Neutral Citation Number: [2021] EWHC 503 (Comm)

Case No: CL-2019-000661

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 09/03/2021

Before :

PATRICIA ROBERTSON QC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

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Between :

(1) PETER ALEXANDER ROSS **(2) JULIANNE MARIE ROSS**	**Claimants**
- and -	
ATTANTA LIMITED	**Defendant**

- -

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Michael James (instructed by **Pure Legal Limited**) for the **Claimants/Respondent**
Peter Knibbs (of **BPE Solicitors LLP**) for the **Defendant/Applicant**

Hearing dates: 22 February 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 9 March 2021 at 10:30 am

PATRICIA ROBERTSON QC :

Introduction and preliminary matters

1. The Defendant, Attanta Limited, is a company providing financial advice, against whom the Claimants bring a claim in respect of allegedly negligent advice provided to them by an employee of the Defendant when they remortgaged their home in May 2007. The Defendant applies for summary judgment to be granted in its favour pursuant to CPR 24.2 or in the alternative for an order striking out the Particulars of Claim pursuant to CPR 3.4.

2. I should record that I was asked to and did grant permission pursuant under Schedule 3 paragraph 1(2)(b) of the Legal Services Act 2007 for Mr Knibbs, the Defendant's solicitor, to appear on the Defendant's behalf, on the footing that whilst he does not have Higher Court rights, he has significant experience of advocacy in the lower courts and his familiarity with the case made this a desirable cost saving measure on a one off basis. If in future Mr Knibbs wishes to appear in the Higher Courts on a regular basis then it will of course be necessary for him to seek Higher Court rights.

3. Self-evidently, and as is common ground, the primary limitation period under section 2 of the Limitation Act 1980 has long since expired. The first plank of the Defendant's application is a limitation point, namely that s14A(4)(b) is not available to the Claimants and that the Court should so decide at this stage. Secondly, and more broadly, the Defendant submits that the statements of case disclose no reasonable grounds for the Claim and/or the Claimants have no real prospects of succeeding.

4. Since the application was proceeding as a heavy application under the Commercial Court rules, the Claimants' evidence in response was due 28 days after service of the application on them some 10 months ago, but that evidence was not served until 14:39 on 12 February 2021, a timescale which, nonetheless, would have complied with the requirement under CPR Part 24 that evidence be served 7 clear days before the hearing, had that been the applicable rule. There was no adequate explanation, other than oversight, for this.

5. The evidence in question comprised a witness statement from the Claimants' solicitor, Mr McBride, to which were exhibited witness statements for each of the Claimants (in largely identical terms) and an expert report, on the footing that this was evidence they would be in a position to deploy at trial and which should therefore be taken into account in determining whether there were properly arguable issues. The evidence from the Claimants themselves largely related to matters of which the Defendant would already have been broadly aware from the Particulars of Claim, but they provided more context and detail and they did (as further described below) raise one new area of factual dispute which had not as far as the Defendant is concerned been previously foreshadowed. Another new element was the expert report dated 3 February 2021, exhibited by Mr McBride. This was from an individual with some 23 years industry experience in providing financial advice, including as an independent mortgage broker. The report was expressed as containing a "*provisional*" opinion and as having been prepared in compliance with CPR Part 35.

6. Permission has not at this stage been sought or given for expert evidence but it is reasonable to expect, given that this is a professional negligence claim against

financial advisers, that such permission would be granted in due course were the matter to proceed to trial. On that basis, the expert report is relevant in showing that there is a reasonable expectation that the Claimants will be able to adduce favourable expert evidence at trial (whether or not precisely in this form). I do not read CPR 35.4 as precluding me from taking it into account for that strictly limited purpose or as requiring permission to be granted before I could do so. That rule must be applied consistently with the overriding objective. In these circumstances, as in Pipia v Bgeo Group Ltd [2019] EWHC 325 (Comm), that makes it appropriate for the Court to take a flexible approach, rather than requiring compliance with CPR 35. That flexibility is appropriate precisely because it cannot be the right approach, on a summary judgment application, to conduct any sort of mini trial of the expert evidence and the considerations are therefore not the same as those discussed by Marcus Smith J, in a different context where for example cross-examination of the experts might well be appropriate, in New Media Distribution Company Sezc Limited v Kagalovsky [2018] EWHC 2742 (Ch).

7. The late evidence is therefore relevant and to exclude it from consideration would be unjust to the Claimants. I had to consider whether the hearing should be adjourned in whole or in part in light of the late service of this evidence.

8. Mr Knibbs submitted that the Defendant might (and he put it no higher than that) want to adduce expert evidence of its own. He did not suggest that the Defendant would want to put in additional factual evidence. That was doubtless because one unfortunate result of the fact this action is brought so long after the events in question is that the Defendant by that time no longer had its file, which had been destroyed in the ordinary course of business, and the individual who gave the relevant advice and who would, as I understand it, have been the only person able to give evidence in response to that of the Rosses, is sadly deceased, having died before the Claimants made a complaint to FOS. Mr Knibbs asked either that the application be adjourned or dealt with on the basis solely of the limitation point.

9. Mr James, Counsel for the Claimants, was frank in accepting that the fault lay with the Claimants for not having served in good time but he questioned the utility of an adjournment, given that it would be wrong in principle to seek to resolve any disputed expert issues on a summary judgment application, and he opposed separating the limitation point from the rest of the application, on the footing that there is an overlap.

10. It seemed to me wholly unrealistic to suppose that any expert report in response (however pertinent and persuasive it might be if the matter goes to trial) could land a complete knock-out blow for summary judgment purposes and, to be fair, Mr Knibbs did not really press that point. He put it no higher than wanting to give this further consideration and, sensibly, did not want to definitively commit his clients to the expense of obtaining a report which at this stage could not, in my view, have advanced their cause on this application. If that expert, hypothetically, agreed with aspects of the Claimant's expert's report, that could not help the Defendant, and if he or she disagreed I would not be able to adjudicate at this stage as to who was right.

11. Equally, the Defendant will be no better off, in terms of demonstrating the Claimant's factual case to be unarguable, if the matter is adjourned, since there is no further factual evidence they can muster on their side at this stage. Any such attack on the

factual case must either be capable of being made good on the face of the evidence, as it stands now, or will depend on disclosure and/or cross examination at trial.

12. The heart of the Defendant's application really lies in the limitation point, but, as that has to be addressed on the basis of identifying accurately how the Claimants do, or reasonably could, put their claim, it does not make sense to seek to separate it from the broader question of whether, subject to limitation, there is an arguable claim (and if so what). Seeking to deal with the application in two bites rather than one risked unnecessarily incurring additional costs and encountering difficulty as to areas of potential overlap.

13. In those circumstances, I determined that I should admit the late evidence and refuse an adjournment, on the basis that the entire application could without injustice to the Defendant be dealt with now and, depending on the outcome of the application, the late service of the evidence could if necessary be taken into account when considering costs.

14. I therefore turn to the substantive application.

Factual background

15. The Claimants claim, as damages for negligent advice in respect of the remortgage of their home in May 2007, the sum of £250,995, that being the entire capital sum of their interest-only mortgage. I shall come back later to whether that could be the correct quantum of any claim. Mr Ross was, according to his witness statement, a self-employed Investment Manager at the time of the remortgage, having begun investing in stocks and shares in 2001. On his own evidence he was someone with some financial know how, as for example shown by his comment that although credit was relatively easy to come by at that time, and financial institutions were relaxed about lending criteria, a self-employed applicant could be assisted by having a mortgage broker. Mr Ross says, and for the purposes of this application I accept, that despite that general know how he was not up to date as to the options available specifically in respect of mortgages and was looking to the Mortgage Broker for guidance in this respect. Mrs Ross was a teacher.

16. The Rosses had an existing interest only mortgage on their house of £100,000 with a 15 year term, arranged in 2005, before Mr Ross became self-employed. There was only very limited evidence before me as to the circumstances in which the Rosses came to enter into that mortgage. I was told that no claim is made in respect of it (although the pleaded case in negligence does appear to reference it). How and why the Rosses came to have an existing interest only mortgage might well turn out to be pertinent to the suitability for them of the 2007 interest only mortgage but that could only be explored at trial.

17. Mr Ross's evidence is that the purpose of the remortgage in May 2007 was to consolidate debt, help their daughter, who was a student, with tuition fees and living expenses, and carry out home improvements. The mortgage application refers to some £84,000 in unsecured debts (of which £70,000 related to outstanding credit card debts), all of which was consolidated into the mortgage. The remortgage therefore raised an additional £66,000 for the other purposes mentioned, after deduction of fees,

and left the Rosses with some £200,000 of equity in their home, based on the Defendant's estimated valuation at that time.

18. Mr Ross says his self-employed income in the two immediately preceding years had been around £74,000 and £78,000, whilst his wife was earning £29,000 as a teacher. On an interest only basis the mortgage was on any view highly affordable on those earnings, in that monthly repayments were £1,127.39, based on the rate at inception of the mortgage of 5.39%. The Claimants' expert calculates by way of comparison that if the whole borrowing of £250,995 had been raised by way of a repayment mortgage, the monthly payments would have been some £2,380.75 and that, if only £66,000 had been added by way of mortgage on a repayment basis, in addition to their existing mortgage, and the remaining debts been left unsecured, the combined monthly outgoings to service those debts would have been some £4,276.95 per month. I take those figures simply as broadly illustrative for present purposes, although doubtless another expert might produce different calculations.

19. Based on the Rosses' combined earnings as at May 2007, they could, on Mr Ross's evidence as to their outgoings, have afforded the higher payments required for a repayment mortgage for the full borrowing of £250,995, instead of the interest only payments they in fact made. As it happens, not all that long afterwards they fell on hard financial times as a result of the 2008 financial crash, when Mr Ross's portfolio suffered and he ceased to be self-employed and instead returned to teaching English (at, presumably, a salary significantly lower than his previous self-employed earnings). Their financial difficulties, at a time when they were paying some £1,300-1,400 a month in mortgage payments (well short of what they would have been paying, based on any of the hypothetical alternatives referred to above) were sufficiently severe that at one point they sought some help from a School Benevolent Fund. However, they were rescued by plummeting interest rates, which left them paying only some £303 per month from July 2009, falling latterly to a mere £219. None of those later developments could have been anticipated at the time of the advice, of course, but it is on the face of it somewhat difficult to see how they could have weathered the financial storm, on reduced income, had they not consolidated their substantial unsecured debts so as to make servicing those more affordable.

20. Turning back to the mortgage application process in May 2007, the relevant forms have been obtained from the lender's file and were in evidence before me, but Mr and Mrs Ross's evidence raises issues as to how those forms came to say what they do say. Those issues had not been raised prior to service of their evidence in response to this application, in which the Defendant had placed reliance on that documentation.

21. The Intermediary Mortgage Supplementary Application Form includes a question asking how the borrower intends to repay the mortgage, in the case of an interest only mortgage. This has been filled out in handwriting which Mr Ross says is not theirs stating "*inheritance money due & sell of property in near future due to down grade to a smaller house*". There was also another reference in a communication from the broker to the lender to their intention being to down-size near retirement age. Mr Ross says (and, in all of this, his evidence is duplicated by his wife) there was no inheritance due (such inheritance as either of them could expect from parents had been, or would be, only very modest compared with the sum to be repaid) and they had no plans to down grade to a smaller house.

22. A further form required details of "*Savings Plan for interest only or combination mortgages*" and has been answered "*max isa and personal pensions*". Mr Ross says of this that their pensions were for retirement purposes and too small anyway to pay off the capital sum and that he had never held an ISA. He denies that the broker had discussed this with them and more generally he denies the broker ever discussed how they intended to pay off the capital in future.

23. He says they were sent blank forms, which they signed and returned, and which were subsequently filled in by the broker in the course of telephone calls between them, such that he was unaware of the inaccurate statements in the forms as to how the loan would be repaid.

24. The credibility of those assertions would (if necessary) have to be a matter for cross-examination at trial, against the backdrop of the disclosure, for example, as to what assets were held by the Rosses and as to what was said and by whom as to plans for repaying the capital at the time of the earlier 2005 mortgage. They are not matters on which I could reach a conclusion at this stage.

25. For present purposes, therefore, I have to assume that the Rosses were advised to take out an interest only mortgage without there having been discussion as to how they would repay the capital sum and in circumstances where they did not have existing savings, pension or inheritance monies that could be applied to that end. They would therefore either need to set up an appropriate new savings vehicle for that purpose or sell the house at the end of the term in order to repay the capital sum borrowed.

26. As regards the term of the 2007 remortgage, this was set as 13 years, in line with the remaining term of the 2005 mortgage that was being replaced. Mr Ross says he was told by the Broker that the term "could not go beyond 2020 as by then I would be 70 years old (my wife would be 66). However I understood him to indicate that this was a "*lifetime mortgage*" i.e. that we could roll it over beyond 2020 without any difficulty and it would be a Lifetime Tracker Loan. He clearly indicated to us that the loan could be extended well beyond 2020 if required and that the Lender would readily accept this, subject to relevant criteria at that time."

27. I take that evidence at face value, for present purposes. There is, however, at first blush an inherent and obvious contradiction between being told that the term specified at inception "*could not go"* beyond age 70 and yet that, somehow, the lender would readily *"extend*" it once Mr Ross got to age 70. The reference to any extension being subject to the relevant criteria at the time would seem a clear indication that those criteria might change and hence, whatever might be said now, an extension might not in the event be forthcoming. There is, equally, an obvious discrepancy between Mr Ross's claimed understanding that this was a lifetime mortgage (i.e. a quite different mortgage product, open-ended as to the term, such that the capital sum need be repaid only following death) and the terms of the mortgage as set out in the mortgage documentation. I come to develop this further, below, in the context of what the Rosses are to be taken to have known, for the purpose of the limitation issue.

28. The Particulars of Claim assert, without elaboration, that the representation was "*false*". It is unclear whether what is meant by that is that the broker did not have any reasonable basis for expressing an opinion as to the likely attitude of the lender at the

end of the term. All in all, there is a lack of clarity as regards this part of the case. However, I will assume that the representation induced the contract, as pleaded.

29. I, likewise, assume for the purposes of this application the correctness of Mr Ross's evidence that the broker "*didn't offer as such any advice as to whether or not our general approach was the best one or not, for example regarding consolidating debt into a long term mortgage*" and that the Rosses never received anything from the Brokers as to why the mortgage that was proposed was the best product for them or any comparison with other products. Again, any dispute about any of these factual matters would have to be a matter for trial.

30. The mortgage offer dated 16 May 2007 identified the fact the mortgage was interest only, specified the term of the mortgage as 13 years and spelt out very clearly that "*you will still owe £250,995 at the end of the mortgage term as your payments only cover interest on this amount of your mortgage. You will need to make separate arrangements to repay this. Where you have provided this information to us, any repayment vehicles for this mortgage are stated on your mortgage application form. When comparing the payments on this mortgage with a repayment mortgage, remember to add any money that you may need to pay into a separate savings plan to build up a lump sum to repay this amount*." Below that, in bold, appears the following text: "*It is important to ensure that you have a suitable savings plan in place and to check regularly that your savings plan is on track to repay this mortgage at the end of the term*."

31. The mortgage completed on 25 May 2007. Over the ensuing ten years the Annual Mortgage Statements that were sent to the Claimants by the mortgage lender each described the mortgage as interest only, stated the remaining term of the mortgage, showed the capital sum borrowed as being still fully outstanding and on the final page of each Statement carried the reminder, in bold, that: "*This is an interest-only mortgage. Your mortgage payments do not include the costs of any savings plan or other investment you may have arranged to build up a lump sum to repay the amount you borrowed. It is important to check regularly that your savings plan or other investment is on track to repay this mortgage at the end of the term*."

32. On 8 April 2014, the mortgage lender wrote to the Claimants reminding them of the approaching maturity date of the mortgage, of 16 May 2020, "*when it will need to be repaid*". This reiterated the need for them to ensure they had suitable repayment plans in place to repay the capital sum borrowed at the end of the term, which was then 6 years and 2 months away. A second such letter, in similar terms, was sent to the Claimants by the lender on 20 February 2017, by which time the remaining term was 3 years 3 months.

33. In between those dates, Mr Ross says he had heard a "Moneybox" program on the radio which spoke of potentially missold interest only mortgages and the fact many of these had been sold without any or any adequate repayment vehicle to pay off the capital at the end of the term. He listened to that program on 29 October 2016 and again on 6 November 2016. He says "*It struck home that this might well apply to us and that our mortgage might have been missold to us. It raised a suspicion but it was far from clear whether that was indeed the case*."

34. He then describes how, following hearing the program, he contacted the lender with a view to confirming the understanding he says he then had, to the effect that, notwithstanding the stated term, the mortgage "*could be extended for the duration of our lives should we wish to do so*". He says the lender indicated that was not in fact the case and he says that it was only following this exchange with the Lender that he realised that the full sum would indeed need to be repaid in May 2020 and that, as matters stood, they would not be able to pay off the loan without selling the house or remortgaging.

35. The Rosses' complaint to FOS was rejected in a letter dated 14 June 2017. It appears from that letter that they complained that they had been led to believe they had been sold a lifetime mortgage, but their communications to the lender and to FOS are not in evidence, so I cannot be sure quite how they put it. FOS rejected the complaint on the basis they were out of time, because it should have been apparent to them within 6 years of being sold the mortgage that what they had been sold was not a lifetime mortgage but an interest only mortgage with a 13 year term, as was evident from the mortgage statement, key facts, application and mortgage offer documents, and they should have brought their complaint earlier if that was not what they wanted. Whilst I note that conclusion, which was reached with reference to the rules of the compensation scheme, I have approached the matter afresh by reference to the provisions of the Limitation Act 1980 and based on my own assessment of the evidence.

36. According to Mr Ross's witness statement, things "*lost momentum*" after that but on an unspecified date he came across adverts for a mortgage claim company whom he contacted, they put him in touch with his present solicitors, and by 22 November 2018 he was in possession of a report from the same expert who has produced the subsequent CPR part 35 report exhibited by Mr McBride. The earlier report is not itself in evidence but is said to have very clearly indicated that the advice given in 2007 was negligent. Mr Ross's position is that: "*this was the first occasion on which we knew with any clarity that the Broker had been negligent. From the end of October 2016, I had been suspicious but was uncertain and did not know in what way the Broker might have been at fault or indeed whether the Broker had been negligent at all in our case.*"

37. The claim form was issued on 28 October 2019 and served on 27 February 2020, following exchange of pre-action protocol letters during the interval between those two dates. The application for summary judgment or strike out was issued on 22 April 2020 and a holding defence (denying the claims generally but advancing no more particularised defence, in light of the pending application) was served on the same date.

38. The primary limitation period expired 6 years after the mortgage completed on 25 May 2007 and therefore the claim is time-barred unless the Claimants can rely on section 14A of the Limitation Act 1980 to extend time for their claim in negligence. If the relevant date of knowledge, for limitation purposes, was on or later than 29 October 2016, when Mr Ross first heard the radio program, the claim was brought in time. If, however, the Rosses had the requisite knowledge any earlier than that, the three year extended period provided for in section 14A does not assist them and they are still out of time.

39. As appears from the factual background summarised in Claimants' expert report, but was not otherwise dealt with in their evidence or Skeleton Argument, the mortgage (which would have reached its term on 27 May 2020) has in fact, it seems, now been redeemed (said by the expert to have taken place "around June 2020"). The Claimant's Counsel was unable to provide me with any further details in this respect (but did not suggest this to be incorrect). That redemption would have post-dated the preparation of the witness statements of Mr and Mrs Ross, which were signed in January 2020, which no doubt explains why it is not mentioned in those witness statements but, surprisingly, it also was not dealt with at all in their solicitor's witness statement, served on 12 February 2021. It appears not to have been appreciated that this development was pertinent.

The Law in respect of Limitation

40. Section 14A of the Limitation Act 1980 provides as follows, under the heading "*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."*

41. The question that arises in this application is when the Claimants first had "*the knowledge required for bringing an action for damages in respect of the relevant damage*". That involves two elements: first, knowledge of material facts about the damage under ss.(6) and (7); and, second, knowledge of the "*other facts*" under ss.(8), a category which includes knowledge "*that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence*" (ss.(8)(a)).

Knowledge for these purposes includes constructive knowledge under subsection (10).

42. It is important, in that respect, to bear clearly in mind that on this application the Court is being asked to decide that it is unnecessary for there to be a trial in order to be able to answer that question. In Jago v Mortgage4You Limited [2019] EWHC 533 (QB), Mrs Justice May, on an appeal from the County Court, adopted the following formulation by the Judge below as a correct approach when the Court is asked to determine summarily that there is no realistic prospect of a claimant being able to rely on section 14A: "*it seems to me at this summary judgment stage of the litigation, all that the claimant has to do to defeat the first defendant's application is to satisfy me that it is not fanciful for her to say that her date of knowledge arose within three years before the issue of proceedings and that it is again arguable by her that the contrary contentions of the first defendant either for a yet earlier date of knowledge than she contends for, or for fixing her with constructive knowledge are not so good as to render her claim fanciful.*" Whilst that was an application solely for summary judgment, it makes no difference to the approach in this respect that the present application is also brought by way of strike out. I adopt that approach as correct.

43. As was emphasised by Sir Thomas Bingham MR (as he then was) in Spencer-Ward v Humberts [1995] 1 EGLR 123 (in particular at 125L-M and 126M), issues as to the application of section 14A are to be approached in a broad common sense way, bearing in mind the object of the section and the injustice it was intended to mitigate. "*There is a danger of being too clever and it would usually be possible to find some fact of which the plaintiff did not become sure until later.*" Time is intended to start to run once the plaintiff has the "factual rudiments" of the claim, giving them three years from then to seek legal advice and get their tackle in order before issuing proceedings.

44. The leading case is the decision of the House of Lords in Haward v. Fawcetts [2006] 1 WLR 682. In broad terms, that case related to a claim whose "*essence*" was that a financial adviser "*did not do his job properly*" and had given "*flawed advice*" (per Lord Nicholls at [19]-[20]). For time to start running it was necessary for there to have been *"something which would reasonably cause Mr Haward to start asking questions about the advice he was given"* and the relevant date was when he *"first knew enough to justify setting about investigating the possibility"* that the advice was defective (at [21] and [23]). On the one hand, for the purposes of subsection (8) Mr Haward needed to know enough about the fact the advice was flawed to start investigating but on the other he did not need to know that his advisers had been negligent, since subsection (9) makes that irrelevant.

45. In Broadley v Guy Clapham and Co [1994] All ER 439, at 449, Lord Justice Hoffman said that the purpose of the section was to determine the moment at which a plaintiff knew enough to make it reasonable for him to begin to investigate whether or not he has a case against the defendant and (at 449) he summarised the task of the Court in these beguilingly simple terms: "*One should look at the way the plaintiff puts the 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*."

46. On some sets of facts, however, that is easier said than done. In Haward itself, for example, the task proved sufficiently complex as to require consideration by five Law Lords over 50 pages of analysis.

47. The submissions before me focussed, in particular, on what will amount to sufficient knowledge of attribution for the purposes of sub-section (8)(a). That was also the central question in Jago and in Haward. In each of those cases, the fact the claimant had experienced a serious loss was painfully apparent, in that they had ploughed large sums into investments which had failed, but the issue was whether they knew enough to attribute that loss to the advice they had received and start investigating whether they had a claim against their adviser. Mrs Justice May helpfully cites at length from key passages from Haward discussing the relevant principles, including in particular the relationship between subsections (8) and (9). I gratefully adopt her summary at [18]-[22], which is in the following terms:

> *"18. In Haward v. Fawcetts [2006] 1 WLR 682, the House of Lords addressed the operation of s.14A, including an examination of the extent of knowledge required by the section. Lord Nicholls summarised the position as follows, at [8] to [11]:*
>
> > *"8. Two aspects of these "knowledge" provisions are comparatively straightforward. They concern the degree of certainty required before knowledge can be said to exist, and the degree of detail required before a person can be said to have knowledge of a particular matter. On both these questions courts have had no difficulty in adopting interpretations which give effect to the underlying statutory purpose.*
> >
> > *9. Thus, as to the degree of certainty required, Lord Donaldson of Lymington MR gave valuable guidance in Halford v Brookes [1991] 1 WLR 428, 443. He noted that knowledge does not mean knowing for certain and beyond possibility of contradiction. It means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice, and collecting evidence: "Suspicion, particularly if it is vague and unsupported, will indeed not be enough, but reasonable belief will normally suffice." In other words, the claimant must know enough for it to be reasonable to begin to investigate further.*
> >
> > *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 (BLT) Ltd [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, 117-118, 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, P242 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 [1994] 4 All ER 439, 448.

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."

19. Their Lordships also considered what Lord Mance (adopting the description of Charles J at first instance) described as "tensions arising from the interaction of subsection 8(a) and subsection (9) of section 14A". At [114] to [115] Lord Mance described the nature of these tensions as follows:

"114.…Under subsection (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 solicitor's negligence" 20 JPN 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 to do (or not to do). Even in such a case, Hart & Honore, Causation in the Law, 2nd ed (1985), p.38, demonstrates 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 a 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 section 14A(9) irrelevant) knowledge that the adviser was negligent: see Hallam-Eames v Merrett Syndicates Ltd [2001] Lloyds Rep PN 178, decided by a Court of Appeal consisting of Sir Thomas Bingham MR and Hoffman and Saville LJJ. The distinction may in such a case be narrow, as Hoffman LJ giving the judgment of the court himself recognised, at p.181, righthand 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."

20. Lord Mance went on to refer to the case of HF Pension Trustees v Ellison [1999] Lloyd's Rep PN 489. In that case pension trustees had transferred funds from one pension fund to another on the advice of solicitors advising on the reorganisation of a pension fund. Unknown to the trustees at the time, the transfer was outside the scope of their fiduciary

duties, requiring the funds to be transferred back. In the meantime, however, a substantial tax charge had been incurred; a claim was eventually made against the original solicitors in negligence. The defendant solicitors relied on limitation and s.14A came up for consideration. Upon a concession as to knowledge made by the claimant in that case the court decided that the claim was statute-barred. The House of Lords in Haward considered the concession to have been wrongly made and the case to have been wrongly decided. Lord Mance commented as follows, at [117]:

> *"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 impermissibility 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….,while section (9) of section 14A goes no further than to make irrelevant knowledge that acts or omissions involved negligence."*

21. Lord Mance went on to emphasise the insufficiency of a pure "but for" approach to causation for the purposes of s.14A knowledge before concluding as follows at [118]:

> *"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 Hoffman 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."*

22. I was taken in argument to many other passages in the speech of Lord Mance and the other Law Lords in Haward, all of which repay careful study. It is apparent from the speeches that what is and is not required in order to satisfy knowledge of attributability for the purposes of s.14A(8) in a case of economic loss is often highly nuanced and dependent upon the facts of each particular case. The question before Judge Gore

> *and now before me on this appeal is whether the facts in this case are sufficiently known to be able conclusively to determine that Ms Jago's arguments on s.14A are so fanciful as to have no prospect of success for the purposes of summary judgment under Part 24."*

48. The outcome in Jago turned on the specific facts of that case, which were such that Mrs Justice May could not safely conclude on a summary basis that there was no prospect of success.

49. Ms Jago had taken out interest only mortgages on her home in 2004 and 2005 to fund an overseas development property investment, on the basis that the investment returns would fund her repayment of the capital sums borrowed. By 2009 she knew the property investments to be worthless. In 2008 she consulted solicitors and, on their advice, brought proceedings against the conveyancing solicitors who had acted for her, making a partial recovery by way of a settlement, but it was her case that it was not until she was cold-called by a mortgage claims company in 2014 that she first appreciated the possibility of a claim against those who had advised her on the mortgages. Proceedings were issued in January 2017.

50. It was argued for the defendants in Jago that Ms Jago had had the requisite knowledge by the end of 2009 at the latest, by which time she knew the investments to be worthless, leaving her with no means of paying off the mortgage other than by selling her home. She also knew who had advised her on the mortgages. On the face of it, there was a parallel with the position of the plaintiff in Haward, who knew that the company in which he had invested heavily had collapsed into insolvency and was worthless, and also knew that his accountants had advised him on the investment. It was submitted that Ms Jago did not need to know she had a cause of action against the advisers, since she knew enough to start the process of investigating this, and that, like Mr Haward, she was time-barred.

51. It was argued for Ms Jago, however, that this was not enough, on the basis that she was unaware that her financial loss constituted damage attributable to the advisers, within the meaning oof subsection 14A(8). She was not in a position to know that *"that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence"* until she understood that the scope of the duty owed to her encompassed an obligation to refuse to recommend any mortgage at all and also to advise her to obtain financial advice regarding extricating herself from the investment.

52. Whereas the defendant in Jago argued that the duties owed by mortgage advisers as regards advising on the suitability of mortgages were well understood by 2009, it was contended for Ms Jago that the *"wider duty"* on which she relied for her claim *"was not evident"* at that time, until the decision of the Court of Appeal on a case involving similar facts in Emptage v FSCS [2013] EWCA Civ 729. By *"wider duty"* what was meant was that Ms Jago's case was that on the facts of her situation, the duty of the mortgage broker when advising on the suitability of her mortgage extended to advising her against taking out any form of mortgage at all for the purpose of making the investment.

53. In that context, Mrs Justice May referred to these further passages in Haward, as follows:

> *"38. In Haward at [62] Lord Walker cited with approval the judgment of Hoffman LJ (as he then was) in Hallam-Eames, including the following passage:*
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> > *"..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. ...*
> >
> > *...If one asks, on common sense principles what Mrs Dobbie was complaining about, the answer is that the surgeon had removed a healthy 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's case. It was part of the essence of her complaint. Nor is it requiring knowledge of fault or negligence. ...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****...Mr Clarke QC for the auditors and Mr Toulson QC for the member's 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's and Dobbie's cases.) 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 Hoffman LJ said in Broadley's case, 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."* (emphasis added)

> *39. At [66] Lord Walker referred to the above as "clear general guidance" as to the principle to be applied in difficult borderline cases. Lord Walker went on, at [77] to say this:*
>
> > *"In [the cases of Ali and Dobbie] the claimant did not know whether his physical disablement was attributable to his working conditions, for which his employer was responsible, or to some more or less natural cause such as ageing.* ***He was therefore in a state of ignorance on a fundamental point, and his ignorance could be dispelled only by a medical expert****. I see no useful parallel with Mr Haward's situation. The relationship between a man's working conditions and his natural ageing as competing causative elements in his deafness is quite different, to my mind, from the relationship between a financial adviser's alleged professional incompetence and the various factors which eventually lead to the collapse of the business on which he advises."* (emphasis added)

54. Mrs Justice May then went on to say (at [40]) that Ms Jago's facts were "*right at the borderline of the two situations with which Lord Walker was dealing in the above passage*." On one view, Ms Jago's ignorance of M4Y's obligation to advise as to the wisdom of taking out any further mortgage at all was a matter of law and irrelevant, on the other (at [41]) "*it may be said that ignorance of M4Y's duty to advise against taking out any mortgage at all was a vital missing factual ingredient, like the fact of a healthy breast in Dobbie, or the fact of a fiduciary duty exceeded in HF Pension Trustees*" such that without such knowledge Ms Jago could not know that her damage was attributable to the act or omission alleged to constitute negligence.

55. Mrs Justice May considered it "*at least arguable that Ms Jago's purpose in consulting M4Y was not to seek advice about whether or not to re-mortgage her house at all but rather what mortgage product was most suitable for raising further funds*". However, the "*overriding consideration*" was the fact the Court was being asked to determine the point before the evidence had been heard and before it could be addressed in the light of that evidence. Her conclusion (at [47]) was that: "*This case involves a decision as to which side of a very fine line Ms Jago's ignorance falls: whether it is more accurately to be characterised as an unawareness that M4Y's omission to advise involved negligence, which is statutorily irrelevant under ss.(9), or ignorance of a fundamental fact concerning M4Y's obligation to advise, going to attributability under ss.(8). The determination of what was the "essential thrust of the case" is in my view (just) capable of falling on Mr Cannon's side of that borderline depending upon nuances in the interpretation of all the evidence*."

56. Thus, to sum up, the outcome turned on the fact that the essence of Ms Jago's case was, not that she had been wrongly advised as to which type of mortgage was more suitable for her needs, but that the adviser had wrongly failed to advise her against any form of mortgage at all. Mrs Justice May decided she could not safely determine at a summary stage whether Ms Jago's ignorance of the fact that giving such advice fell within scope of what she could expect from her adviser was properly to be characterised as ignorance of a fact going to attribution, and hence something she

needed to know before time would start to run, or as being ignorance that the omission to so advise was negligent, which is irrelevant.

57. In Kays Hotels v Barclays Bank [2014] EWHC 1927 (Comm) Mr Justice Hamblen similarly declined to give summary judgment or strike out a claim on the basis of section 14A of the Limitation Act 1980. The defendants in that case had sought to characterise the "essence" of the claim as being that advice on an interest hedging product was unsuitable because the claimant was told that interest rates would rise and it was not explained to him that the effect of the "floor" was that if they instead fell he would have to make payments to the Bank. Having so characterised the essence of the claim, they sought to argue that the claimant had had the necessary knowledge when he first had to make a payment, upon the floor being breached.

58. Mr Justice Hamblen, having analysed the pleaded case, concluded (at [26]) that this was "*far too narrow and does not correctly identify the essence of the complaint. If the complaint had simply been that the claimant had been advised that he would incur no interest rate loss, then one could understand that as soon as it became apparent that the claimant was having to pay interest rate losses, he would or should have known the facts necessary to investigate into such a claim*". However, his case was that the product was unsuitable because his aim was to achieve protection without exposure to *"excessive"* risk (so the mere fact of some such payments would not of itself lead him to know there was lack of suitability in that regard) and that was in any event but one facet of a far broader case on unsuitability which included that he had been wrongly told that he had to take out the product if he wanted a loan from the bank and that the associated risks over the whole life of the product which included not just his exposure in respect of interest but also liability for a termination payment had not been properly explained (at [17]). On that basis, the evidence relied on by the defendant as to the claimant's knowledge that some interest payments were being made did not give rise to an "*unanswerable case*" as to his knowledge (at [26]). Mr Justice Hamblen noted that whilst the test as to constructive knowledge in subsection 10 is objective, it refers to facts observable or ascertainable by the claimant and had to be considered in the circumstances applicable to the person in question (at [28]). He concluded, given the view he had taken as to the proper characterisation of the claim, that the facts would be important and needed investigation at trial.

Principles applicable on summary judgment/strike out

59. The defendants apply to strike out the claim under CPR 3.4 (2) and in the alternative for summary judgment pursuant to CPR 24.2. I have already cited the passage from Jago which I take as encapsulating the correct approach, specifically, as to whether or not the limitation issue arising under s14A(8) can be summarily determined in favour of the defendant. That passage is consistent with the applicable principles on strike out and summary judgment applications more generally, which are well established and were not in dispute before me. Jago and Kays Hotels are instructive examples of cases where applications to dispose summarily of a limitation point based on section 14A have failed but it does not of course follow that such a point cannot succeed in an appropriate case.

60. I bear in mind in particular:

a) That it is sufficient for the respondent to show some prospects, i.e. some chance of success. That prospect must be real, i.e. the court will disregard prospects which are said to be *'false, fanciful or imaginary'*. The hearing of a summary judgment application is not a summary trial and the courts deprecate a *'mini-trial'*: Swain v Hillman [2001] 1 AER 91.

b) That the test which the court has to use in a summary judgment application is not one of probability but an absence of reality: Three Rivers DC v Bank of England (No.3) [2001] 2 AER 513 HL.

c) The guidance set out by Lewison J in Easyair v Opal Telecom [2009] EWCA 339(Ch) to the effect that:

> *"Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus, the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add or alter the evidence available to the trial judge and so affect the outcome of the case."*

Analysis

61. What then is the essence of the Claimant's case on the facts before me?

62. As articulated in the Particulars of Claim (and even more so in the Letter of claim) there is something of a "kitchen sink" aspect to the particulars of negligence, which are pleaded in somewhat catch-all and generic terms more descriptive of the general class of cases relating to unsuitable mortgage advice than the specifics of the Claimants' own particular complaint. However, it is clear from paragraphs 11 and 12 of the Particulars of Claim that the basic thrust of the claim is that the Defendant failed to advise the Claimants of the need for, or to ensure that they had, a suitable repayment vehicle, and negligently advised them to enter into an interest only mortgage when a capital repayment mortgage would have been more suitable for their needs. In addition, at paragraphs 13 and 14 the allegation is made that they were induced to enter into the mortgage by the representation that it could readily be extended beyond 2020 "*subject to the relevant criteria at the time*".

63. Whilst it was also alleged, as part of the particulars on unsuitability, that the defendant had failed to advise on the appropriateness of consolidating unsecured debt into the mortgage, Counsel for the Claimants indicated to me in the course of submissions that that is not now pursued in light of the expert report. That is a sensible concession. As mentioned above, the Claimants were burdened with a very high level of unsecured debt, relative to their income, which on their expert's calculation it would have cost them very substantially more per month to service had it remained unsecured (and,

given the financial difficulties they later experienced, it is just as well that they were not in fact carrying that much higher financial burden).

64. The three elements therefore, which both Mr James and Mr Knibbs agreed were the essence of the Claimants' case, were the failure to advise them as to a suitable repayment vehicle, the advice to enter an interest only mortgage when a repayment mortgage would have been more suitable and the fact they should not have been advised that they could extend the term.

65. The first and second of those points really come back to the same thing. The basis for saying a capital repayment mortgage would have been more suitable is that it would not have exposed the Rosses to the risk of being left with the principal debt outstanding at the end of the term and no repayment vehicle in place, or a repayment vehicle which proved to be inadequate for the purpose. On the figures set out in their expert's report, a capital repayment mortgage would have appeared at the time of the advice to be within the range of what they could reasonably afford on their income as it stood at that time. By the same token, however, it would have appeared that they could have afforded to save into an alternative repayment vehicle.

66. I have not overlooked that the Rosses' evidence is that they were, until their solicitor obtained the Lender's file, unaware that the lender had been misled by statements on the forms as to how they planned to repay the capital at the end of the term which (as they allege) were not based on anything they had told the broker and were untrue. However, that amounts to saying the lender was duped into offering them a mortgage which on the true facts was unsuitable. It does not alter the nature of their claim against the broker, which is for misadvising them in respect of that mortgage, and, if the lender was indeed misled, that is not something they needed to know for the purposes of bringing their claim and is not relevant to the analysis under section 14A.

67. One therefore comes back, in that respect, to what knowledge they had that would reasonably cause them to start asking questions about the suitability, for their needs, of an interest only mortgage with a fixed term ending in May 2020, such as to make it reasonable for them to begin to investigate whether or not they had a case.

68. Mr Knibbs, for the Defendants, submitted that the actual knowledge the Rosses had at the time of entering into the mortgage, from the documentation they received at that time (described above) and from their knowledge of their own affairs, included:

    a) That the Mortgage was interest-only;

    b) That the Mortgage capital balance would fall due on the expiry of the Mortgage term;

    c) That the Claimants would have to make arrangements to pay the capital at the expiry of the Mortgage term;

    d) The Mortgage expiry date;

    e) That Mr McNeill of the Defendant company had advised the Claimants on the Mortgage.

f) Details of all the advice given by Mr McNeill to the Claimants up to completion of the Mortgage.

g) That (on their own evidence as to the terms of the representation alleged to have been made to them) there was no guarantee that the mortgage term would be extended.

h) Knowledge of their own means.

i) Knowledge of the costs of the mortgage.

j) Knowledge of the purpose of the borrowing.

69. Mr James emphasised that his clients were not claiming that they were unaware they had an interest only mortgage. Indeed, that would plainly be unsustainable given the documents they saw at the time, which I have described above. They either must actually have known this or at least could reasonably be expected to know it, such that it comes into account as constructive knowledge by virtue of subsection (10).

70. In essence, Mr James, for the Claimants, did not take issue with Mr Knibbs' list as to what was evident on the face of the documents or from their own knowledge, but said that body of knowledge did not go far enough because:

a) Knowing that the mortgage documents specified a finite mortgage term did not answer the question as to whether the lender would agree to extend that term and they did not know that was not the case until they asked the lender (after the Moneybox program in 2016) and got the answer no.

b) Knowing they had been sold an interest only mortgage did not enable them to know that they had been given unsuitable advice.

c) They did not know that the broker should have provided them with comparisons.

d) They did not know that the broker should have advised a capital repayment mortgage.

e) Until they understood the scope of the Broker's duty to them in recommending a mortgage that was suitable, they did not have sufficient knowledge of attribution for the purposes of subsection (8).

f) Mere suspicion was not enough and it was not until the Moneybox program that they were alerted in terms that were sufficient to prompt them to look into whether they might have a claim.

71. Mr James relied in particular on the passages in Haward, cited above, and on Jago. He contended that the "full scope" of the obligations owed to the claimants by the defendant was fundamental to their knowledge for the purposes of subsection (8).

72. The present case does not appear to me analogous to the facts which persuaded Mrs Justice May in Jago to give the claimant there the benefit of the doubt as to where

exactly the borderline fell between knowledge of attribution and knowledge of negligence. There, on the particular facts, it was arguable that the claimant, being ignorant of the fact that the *"wider"* duty owed to her extended so far as to advise against taking out any mortgage at all, would therefore not appreciate that the damage might be attributable to a failure to so advise and therefore would not know enough to start investigating whether there was a claim against the broker.

73. On the facts before me in respect of this claim, there is no question of any such *"wider"* duty to steer the claimants away from any mortgage at all being engaged, and no question of any equivalent ignorance about the scope of the duty owed.

74. The Rosses went to a broker "*to assist us in locating for a suitable mortgage*" (as they themselves express it in their witness statements). They were therefore, on their case, not in any doubt about the fact they were looking to the broker to advise them on a mortgage that was suitable for their needs. They therefore knew enough, in layman's terms, about the scope of the duty owed to them and they knew what advice they had and had not been given. Moreover, provided that the Rosses did know enough about the unsuitability of the mortgage for their needs to begin investigating whether they had been given flawed advice (which I consider below) they did not need to know what specific steps a broker acting in compliance with MCOB would have taken to assess suitability. That is a matter of law which could and would have been identified by investigation, once they knew enough to make it reasonable to begin investigating.

75. I came very close to concluding that Mr Knibbs was right in his submissions and that one could safely conclude at this stage that the knowledge that the Rosses had at the outset of the mortgage was sufficient to carry them over the requisite threshold, or at least that they had the relevant knowledge more than three years before issuing the claim, because:

a) On their case (as to the inaccuracy of what was recorded in the forms about their repayment plans) they wholly lacked any appropriate repayment vehicle, and they had had no discussion with the broker about repayment vehicles. They knew from the mortgage documentation that they had committed themselves, on the broker's advice, to an interest only mortgage with a 13 year term and with no repayment vehicle of any sort in place.

b) The risk that they would be left with a debt of £250,995 to settle at the end of the term and no means of payment was patent and was spelt out in the mortgage documentation (and each ensuing statement). They did not need to be shown a comparison with a repayment mortgage to know that that alternative would, by definition, not have involved that risk.

c) If their real objective was a lifetime mortgage, such that they could be sure that they would not need to repay the capital sum borrowed within their lifetimes, then the only way to be certain of that would have been to enter into that form of mortgage in 2007 (rather than trust to the hope that that would prove to be possible 13 years later).

d) The mortgage plainly was not a "lifetime mortgage" but had a clearly stated fixed term at which full repayment was stated to be due. Any opinion that may have been expressed by the broker about the likely attitude of the lender to agreeing to an eventual extension beyond that term could be nothing more than that, an opinion from the broker which might or not in the event prove to be a correct prediction of the lender's attitude to entering into a new and quite different bargain at a future date. Indeed, it is implicit in the words *"subject to the relevant criteria at the time"* that attitudes may change. The Rosses patently had no guarantee from the lender in that respect and nor do they claim that they did. On any view that left them exposed to a risk that they would be held by the lender to the clear terms of the bargain they had in fact made and would be required to repay the capital sum at the conclusion of the term.

e) If the exposure to any such risk, of itself, rendered the transaction *"intrinsically unsound"* from the outset, and inherently unsuitable for them, it follows from what I have said above that they can be said to have known enough even at that early point to question the good sense of the advice they had been given and at least begin to investigate whether they had been misadvised by the broker and, indeed, also to take steps to switch to a mortgage that did not expose them to that risk.

f) Had they begun the process of investigating in light of these points, they would have received earlier the response from the lender and the expert advice they subsequently did receive.

g) In this respect, their situation could be said to be more analogous to the patient who knows her healthy breast has been removed (Dobbie v Medway Health Authority [1994] 4 All ER 450, discussed in Haward at [45]) than it is to the position of Ms Jago. The patient in Dobbie knew the lump was benign but did not know that meant her breast did not need to be removed. She did not need to know whether the removal was the result of negligence to begin investigating and the knowledge she did have was therefore enough to start time running.

h) Relating all this to the wording of section 14A: the damage in respect of which the Rosses claim is that they have entered into an unsuitable transaction, namely an interest only mortgage rather than the capital repayment mortgage which they allege would have been more suitable for their needs. The act or omission which is alleged to constitute negligence is the provision of flawed advice, namely the recommendation of that, as they allege, unsuitable mortgage and the failure to advise them to take out a capital repayment mortgage instead. As a result, they were exposed to the risk they might reach the end of the term and be faced with having to sell their home in order to repay the loan. If that risk was not, in fact, a risk they were ready and willing to take, the fundamental flaw in the advice they had received, it may be said, should have been apparent to them from the outset. There is no one else but the broker to whom that advice was attributable.

i) Insofar as one consequence of taking an interest only mortgage, rather than a repayment mortgage, was a higher overall cost of borrowing than would have been the case with a repayment mortgage, that appears to me to be more in the nature of a consequential loss flowing from taking a mortgage which was unsuitable for other reasons (namely because of the risk identified above) rather than itself being a free standing basis for the mortgage being unsuitable. However, if that is wrong, the fact that, in principle, paying interest on the entire capital sum for the duration of a mortgage will mean you pay more in interest than if paying interest on a reducing capital amount is something that would be readily apparent to or ascertainable by someone with even a modicum of financial knowledge, which Mr Ross, at least, evidently had.

76. However, with some considerable hesitation, I have eventually concluded that there are features of this case which mean one cannot safely reach a conclusion on the limitation point at this preliminary stage, without the benefit of evidence and submissions at trial. The answer I have outlined above is (at least) arguably correct, certainly, but that is not enough: it is not so plainly and unanswerably correct that one can decide that now.

77. Whilst the argument before me focussed mainly on subsection (8)(a), and knowledge of attribution, with particular reference to how that was analysed in Haward and Jago, it seems to me on reflection that subsection (7) may be critical. That defines the "*material facts about the damage*" for the purposes of the knowledge which the Claimant must have under subsection 6(a). This is "*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*."

78. Now, for the purposes of when a cause of action accrued, the *"damage"* is undoubtedly the act of entering into an allegedly unsuitable mortgage. However, it seems to me arguable (i.e. not fanciful) that the Rosses did not have the requisite knowledge of their *"damage"* for the purposes of section (7) until a date within 3 years of issuing the claim. That is on this basis:

a) As Lord Mance said in Haward (at [106]), "*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*". Latent damage, in the context of claims for financial loss flowing from negligent advice, means that although the cause of action has accrued with the entering into of the unsuitable transaction, the fact of its unsuitability may, reasonably, not be immediately apparent to the Claimant.

b) I have focussed, above, on exposure to an unwanted risk, as being the feature which rendered the mortgage unsuitable for the Rosses. However, whilst the existence of the risk was or should have been evident to them on the face of the mortgage terms, it is arguable that that is not enough to make them aware of the unsuitability of the mortgage for their needs and hence that they had entered a transaction

which was intrinsically unsound. In life, we all make judgments about degrees of risk when deciding whether a particular risk is one we are comfortable shouldering.

c) If the Rosses had been reassured, before they entered into the mortgage, that they would be able to extend it or "roll it over" into a lifetime mortgage and had entered into the mortgage on that basis, the belief that was induced in them by that reassurance, if it was found to be a reasonable belief, might have a bearing on whether and when they had knowledge of having suffered *"damage"*, or at least *"serious"* enough damage for the purposes of subsection (7). If, for example, in light of what they were told, it was reasonable for them to believe that, whatever the mortgage terms might say, there was no realistic risk of having to repay at the end of the term (and hence no need to worry, for example, about the various notices they received warning them about repayment vehicles) the unsuitability of the mortgage for their needs would arguably not have been apparent to them until they were disabused of that belief.

d) As I have said, there is a distinct lack of clarity as to what, exactly, they are alleging they were told. Insofar as their claim is that they were misled about the true nature of the mortgage they were signing up to, and thought it was a lifetime mortgage, I agree with the conclusion reached by FOS that the fact this was an interest only mortgage with a fixed term was readily apparent on the face of the documents. Mr James in fact disavowed putting their case in those terms. I do not think I can wholly dismiss at this stage the claim that an assurance was made in terms that could have influenced their understanding as to what would happen at the end of the term and hence what risk was involved in taking on the interest only mortgage.

e) I would emphasise that it is certainly not at all clear that any opinion that may have been expressed was negligent. However, it seems to me that the impact of any such representation on whether, and when, they knew (or a reasonable person in their position would have known) of their damage can only really be assessed in light of the evidence at trial and submissions directed to the way in which the claim is by then articulated. If (and this is, I emphasise, an "if") it were to be established that it was reasonable for them to believe that the risk represented by the mortgage terms was wholly theoretical and was not in any realistic scenario going to eventuate, that may then bear on whether they knew they had suffered damage, and indeed serious damage, by entering into the mortgage. I do not think I can altogether dismiss that as "fanciful", which is the threshold I have to apply.

f) Equally (and this is bound up with the reasonableness of continued reliance on any such representation) I do not think I can reach a definitive view on a summary basis as to whether a reasonable person in their position who had received such assurances from their broker would have taken steps, and if so exactly when, to check with the lender.

g) There is considerable force in the point that the lender's actual (rather than their predicted) attitude was an ascertainable fact, knowledge of which the Rosses might reasonably have been expected to acquire sooner than they in fact did (c.f. section 14A subsection 10). In particular, the Defendant argued that when the lender communicated with the Rosses in the terms of the letter of 8 April 2014, that should reasonably have prompted them to check with the lender that the lender was indeed willing to extend the term. Had they, at latest following receipt of that letter, made the enquiry of the lender which they did not in fact make until sometime after the "Moneybox" program, they would have ascertained then that the lender was not willing to extend the term and that the risk which (as I have said above) had in any event been pregnant in the transaction from the very beginning, in that regard, had in fact eventuated.

h) All of that represents a considerable hurdle, certainly, but I do not think it reaches the threshold of being so obviously unanswerable that evidence and submissions at trial are incapable of influencing the view one takes of those points. As was the case in Kays Hotels (at [27]-[28]), the facts will be important, and even though the test under subsection 10 is objective, it also involves consideration of the context and circumstances of the person in question, such that it ought to be addressed on the basis of the full factual picture. The passage from Easyair I have cited above is particularly pertinent in this respect. The eventual decision as to whether or not the claim is statute-barred will have to be one for the trial judge on the evidence and submissions before him or her.

Conclusions

79. For those reasons, I have concluded that this is not a case in which I should determine the s14A issue at this stage and more generally that the Claimants have put forward arguable claims which should be permitted to go forward to trial. Mr Knibbs did mount an attack in his Skeleton Argument on the merits of the claims, independently of the section 14A point, pointing to what he said were various contradictions and inconsistencies in the Claimants' evidence, but it is sufficient to say that these are matters for cross examination or submission at trial and I will not lengthen this judgment further by dealing with them in any more detail. On that basis, I dismiss the application for summary judgment.

80. However, it does seems to me that there is one particular aspect of the Claimants pleaded case, which I have not so far addressed in detail in this judgment, which is plainly misconceived and, correspondingly, there is one aspect of the Defendant's strike out application which should succeed.

81. In the particulars of damage under paragraph 16 of the Particulars of Claim the loss is identified in these terms: "*As at May 2020, being the end of the Re-mortgage, the Claimants have lost the difference between having entered into the said interest only loans and having entered into capital repayment mortgages on the same terms."* The Claimant then purports to quantify that difference in these terms: "*The said sum*

amounts to £250,995.00 which is the sum the Claimants will now be due to pay." That same sum of £250,995 is also referred to in the prayer.

82. Mr Knibbs submitted in his Skeleton Argument for the Defendant that this was not a recognisable claimable loss. The Claimants were seeking to have the Defendant pay their mortgage for them, despite having had the benefit of the loans. They would still have had to repay the capital balance if they had had a repayment mortgage, as they say they should have done. I put this point to Mr James. I cannot see that there is an answer to it. Certainly, Mr James was not able to suggest one. It seems to me of primary importance that these parties should not be proceeding to an eventual trial under a fundamental misapprehension about the value of this claim.

83. In my judgment it is absolutely plain that, if the advice to enter into this interest only mortgage was flawed, the measure of the financial loss which would have flowed from that flawed advice is not, as currently pleaded, the capital sum borrowed. Unlike Ms Jago, this claim is not based on the proposition that the Rosses should have been advised against mortgaging their home at all and, unlike Ms Jago's adviser, the broker's liability is not for causing the loss of a capital sum which should not have been borrowed and ploughed into an unsuccessful investment. Rather, they have had the intended use of the capital sum they borrowed, inter alia in clearing their significant unsecured debts and in funding home improvements. It was never going to be "free" money and the broker has no liability in respect of the ways they chose to spend it.

84. On the basis of the hypothetical non-negligent advice they say they should have been given, namely to enter into a repayment mortgage instead, they would by now have had to repay the capital sum borrowed in any event. Had the risk to which they were exposed (of a forced sale of their home to repay the debt) in fact eventuated there might have been some form of consequential losses. However, as matters stand, although I have no detail at all as to how this result has been brought about, it appears that the 2007 mortgage has now been redeemed. It would seem, therefore, that the risk of the Rosses being forced out from their home has been avoided. There is certainly no pleaded claim for any consequential loss, or for any costs that may arguably have been incurred in mitigating their losses. If any such costs have in fact been incurred, they will need to be pleaded by way of amendment.

85. I would add that even if the broker's representation had proved to be an entirely correct prediction of the lender's attitude, and they had rolled over seamlessly and painlessly into a lifetime mortgage as at 20 May 2020, that would not have caused the liability of £250,995 somehow magically to disappear. It would then have stood as a debt against the asset of their home, and even though it may only have had to be paid out of their estate after their death (assuming such were the terms of the lifetime mortgage) that liability still has to be brought into the calculation to arrive at their net loss.

86. Damages are compensatory. By seeking damages of £250,995, the Claimants are seeking to be made better off than they would have been in any hypothetical, non-negligent comparative situation.

87. Leaving aside the possibility of some as yet unidentified consequential loss or cost incurred in mitigation, it seems to me that, in principle, the true measure of their loss

(assuming that they were to establish at trial that they ought to have been advised to take out a capital repayment mortgage and that they could and would have done so) would be the difference in the cost of borrowing over the term of the mortgage. Instead of paying interest on the entire capital sum of £250,995 for 13 years, they would have been paying interest on a steadily reducing capital amount, because they would have been making capital repayments throughout the term. The cost of their borrowing a capital sum of £250,995 on a capital repayment basis, i.e. the cumulative interest paid over the term of the loan, would therefore have been somewhat less than it was on an interest only basis.

88. The Defendant's strike out application should therefore succeed to this limited extent:

    a) The following words should be struck out in paragraph 16: "*The said sum amounts to £250,995.00 which is the sum the Claimants will now be due to pay*."

    b) The words *"in the sum of £250,995"* should be struck out in the prayer.

89. The Claimants, at the same time as amending to strike out those parts of the Particulars of Claim, should amend to set out what sum(s) they allege are properly due by way of damages and on what basis. Even if what is said now in that regard may need further refinement in the light of any expert evidence at a later stage (if permission is in due course given), sensible case management requires that the parties (and the Court) at least know, and know relatively soon, which ballpark they are in in terms of quantum. Equally, the Defendant will need to amend the Defence to put forward their substantive position in response to the claims generally, since what has been filed to date was merely a holding Defence pending the hearing of this application. That would be better done after the Claimants have repleaded their case on loss. I will hear from the parties (in writing, unless a hearing to deal with consequential matters appears necessary) as to what consequential directions are appropriate and on costs. As to the latter, the factors I would particularly invite the parties to address are the late service of the Claimants' evidence (and the impact that late evidence has had on the outcome of the application) and the fact that the Defendant has been successful in part (but not on the aspect to which most of the argument was directed).