable of being attributed to an act or omission which she can identify (in broad terms) that she goes to a solicitor to seek advice about making a claim for compensation.
>
> (4) On the other hand she will not have the requisite knowledge if she thinks she knows the acts or omissions she should investigate but in fact is barking up the wrong tree; or if her knowledge of what the defendant did or did not do is so vague or general that she cannot fairly be expected to know what she should investigate; or if her state of mind is such that she thinks her condition is capable of being attributed to the act or omission alleged to constitute negligence, but she is not sure about this, and would need to check with an expert before she could be properly said to know that it was."

All such formulations seem to me relevant also under s.14A, provided that it is remembered that under subs.(8)(a) the requisite knowledge must be of the attributability in whole or part of the damage suffered to the act or omission alleged to constitute negligence. The passage from HHJ Playford's judgment cited in paragraph 103 above was therefore, in my view, incorrect in law.

113. Turning to the phrase "the act or omission which is alleged to constitute negligence", the word "constitute" is in my view significant. It indicates that the claimant must know the factual essence of what is subsequently alleged as negligence in the claim. Once such knowledge has been acquired, it is under subs. (9) irrelevant whether or not the claimant knew that the relevant act or omission "did or did not, as a matter of law, involve negligence". So, there must be knowledge of the act or omission allegedly constituting negligence, but there need not be knowledge that, as a matter of law, such act or omission involved negligence. Whether an act or omission involves negligence is a matter of law for the court, even though a court may of course hear a good deal of evidence (e.g. about accountancy principles and practices) in order to determine it. Evidence of relevant accountancy principles or practices will commonly be deployed on the issue whether, as a matter of law, such act or omission involved negligence. The difficulty is that knowledge of such principles or practices may also in some cases be said to bear on the question whether a person suffering loss would attribute such loss to accountants who had advised or not advised him.

134. Lord Mance added at paragraphs 119 to 121:

> 119. On the other hand, as counsel for the claimants accepted in his note to the judge (paragraph 99 above), a claimant cannot postpone the running of time almost indefinitely by reference to detailed factual points which often only become known in the course of investigation of a possible claim, or during litigation itself. The Court of Appeal was right in *Broadley v. Guy Clapham & Co.* to disapprove a test adopted by Hirst J in *Bentley v. Bristol & Weston Health Authority* [1991] 2 Med LR 359, in so far as it would have required a claimant to know all factual matters necessary to establish negligence or to draft a fully and comprehensively particularised claim.
>
> 120. The authorities have thus adopted as the relevant test when the claimant acquired "knowledge of the essence of the act or omission to which the injury is attributable": see *Nash v. Eli Lilly & Co.* [1993] 1 WLR 782, 799C per Purchas LJ and *Hallam-Eames v. Merrett Syndicates* [2001] Ll.R. 178, 181. The Court of Appeal in *Hallam-Eames* thus distinguished between, on the one hand, "elaborating the detail by requiring knowledge of precisely how he had come to do the act complained of" (which is irrelevant) and, on the other, knowledge of facts which are "part of the essence of [the] complaint". An example given of the latter was the fact in *Dobbie v. Medway Health Authority* [1994] 1 WLR 1234 that the breast removed by the surgeon had been healthy. In *Hallam-Eames*, the essential facts of which knowledge was required were of a reverse character — viz that the run-off policies and reinsurances to close and the certified accounts were in effect unsound (or "unhealthy"). Hoffmann LJ explained:
>
> > "… the act or omission of which the plaintiff must have knowledge must be that which is causally relevant for the purposes of an allegation of negligence. There may be many acts, omissions or states which can be said to have a causal connection with a given occurrence, but when we make causal statements in ordinary speech, we select on common sense principles the one which is relevant for our purpose.
>
> …
>
> It is this idea of causal relevance which various judges of this court have tried to express by saying that the plaintiff must know the 'essence of the act or omission to which the injury is attributable' (Purchas LJ in *Nash v. Eli Lilly* [1993] 1 WLR 782, 799) or 'the essential thrust of the case' (Sir Thomas Bingham MR in *Dobbie* … [1994] 1 WLR 1234, 1238) or that 'one should look at the way the plaintiff puts his case, distil what he is complaining about and ask whether he had in broad terms knowledge of the facts on which that complaint is based' (Hoffmann LJ in *Broadley* [1993] 4 Med LR 328, 332).

…

He [the claimant] must have known the facts which can fairly be described as constituting the negligence of which he complains. …"

121. Hoffmann LJ continued:

> "What, on these principles, are the facts which constitute the negligence of which the Names complain? It would in our view be incomplete to say that it was the writing of the run-off reinsurance policies or the RITCs or the certification of the syndicate accounts. These facts in themselves do not amount to acts of which the Names would even prima facie be entitled to complain. It is necessary to add the allegation that the run-off policies and RITCs exposed the Names to potentially huge liabilities and that the certified accounts attributed values to IBNRs [incurred but not reported losses], none of which were in fact capable of reasonable quantification."

135. Lord Mance continued in paragraph 122:

122. The third element is what is meant by damage being "attributable" in whole or part to the act or omission allegedly constituting negligence. The authorities establish that the word "attributable" means here "capable of being attributed", rather than "caused by": *Guidera v. N.E.I. Projects (India) Ltd.* (30 January 1990, CA Tr. No. 60 of 1990) per Sir David Croom-Johnson, *Nash v. Eli Lilly* at pp.797–8, per Purchas LJ and *Dobbie v. Medway Health Authority* at p.1240, per Sir Thomas Bingham MR. Consistently with the clear wording of the statutory language, the authorities also emphasise that s.14A is concerned with knowledge in this sense of the attributability of the damage suffered to the act or omission allegedly constituting negligence: see e.g. *Halford v. Brookes* [1991] 1 WLR 428, 443D per Lord Donaldson MR, *Dobbie v. Medway Health Authority* [1994] 1 WLR 1234, 1240E–H per Sir Thomas Bingham MR and *Spargo v. North Essex District Health Authority* [1997] PIQR P235 , P242, per Brooke LJ in the passages quoted in paragraph 112 above. This is, of course, of particular relevance in cases where there is another possible cause (cf *Irshad Ali v. Courtaulds Textiles Ltd.* [1999] Lloyd's Rep. Medical 301), though it must always be remembered that all that s.14A requires is knowledge that loss is "capable" of being attributed in whole or "in part" to the act or omission alleged to constitute a particular defendant's negligence. It has indeed been held that a claimant may have the requisite knowledge although he faces alternative possible defendants, one or other but not both of whom may be liable (cf *Halford v. Brookes* [1991] 1 WLR 428, 443G–H).

B2 Issue 1(2): knowledge of "inequitable apportionment" enough?

B2.1 Inapt shorthand: knowledge that things "could and should have been different"

136. Issue 1(2), as set out in section A8 above, begins with a concession. I shall refer to it as the "could and should concession". This is that, in order for Mrs Trainer to have section 14A cumulative knowledge, she must have:

> … knowledge that things could and should have been different …

137. Subject to that concession, issue 1(2) asks whether, for the purposes of section 14A cumulative knowledge, Mrs Trainer needed to have had actual or constructive knowledge:

> … that Allanton had no contractual right to insist on the varied terms and/or that there was no contractual warrant for the inequitable apportionment;

138. In this regard it is important:

(1) to distinguish between material facts knowledge (which is concerned with knowledge of damage) and causation knowledge (knowledge that the damage was attributable to the act or omission alleged to constitute negligence): see section A1.4 above; and

(2) to bear in mind under section 14(9) of the 1980 Act, as regards relevant "knowledge" provisions, that knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant: see section B1.2 above.

139. The use of the word "should" in the could and should concession, and in paragraph 5-096 of Jackson & Powell (see paragraph 56 of the master's judgment, cited in

section A7.4 above), is at first sight surprising. If it were used in the sense that there was a defendant who ought to have done something, there would be a potential inconsistency with the clear statement in section 14A(9) that knowledge of negligence is irrelevant. Similarly, if used in that way, the word "should" seems potentially inconsistent with Lord Brown's paragraph 90, indicating that it was not necessary to know that Fawcetts had failed to carry out necessary investigations.

140. Part A of the May 2019 Cramer Pelmont note addresses this potential inconsistency. It explains Cramer Pelmont's agreement to the use of the word "should" by citing Lord Brown's paragraph 88, Lord Nicholls's paragraph 14, Lord Walker's paragraphs 61 and 67, and Lord Mance's paragraphs 116 and 117.

141. What is apparent from Lord Brown's paragraph 88 (see section B1.2 above), however, is that the word "should" nowhere appears. It is clear from paragraph 88 that Lord Brown adopts the explanation of *Dobbie* that is given in *Hallam-Eames*: Mrs Dobbie would have suffered no damage had her removed breast been unhealthy.

142. Nor does the word "should" appear in Lord Nicholls's paragraph 14: see section B1.2 above. Consistently with Lord Brown's paragraph 88, Lord Nicholls states:

> the essence of [Mrs Dobbie's] case was that she had suffered injury by the removal of a healthy breast, that is, her breast had been removed unnecessarily and something had gone wrong.

143. Nor does the word "should" appear in Lord Walker's paragraph 61 and 67. Paragraph 61 is set out in section B1.3 above. In paragraph 67 Lord Walker adopted what was said by the Court of Appeal in *Hallam-Eames*. Lord Walker's view is that the word "damage" in section 14A must at least connote what a claimant believes to be actionable damage, thus requiring an appreciation of the "real significance" which,

at first sight at least, indicates that what has happened gives an entitlement to complain.

144. What Lord Mance said in paragraphs 114 to 118 is set out in section B1.3 above. In the context of causation knowledge Lord Mance noted the problem, in relation to section 14A(9), that in everyday life we may only be prepared to attribute responsibility if and when we appreciate what ought normally and properly to have happened. It was, he said, a particularly acute problem when negligence consists of omitting to do something which it was an adviser's duty in law to do (or doing something that it was the adviser's duty not to do) and where the only reason why the client does not attribute any resulting damage to the adviser is that the client does not know that the adviser would have been expected so to do (or not to do).

145. Lord Mance did not examine this scenario further. Instead he turned to circumstances where an adviser causes or allows a client to enter into a transaction but the client has no reason to attribute loss suffered in the transaction to the adviser until the client discovers that the transaction was from the outset intrinsically unsound. In this circumstance Lord Mance's analysis adopted the approach of the Court of Appeal in *Hallam-Eames*.

146. At paragraph 117 Lord Mance uses the word "should" – but only in relation to what the court, rather than any defendant, ought to have done. The context concerns *HF Pensions Trustees Ltd*, where an impermissible transfer was made. In this context, for there to be causation knowledge, the claimant would need to know that the transfer was impermissible. Lord Mance added that this was "possibly" also

something which a claimant needed to know for material facts knowledge, as Lord Walker had suggested.

147. What this analysis seems to me to show is that, both in the concession in the present case and in paragraph 5-096 of *Jackson & Powell*, the word "should" must not be understood as connoting fault on part of the defendant. For this reason the "could and should" terminology adopted by the parties in the present case is best avoided. In relation to material facts knowledge, while Lord Mance goes no further than to accept that Lord Walker's view may "possibly" apply (see paragraph 117, and contrast paragraph 107), the speeches of Lord Nicholls, Lord Walker and Lord Brown indicate that once a claimant knows that a better outcome, from the claimant's point of view, was possible and that something had gone wrong, the claimant will at that point have material facts knowledge. As to the degree of certainty required, applying Lord Nicholl's paragraph 9 and Lord Mance's paragraph 112 the threshold in relation to these things will be the point at which the claimant knows enough for it to be reasonable to begin to investigate further.

B2.2 More shorthand: "inequitable apportionment"

148. The parties' formulation of the present issue was whether, for material facts knowledge, it would have been sufficient for Mrs Trainer to acquire actual or constructive knowledge of the inequitable apportionment between her and Mr Trainer, or whether it was necessary for her to know in addition that Allanton had no contractual right to insist on the varied terms and/or that there was no contractual warrant for the inequitable apportionment: see section A8.5 above. What is meant by "the inequitable apportionment", however, calls for explanation.

149. In her particulars of claim, Mrs Trainer identifies two ways in which she says she could have obtained a better outcome.

150. First, she says that if properly advised she could have rejected Allanton's attempts at renegotiation. If so, she says that (at best) she would have received her half share of the Wildwood Lodge contractual purchase price. At worst, she says that she might have agreed to some reduction in the overall amount paid by Allanton, but even so the overall amount paid by Allanton would have been greater than was paid by Allanton in the event.

151. The second way in which Mrs Trainer says she could have obtained a better outcome is that, whatever the amount paid by Allanton, if properly advised she could have negotiated with Mr Trainer to obtain a 50/50 split, or at least a better split than in the event she received. The parties have described this as Mrs Trainer's "inequitable apportionment" claim. That wording is shorthand for Mrs Trainer's case that, on the one hand, she was told by Mr Trainer that he was getting much the same as her by way of a small payment on completion with a possibility that he would get more, only because he was prepared not to insist on payment of his entire share upon completion, if and when the development was completed successfully, while on the other hand, under the arrangements Mr Trainer in fact made with Allanton, he received on completion £400,000 rather than Mrs Trainer's £300,000, very substantial sums by way of deferred consideration, and undisclosed payments of £50,000 and £12,500.

152. Mrs Trainer accepts that if she had discovered that Mr Trainer's benefits under the revised arrangements gave him a much more advantageous apportionment than she,

when entering into the new arrangements, had believed would be his, then that would inevitably have caused her intense concern. As I understand it, the parties when formulating issue 1(2) have used "the inequitable apportionment" to refer to the postulated knowledge by Mrs Trainer of an apportionment "much more advantageous" to Mr Trainer than she had believed would be his.

B2.3 Material facts knowledge and inequitable apportionment

153. The master, when dealing with material facts knowledge at paragraph 57 of his judgment (see section A7.4 above), made no distinct ruling relevant to the present issue. This is not surprising: it is only on this appeal that the present issue has been formulated with any degree of precision. What the master indicated at paragraph 57 was that he suspected that Mrs Trainer had material facts knowledge at a comparatively early stage. After making observations in relation to this suspicion, he went on at paragraph 58 onwards to deal with causation and identity knowledge.

154. The present issue arises because Mrs Trainer, in the event that this court were to hold that Cramer Pelmont had reasonable arguments that Mrs Trainer had causation knowledge and identity knowledge prior 31 October 2015, wishes to be in a position to show that Cramer Pelmont has no reasonable argument that she had material facts knowledge prior to 31 October 2015. Thus the question for me to decide is whether on this issue Mrs Trainer has demonstrated the absence of any reasonable argument that knowledge of the inequitable apportionment would amount to material facts knowledge.

155. Mrs Trainer submits that knowledge of the inequitable apportionment would not constitute material facts knowledge because of the cumulative effect of a series of pre-requisites. I can summarise them in this way:

- pre-requisite (1): in the context of varied contractual arrangements where there had been separate negotiations by Allanton with Mr Trainer and Mrs Trainer and where what was really going on and why was opaque, Mrs Trainer still needed to investigate and to be advised as to what was in fact going on;

- pre-requisite (2): Mrs Trainer needed to be advised that as between her and Allanton there was no contractual warrant or other justification for the inequitable distribution; and

- pre-requisite (3): Mrs Trainer needed to be advised that there was no contractual warrant or other justification, as between her and Mr Trainer, for the inequitable distribution.

156. Cramer Pelmont's response can be encapsulated in three propositions:

- first response proposition: nothing in section 14A says that, in order to have material facts knowledge, Mrs Trainer must have known about all the damage: on the contrary in *Hamlin v Edwin Evans* (1996) 29 HLR 414 the Court of Appeal held that in a case, such as the present, where there is a single and indivisible cause of action for negligence, the reference in section 14A(5) to "relevant damage" will be satisfied once a

claimant has knowledge of damage (great or small) in respect of that negligence;

- second response proposition: this court accordingly need not concern itself with the date on which Mrs Trainer knew that she could have been better off by rejecting Allanton's claim; and

- third response proposition: in order to have material facts knowledge Mrs Trainer did not need legal advice as to her contractual rights against either Allanton or Mr Trainer.

157. As to those three propositions, I have not been able to identify in Mrs Trainer's submission any convincing basis on which the first response proposition can be disputed. The same applies to the second response proposition. In those circumstances Cramer Pelmont has at least a reasonable argument that alleged pre-requisite (2) is not an essential element of material facts knowledge. As to pre-requisites (1) and (3), what is said in Lord Nicholls's paragraph 9 and Lord Mance's paragraph 112 clearly give Cramer Pelmont a reasonable argument that knowledge of the inequitable apportionment, even though further investigation may be needed before proceedings could be issued, gave Mrs Trainer enough information for it to be reasonable to begin to investigate further and was enough information to constitute material facts knowledge. It is at least difficult to see how Mrs Trainer's contention to the contrary can be reconciled with what is said in those paragraphs.

158. The master's conclusions in paragraphs 59 to 71 of his judgment meant that he did not need to analyse the submissions he had heard on material facts knowledge. On my analysis of the submissions before me, however, I conclude that Cramer Pelmont has

at least a reasonable argument that Mrs Trainer had material facts knowledge once she had knowledge of the inequitable apportionment. Certainty is not required. Nor is knowledge of negligence. The substantial difference between what Mr Trainer had told her, and what the inequitable apportionment involved, makes it at least arguable that on learning of the inequitable apportionment Mrs Trainer would have sufficient knowledge that something must have gone wrong.

B3 Issue 1(3)(a): pre-damage imputed knowledge

159. This issue involves a general question of construction, not limited to material facts knowledge. Mrs Trainer advances a proposition that a defendant cannot, in order to deny a claimant the protection of section 14A, rely upon constructive knowledge (as opposed to actual knowledge) of "damage" or "attributability" before "damage" has been sustained and the cause of action is complete. Mrs Trainer acknowledges that there is no authority for the proposition, but submits that it is self-evident because it follows necessarily from the purpose, wording and structure of section 14A.

160. The key feature relied upon by Mrs Trainer in this regard was that section 14A will only be engaged in a case where the cause of action in negligence is complete. That is undoubtedly true: see the express words of section 14A(1) and the observations of the Court of Appeal in *Hamlim* at page 422.

161. Mrs Trainer derives from this feature that "damage", in the sense identified in Lord Nicholls's paragraph 3 (see section A1.1 above), will already have occurred by the time that section 14A(1) is engaged. This is also undoubtedly true: as noted in section A1.1 above, for a cause of action in negligence to be complete (and thus for section 14A(1) to be satisfied) real damage must have been suffered.

162. Mrs Trainer goes on to derive from this feature a further proposition that because damage will necessarily have occurred before section 14A is engaged, it is as a result impossible to say that Mrs Trainer could reasonably have been expected to acquire knowledge of damage, or Cramer Pelmont's responsibility for it, before it had occurred. Taken literally, the proposition is trite: you do not know that damage has been suffered before that damage has occurred. As I understand it, however, what Mrs Trainer is seeking to say is that if a claimant does not have actual knowledge of damage after the cause of action has accrued, but a defendant says that there were observable or ascertainable facts which might reasonably have been expected to lead the claimant to acquire such knowledge, it is not open to the defendant to rely upon facts observable or ascertainable prior to the date when the cause of action accrued.

163. In response, Cramer Pelmont pointed out that section 14A(1) is of general application. It contains no indication that the alternative starting date cannot be determined by reference to constructive knowledge acquired from facts observable or ascertainable before the cause of action accrued. Moreover, if there had been an intention to introduce such a barrier to the applicability of section 14A(10), it would have been easy to include in that subsection an express provision limiting it to knowledge that the claimant might reasonably have been expected to acquire from facts observable or ascertainable after the cause of action accrued.

164. Mrs Trainer in reply stressed that section 14A seeks to give a benefit to claimants who have suffered latent damage. It could not, she submitted, be right that carelessness prior to damage should deprive a claimant of that benefit.

165. In essence, the parties' contentions summarised above raise a novel question as to precisely how section 14A strikes a balance between on the one hand assisting those affected by damage they were actually unaware of, and on the other hand limiting that assistance where a claimant might reasonably have been expected to gain section 14A cumulative knowledge. In that regard section 14A does not say that knowledge of damage in itself is a barrier to benefiting from section 14A: the benefit provided by section 14A will only cease to assist a claimant at a stage when the claimant not only has material facts knowledge, but also has both causation knowledge and identity knowledge. This may be thought to undermine Mrs Trainer's further proposition described above.

166. Moreover, so far as actual knowledge is concerned, the question under section 14A(1) is whether the claimant had that knowledge on the date on which the cause of action accrued. Such knowledge might well be derived from things that were known before the cause of action accrued. If that is the case for actual knowledge, then it is arguable that it should similarly be the case for constructive knowledge. As to the overlap with contributory negligence, it does not seem to me that this necessarily prevents the two concepts from being distinct.

167. To my mind it is at least arguable that when the competing arguments come to be weighed the balance may lie in favour of permitting reliance by a defendant, for the purposes of section 14A(10), upon facts observable or ascertainable before the cause of action accrued.

B4 Issue 1(3)(b): trail of inquiry

168. Like issue 1(3)(a), this issue concerns section 14A(10). Unlike issue 1(3)(a) however, it concerns an aspect of section 14A(10) on which there is a potentially relevant Court of Appeal decision.

169. In *Gravgaard v Aldridge & Brownlee (a firm)* [2004] EWCA Civ 1529, [2005] PNLR 19 the facts are conveniently summarised in the headnote at page 319 of the Professional Negligence Law Reports:

> In 1982 the claimant inherited a property in Bournemouth in which she went to live with her husband who traded as a tour operator. His business was financially supported by limited guarantees given by the claimant and secured on the property. In early 1988 the claimant and her husband decided to pay off the existing business overdraft and raise some working capital by mortgaging the property to the Wessex Building Society. The defendant firm of solicitors was retained to convey the mortgage and in March 1988 the claimant and her husband attended the defendant's offices to enter into a deed of gift transferring the property into their joint names to hold on trust for both of them and to execute the mortgage. Between November 1988 and October 1990 the property became further encumbered by charges in favour of the bankers and creditors of the business, and in October 1993 a possession order was obtained by Lloyds Bank suspended on terms as to regular payments. In 1996 the claimant unsuccessfully sought legal aid to bring a claim against the bank believing that she had been tricked into entering charges in its favour in September and November 1988 without properly having understood them, and wrote to the bank's solicitors making a complaint to that effect in December of that year. The claimant attended her local Citizens Advice Bureau in April, 1999 and instructed solicitors to act on her behalf in May, 1999. In January, 2001 having examined the defendant's file, her solicitors advised the claimant that there had been no requirement by the Wessex Building Society that she transfer the property into joint names. In May, 2002 proceedings were issued alleging the defendant was negligent in failing to ascertain this information and to advise the claimant that no benefit would accrue to her by entering into the deed of gift, and that the property would be exposed to her husband's creditors. At trial the claim was dismissed on the issue of limitation. The judge held that although the claimant did not have actual knowledge of the fact that the defendant's advice had been wrong until 2001, a reasonably competent solicitor or financial adviser, upon being fully informed of the events of February and March 1988, would have had little *320

> difficulty in concluding the advice provided to the claimant by the defendant had been wrong and arguably negligent, and that such conclusion could reasonably have been reached even without the defendant's file; that pursuant to s.14A of the Limitation Act 1980 the claimant might reasonably have been expected to seek and obtain expert advice on the matter no later than the end of 1996 and the date of her constructive knowledge was substantially more than three years prior to the date of issue of her claim.

170. The lead judgment in the Court of Appeal was given by Arden LJ, with whom May LJ and Black J agreed. The Court of Appeal accepted the defendant's argument that it was reasonable to expect that Mrs Gravgaard would take legal advice on her claims against Lloyds as soon as she had been prevailed on to execute the second guarantee in November 1988. The Lloyds' guarantees and second charge were so intimately bound up with the March 1988 transactions that anyone advising her would have realised that the former had to be investigated as well. In those circumstances it was reasonable to expect that Mrs Gravgaard would have sought that advice.

171. Mrs Trainer accepts, in the light of *Gravgaard*, that if she had had knowledge of the damage she complained about against Downs, then Section 14A(10) may have the consequence, that she should, after suitable further enquiries, have eventually discovered the potential responsibility of Cramer Pelmont. She submits, however, that the position is different, and *Gravgaard* can be distinguished, if her only knowledge of damage concerned the damage she complained about against Mr Trainer.

172. Thus the question which arises for present purposes is whether Cramer Pelmont has a reasonable argument that *Gravgaard* cannot be distinguished in the way that Mrs Trainer suggests. In that regard Mrs Trainer focussed on the words "the relevant

damage". It was submitted, plainly rightly, that "the relevant damage" in subsection (5) was damage relevant to the cause of action against Cramer Pelmont: see *Hamlin* and *H v Northampton County Council* [2004] EWCA Civ 526, [2005] PIQR P7. In *Gravgaard* there was an overlap between the damage which was the subject of the complaint against Lloyds and the damage which was the subject of the claim against the defendant. It was for that reason that Mrs Trainer accepted that a trail of enquiry beginning with Downs and ending with Cramer Pelmont could fall within section 14A(10), as there was a similar overlap in the present case in that regard. However, submitted Mrs Trainer, there was no sufficient overlap as would permit Cramer Pelmont to rely upon a trail of enquiry which began with a complaint against Mr Trainer.

173. Cramer Pelmont's response was that Mrs Trainer's argument involved an impermissible gloss. The reasoning in *Gravgaard* had not involved any examination of an overlap. There was no reason to do anything other than apply the words in section 14A(10) at face value.

174. It seems to me that there is plainly a reasonable argument available to Cramer Pelmont that *Gravgaard* cannot be distinguished in the way that Mrs Trainer suggests. True it is that section 14A(5), for the purposes of the alternative starting point in a claim against Cramer Pelmont, is focussing upon the damage which is the subject of Mrs Trainer's claim against Cramer Pelmont. On its face, however, section 14A(10) does not limit the "observable or ascertainable" facts in the way suggested by Mrs Trainer. Mrs Trainer submitted that her present argument was not run in *Gravgaard*, and that there was nothing which precluded it from being run in the present case. That, however, misses the crucial point for present purposes. The

mere fact that it may be open to Mrs Trainer to run the argument in the present case does not mean that the argument is bound to succeed.

C. Inferences and conclusions drawn by the master

C1 Inferences/conclusions on material facts knowledge

175. Inferences and conclusions in relation to material facts knowledge are the subject of issues 2(1) and (2): see section A8.8 above. In the light of my conclusions in section B above I can deal with these matters relatively briefly. As noted in section B2 above, these were matters which the master did not need to analyse, and did not analyse, in any detail.

176. Issue 2(1) identifies three possible bases for thinking that Mrs Trainer had actual or constructive material facts knowledge prior to 31 January 2015. Basis (a) simply relies upon the undisputed fact that Mrs Trainer has always known that she was significantly worse off under the contractual arrangements than under the original arrangements. This may well have been the basis upon which the master proceeded when commenting in paragraph 57 that he suspected that Mrs Trainer knew she had suffered "damage" at a comparatively early stage. However Cramer Pelmont no longer suggests that it would of itself suffice to constitute knowledge of material facts about knowledge of the damage, and I need say no more about it.

177. Potential basis (b) in issue 2(1) concerns the Deed of Variation and the terms of Contract. It approaches these documents in two alternative ways. The first alternative is that Mrs Trainer may have read the Deed of Variation prior to executing it, or the Terms of Contract as part of her involvement in the Ebgui litigation. In that regard Mrs Trainer relies upon her witness statements in the

present case, denying that she read either of these documents, and submits that there is no evidence that she did. It seems to me that this, at least arguably, takes too limited an approach to what is needed. As Cramer Pelmont observes, Mrs Trainer is an experienced property developer. There is, to say the least, a real possibility that she became aware of the inequitable apportionment by reading either or both of the Deed of Variation and Terms of Contract. It was urged on her behalf that there might have been a reasonable explanation for Mr Trainer receiving £400,000 on completion as opposed to Mrs Trainer's £300,000. That submission, however, misses the point: such a substantial disparity from what she had been told would, at least arguably, make her aware that a better outcome, from her point of view, was possible and that something had gone wrong. I recognise that Mrs Trainer has given evidence of personal difficulties which were affecting her at the relevant time. A question may arise as to whether those personal difficulties were such as to lead her not to do things which she might otherwise have been expected to do. That question, however, is pre-eminently, a question to be decided after a trial at which her evidence has been tested.

178. The alternative approach taken in sub-paragraph (b) relies on constructive knowledge under section 14A(10), and says that Mrs Trainer might reasonably have been expected to read either or both of the Deed of Variation and the Terms of Contract, and to investigate further as a consequence. Here, too, it seems to me that Cramer Pelmont has a reasonable argument meriting consideration at trial.

179. Sub-paragraph (c) in issue 2(1) envisages a real possibility that Mrs Trainer knew about at least one of the alleged secret payments to Mr Trainer because it was referred to in solicitors correspondence in 2011. Mrs Trainer says in that regard that

there is no evidence that she saw the relevant letter. As to this, however, the master observed in paragraph 57 of his judgment that Mr Trainer seems to have been prepared to risk Mrs Trainer finding out, in the course of the Ebgui litigation, things which had been kept secret earlier. A question may arise whether as part of the Ebgui litigation Mr Trainer passed on the relevant letter to Mrs Trainer, or in some other way informed her of the secret payments. This, too, seems to me to be pre-eminently a matter for trial.

180. Issue 2(2) identifies two potential answers by Mrs Trainer on material facts knowledge. The first of these is at sub-paragraph (a) of issue 2(2). This does no more than mirror the questions which arose under sub-paragraph (b) of issue 2(1). For the reasons given above when dealing with that sub-paragraph, there is a reasonable argument open to Cramer Pelmont in this regard which calls for trial.

181. Sub-paragraph (b) of issue 2(2) concerns lack of knowledge that Allanton could not contractually insist on the renegotiated terms, and lack of knowledge that there was "no contractual warrant" for the inequitable apportionment. For the reasons given in section B2 above neither of these assertions prevents Cramer Pelmont from having a reasonable argument on material facts knowledge.

C2 Inferences/conclusions: causation and identity knowledge

182. The specific matters relied upon in respect of causation and identity knowledge, listed in issues 2(3) and 2(4), are set out in section A8.9 above. Here, as in section C1 above, I can take matters relatively briefly in the light of the conclusions set out earlier in the present judgment.

183. It is convenient to deal first with the question of actual knowledge that the damage in issue was attributable in whole or in part to the acts or omissions of Cramer Pelmont. In circumstances where Mrs Trainer knew that Cramer Pelmont was involved "in the matrimonial side of things", in circumstances where Mrs Trainer knew that she had sent the 15 September 2011 email to Downs stating that she was taking advice on all commercial matters from Cramer Pelmont, and in circumstances where Cramer Pelmont had said in Mr Charnley's 7 October 2011 "To whom it may concern" document that he had explained to Mrs Trainer the terms and implications of the proposed Deed of Variation, it seems to me that the question of Mrs Trainer's actual knowledge gives rise to arguments which may reasonably be advanced on Cramer Pelmont's behalf and properly fall for determination at trial.

184. The master, at paragraphs 62 to 64 of his judgment, considered that Sears Tooth's 15 September 2017 letter was "altogether inconsistent" with Mrs Trainer "then having knowledge" that Cramer Pelmont was a defendant against whom a claim for relevant damage could be brought. As to actual knowledge, however, the material question is not what view Sears Tooth had formed in late 2017. I accept that the letter written by Sears Tooth on 15 September 2017 is a pointer against Mrs Trainer having actual knowledge, so far as relevant for present purposes, at that time. But it does not rule out the possibility that Mrs Trainer had relevant actual knowledge earlier, and this is, to my mind, a matter meriting trial.

185. Turning to constructive knowledge, for the reasons given in section B4 above, it seems to me that Cramer Pelmont has a reasonable argument that knowledge on the part of Mrs Trainer of the inequitable apportionment would have led to a train of enquiry leading to the ascertainment of facts which Mrs Trainer might reasonably

have been expected to acquire and which would give rise to causation knowledge and identity knowledge. As to how long would be needed for this purpose, each side sought to make points by reference to the time that had been required in 2017. While evidence as to what occurred in 2017 may have relevance, it does not seem to me that it can be determinative one way or the other: the matter calls for a trial at which the position at earlier stages is examined.

186. In these circumstances, on the basis of submissions which significantly differed from those before the master, I conclude that issues 2(3) and (4) must be decided in favour of Cramer Pelmont.

D. Other issues

187. As noted in section A8.4 above, issue 1(1) concerned knowledge acquired after Mrs Trainer's bankruptcy. This issue only arises if Mrs Trainer had not, prior to her bankruptcy, acquired, as regards her claim against Cramer Pelmont, section 14A cumulative knowledge. For the reasons given earlier in this judgment, however, I have concluded that Cramer Pelmont have reasonable arguments which, if right, would have the consequence that Mrs Trainer had acquired section 14A cumulative knowledge prior to her bankruptcy. That being so, this issue does not arise. It involves novel arguments in an area of developing law, and I consider that if it were to arise it is best dealt with at a full trial.

188. Ground of appeal 4 concerned the approach that the court should take to what the master described as "disappointing" events: see section A6.2 above. For the reasons given earlier in this judgment, however, it is not necessary for me to examine those events in order to reach the conclusion that Cramer Pelmont has reasonable

arguments meriting trial. The evidence concerning those events may be highly relevant at that trial, and I consider it to be undesirable for me to seek to analyse that evidence at the present stage.

E. Conclusion

189. For the reasons given above I conclude that this appeal must be allowed. I ask the parties to seek to agree consequential orders.