



Neutral Citation Number: [2021] EWHC 1326 (Ch)

Appeal no: CH-2020-000138

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
ON APPEAL FROM THE BUSINESS LIST (ChD)
FINANCIAL SERVICES AND REGULATORY SUBLIST

FS-2019-000012

CHANCERY APPEALS

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

Date: 26 May 2021

Before :

Elizabeth Jones Q.C.
sitting as a Deputy Judge of the High Court

Between :

Biraja Pada Bhattacharya
Susmita Bhattacharya
- and -
Oaksix Holdings Limited

Appellants

Respondent

Tom Shepherd (instructed by **Ingram Winter Green LLP**) for the **Appellants**
Stewart Chirnside (instructed by **Gowling WLG (UK) LLP**) for the **Respondent**

Hearing dates: 21 April 2021

APPROVED JUDGMENT

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

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 26/5/2021 at 10.30am.

Elizabeth Jones Q.C.:

1. This appeal from a judgment of Deputy Master Linwood given on 15 May 2020 raises an important point as to the limitation of actions under sections 26 and 28 of the Financial Services and Markets Act 2000 ("FSMA").
2. The Appellants issued proceedings against the Respondent on 8 August 2019. After service of the Reply, the Respondent issued an application seeking to strike out certain claims and/or seeking summary judgment against the Appellants in respect of those same claims.
3. The factual background was agreed by the parties for the purpose of the application. The Deputy Master's judgment sets out the facts and the initial procedural history as follows, referring to the Respondent as "OHL":

"7. In December 2011 the claimants applied for a loan from OHL. On or about 6 February 2012, OHL offered the claimants a nine-month bridging loan of £4,830,000 secured by a first legal charge over their property (which I will call "the Property"), which the claimants agreed to on 17 February 2012. This was the first loan agreement which provided that OHL could deduct, on completion: (1) £477,711 representing nine months' interest; (2) an arrangement fee of £61,245 from which OHL would pay £20,415 to the claimants' broker; and (3) an administration fee of £595 plus, the claimants say but the defendant disputes, legal fees of £4030. For the purpose of this hearing, the defendant accepts that those legal fees are part of the monies paid by the claimants to the defendant. Completion took place on 28 February 2012. Repayment was due on 28 November 2012.

8. On or before 28 November 2012, the claimants and OHL agreed to amend the terms of the first loan agreement to extend the availability period by six months to 28 May 2013. The terms of this first extension agreement were subsequently recorded in an amendment agreement between the parties dated 25 March 2013.

9. Under the first extension agreement, the claimants agreed: (1) to repay the sum of £1,250,000, thereby reducing the principal amount outstanding on the first loan agreement to £2,833,000; and (2) to pay the following amounts in respect of additional interest and fees: (i) £220,974 representing an upfront payment in respect of a further six months' interest on the outstanding balance of, as I have said, £2,833,000; (ii) a one per cent extension fee of £28,333; (iii) an extension arrangement fee of £5000, and (iv) an administration fee of £895. On or about 28 November 2012, the claimants repaid the principal sum of £1,250,000 and paid the amounts I have explained above in respect of the additional interest and fees as agreed under the first extension agreement.

10. On 28 May 2013, the first extension agreement came to an end and the loan was due for repayment. However, the parties agreed to extend the term of the first loan agreement for a further two months until 28 July 2013 in return for the claimants making additional interest payments of £36,829 per month during that second extension

agreement. The claimants subsequently made additional interest payments of that amount from 7 June 2013 to 10 July 2013 respectively.

11. In July 2013, the claimants applied for a new loan from OHL to refinance their existing loan. OHL sent an undated written offer to the claimants for a new six-month loan in the sum of £3,118,000 to be secured by a first new legal charge over the property, subsequently accepted by the claimants on or about 27 August 2013. Under the second loan agreement, the following amounts were to be deducted from the loan amount on completion: (1) £243,204 representing six months' interest; (2) an arrangement fee of £31,180; (3) an administration fee of £895; (4) a broker fee of £2500; and (5) legal fees of £3360. On or about 27 August 2013, OHL advanced the sum of £3,118,000 to the claimants, which was used to finance the amounts outstanding on the first loan agreement.

12. On 27 September 2013 the claimants obtained a new loan from a third-party lender, Fern Trading Ltd. They used this to repay the amounts due to OHL under the second loan agreement.

13. On 8 August 2019, the claimants issued these proceedings against Omni Capital Partners Ltd. That was an error and an application was made by the claimants to correct the name of the defendant to OHL, which was consented to by the defendants approved by me at the outset of this hearing.

14. In the particulars of claim, the claimants seek:

(1) declarations the first and second loan agreements were unenforceable under s. 26(1) of FSMA because they were regulated mortgage contracts and OHL was not an authorised person under s. 19 of FSMA; and

(2) repayment of the interest and fees paid to OHL under both the first and second loan agreements. The total amount claimed by the claimants in the particulars of claim is £986,512, which is split between £867,149 in respect of the first loan agreement and £119,363 in respect of the second loan agreement.

15. OHL served its defence and counterclaim on 14 February 2020 in particular pleading the claimant's claim for repayment of the amounts paid by them under the first loan agreement was statute barred, plus, neither loan agreement was a regulated mortgage contract as at all relevant times the claimants occupied or intended to occupy less than 40 per cent of the property.

16. The claimants in their reply and defence to counterclaim pleaded as to limitation at para. 3(2):

“The claimants' claim is for a declaration that the loan agreements were regulated and that the defendant was unauthorised and was in contravention of the general prohibition in s. 19 of FSMA and so the consequences of s. 26 and s. 28 are

automatically engaged and the loan agreements were and are unenforceable against the claimants.”

4. The application by the Respondent was issued on 16 March 2020, and sought to strike out the Appellants’ claim insofar as it related to the recovery of monies paid by the Appellants to the Respondent prior to 9 August 2013 and/or sought summary judgment pursuant to CPR24.2 in respect of the claim to recover the same sums.
5. By an order dated 15 May 2020 the Deputy Master struck out the claim for repayment of sums paid prior to 9 August 2013 under the first loan agreement of 17 February 2013 (“the First Loan Agreement”) and also struck out the claim for a declaration that the First Loan Agreement was unenforceable. The Deputy Master also gave summary judgment for the Respondent in respect of the same claims. Permission to appeal was then sought by the Appellants on 2 June 2020 and permission was given by Adam Johnson J on 24 November 2020. The proceedings were stayed by the Deputy Master’s order of 15 May 2020 pending the hearing of any appeal. It is therefore the case that although the proceedings were issued in August 2019, they have progressed very little and no directions have yet been given for trial.
6. Although there were 9 grounds of appeal, they raised the following issues:
 - 6.1. whether the Deputy Master had been wrong to grant summary judgment having regard to the complexity of the issue and its significance and the absence of direct authority;
 - 6.2. whether the Deputy Master had been wrong to find that the claims made fell within section 8(2) and section 9 of the Limitation Act 1980 (“the Limitation Act”):
 - 6.3. If section 8(2) and section 9 of the Limitation Act applied, whether the Deputy Master had been wrong to find that time started to run for the purpose of those sections when each of the sums claimed was paid to the Respondent;
 - 6.4. whether, if the money claim was statute barred, the Deputy Master was wrong to also strike out, and give summary judgment for the Respondent on, the claim for the declaration that the First Loan Agreement was unenforceable.

The test on appeal.

7. The parties were agreed that on this appeal I should conduct a review of the Deputy Master’s decision, and not a re-hearing, and that the relevant question was whether I am satisfied that the decision of the Deputy Master was wrong. The principles are well known and are set out in the notes in the White Book at 52.21.1.
8. Shortly before the hearing of this appeal, there was a change of legal representation on behalf of the Appellants. As a result, an amended skeleton argument on behalf of the Appellants was served on 15 April 2021, the Thursday before the window for the appeal. The Respondent objected to certain passages in the skeleton argument, and it was

accepted by the Appellants that there were some new arguments raised, one of which necessitated an application for permission to amend the particulars of claim. I will deal with these at the appropriate point in this judgment.

Issue 1: Was the Deputy Master wrong to make a summary determination?

9. CPR 24.2 provides that the court may give summary judgment against a claimant or a defendant on the whole or part of a claim or on a particular issue if

“(a) it considers that –

(i) that claimant has no real prospect of succeeding on the claim or issue.”

10. CPR 3.4(2)(a) provides that the court may strike out a statement of case if it appears to the court that the statement of case discloses no reasonable grounds for bringing or defending the claim.

11. The Deputy Master referred to, and I was referred by both parties to, the judgment in JSC VTB Bank v Skurikhin [2014] EWHC 271, and in particular to paragraph 15(8) of that judgment:

“Some disputes on the law or the construction of a document are suitable for summary determination, since (if it is bad in law) the sooner it is determined the better, see the Easyair case. On the other hand the court should heed the warning of Lord Collins in AK Investment CJSC v Kyrgyz Mobil Tel Ltd at [84] that it may not be appropriate to decide difficult questions of law on an interlocutory application where the facts may determine how those legal issues will present themselves for determination and/or the legal issues are in an area that requires detailed argument and mature consideration, see also at [116].”

12. It was not suggested by either party that there was any difference between the threshold for CPR 3.4(2)(a) and CPR 24.2. The notes in the White Book to CPR3.4 make it clear that a claim may be struck out where it is not a valid claim as a matter of law, and that the court should not strike out a claim in an area of developing jurisprudence since decisions as to novel points of law should be based on actual findings of fact.

13. The first ground of appeal was that the Deputy Master was wrong to make a summary determination having regard to the complexity of the issue and its significance and the absence of any direct authority relating to the issue and the need for detailed argument and mature reflection. It will be seen that this formulation closely tracks the language of the JSC VTB Bank case referred to above.

14. Mr Shepherd for the Appellants described this ground as an overarching ground. I will return to it after considering the other grounds.

Issue 2: do sections 8(2) and 9 of the Limitation Act apply to the claims brought by the Appellants?

15. The claims brought by the Appellants as currently pleaded arise out of sections 26 and 28 of FSMA.

16. Section 26 of FSMA is headed “Agreements by unauthorised persons” and relevantly provides as follows:

“(1) An agreement made by a person in the course of carrying on a regulated activity in contravention of the general prohibition is unenforceable against the other party.

(2) The other party is entitled to recover:

- (a) any money or other property paid or transferred by him under the agreement; and*
- (b) compensation for any loss sustained by him as a result of having parted with it.”*

17. Section 28 of FSMA is headed “Agreements made unenforceable by section 26 or 27” and relevantly provides as follows:

“(1) This section applies to an agreement which is unenforceable because of section 26 or 27.

(2) The amount of compensation recoverable as a result of that section is:

- (a) the amount agreed by the parties; or*
- (b) on the application of either party, the amount determined by the court.*

(3) If the court is satisfied that it is just and equitable in the circumstances of the case, it may allow

- (a) the agreement to be enforced; or*
- (b) money and property paid or transferred under the agreement to be retained.*

.....

(7) If the person against whom the agreement is unenforceable:

- (a) elects not to perform the agreement, or*
- (b) as a result of this section, recovers money paid or other property transferred by him under the agreement,*
he must repay any money and return any other property received by him under the agreement.”

18. Section 8 of the Limitation Act is headed “Time limit for actions on a specialty” and provides as follows:

“(1) An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued.

(2) Subsection (1) above shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.”

19. Section 9 is headed “Time limit for actions for sums recoverable by statute” and relevantly provides as follows:

“(1) An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued.”

20. “Action” as defined in section 37 of the Limitation Act “*includes any proceeding in a court of law*”.

21. The Deputy Master found that the Appellants’ claim under sections 26(2) and 28(7) of FSMA was subject to a 6 year limitation period as it is a claim for recovery of money which arises only under FSMA.

22. The Appellants put their submissions on this issue in a number of different ways:

22.1. **Ground 2:** that the Deputy Master erred in failing to have regard to the fact that section 9 of the Limitation Act is an exception to the general rule that a claim on a specialty has a 12 year limitation period so that the burden was on the Respondent to show that section 9 applied;

22.2. **Ground 3:** the Deputy Master erred in failing to treat the claim as analogous with that of the claimant in Pratt v Cook, Son & Co (St Paul’s) Ltd [1940] AC 437;

22.3. **Ground 4:** the Deputy Master erred in failing to find that the relief available to the Appellants did not constitute monies *due* under FSMA and was not caught by section 8(2) and section 9 of the Limitation Act (emphasis in the grounds of appeal);

22.4. **Ground 5:** the Deputy Master erred in failing to have regard to the language of entitlement in section 26(2) of FSMA which took the claim out of the exception contained in section 9 of the Limitation Act;

22.5. **Ground 6:** the Deputy Master erred in failing to have regard to the characteristics of section 28(7) which is closely akin to the use of equitable remedies or accounting in restitution where there is no period of limitation at all and instead the doctrine of laches applies.

Ground 2

23. Mr Shepherd's argument was that the Deputy Master had not dealt with the submission that the burden to show that the money claim fell within the exception in section 9 of the Limitation Act was on the Respondent, that this was a matter of public importance, and that since there was to be a trial anyway and there was not any decided case, the burden had not been discharged by the Respondent. I do not think there is anything in this point. The Deputy Master made it plain in paragraphs 19-20 of the judgment that he was well aware where the burden lay, and specifically referred to the point made by Mr Shepherd in paragraph 35 of the judgment. I do not see any basis for saying that the Deputy Master erred.

Ground 3

24. It is fair to say that Mr Shepherd did not press this ground with great enthusiasm in his oral submissions. The short point is that an analogous claim was made by the claimant in Pratt v Cook, Son & Co (St Paul's) Ltd [1940] AC 437 under the Truck Act 1896. The court found that the claim to be paid part of his wages in cash, whereas they had been paid by the provision of dinners and teas prepared and served on the employer's premises, was an action brought on a specialty and the limitation period was 20 years. However, the relevant statute of limitation was the Civil Procedure Act 1833, which simply did not contain provisions similar to section 8(2) and 9 of the Limitation Act. Accordingly, that case is of no assistance. Mr Shepherd also referred me to a passage in paragraph 4-015 of McGee on Limitation Periods, 8th edition, which refers to Pratt and then two later cases of the House of Lords, and says that the law in this area is now in an almost irretrievable state. However, the difference between Pratt and the later cases is simply that there was a different limitation statute in play, and Mr Shepherd did not seek to persuade me that the law is in fact in an irretrievable state. There is no criticism that can be made of the Deputy Master's reasoning on this point at paragraphs 41-48 of the judgment.

Grounds 4, 5 and 6

25. These grounds are interrelated, and examined the wording of section 9 of the Limitation Act and sections 26 and 28 of FSMA and the nature of the underlying claim.
26. First, Mr Shepherd relied on Brueton v Woodward [1941] 1 K.B. 680. The plaintiff in that case was a bookmaker who had paid cheques in June 1922 to the defendant in respect of bets placed by the defendant. By writ dated 10 August 1940 he brought an action to recover the value of the cheques from the defendant under section 2 of the Gaming Act 1835, which provided (in short) that money paid pursuant to notes and bills as a result of bets were "*deemed and taken to be a debt due and owing*" from the recipient of the money to the payer of the money. Singleton J referred to a passage from the judgment of Romer L.J. in a case called Gutsell v Reeve [1936] 1 K.B. 272 at 288, which made a distinction between an action brought on a statute and suing in respect of a cause of action given to him by that statute. The plaintiff's counsel submitted that the plaintiff was not suing on a statute but was merely seeking to enforce a cause of action given to him by a statute. (In Collin v Duke of Westminster [1985] 1 Q.B. 581, Oliver L.J. characterised

the distinction mentioned in Gutsell v Reeve rather more comprehensibly as the distinction between the case where all that the statute did was to make binding a contract which otherwise would not be binding or to vary one term of a contract, and the case where the action rested on the statute and only on the statute.)

27. Singleton J said as follows:

“I do not think that the decision in Gutsell v Reeve really helps me in this case. Each case must of course depend upon its own facts and the exact terms of the statute in question. The writ claims the money as being the amount recoverable under and by virtue of the provisions of s 2 of the statute 5 & 6 Will. 4, c 41. It is true that that does not determine the matter, but the right to sue and indeed everything connected with it, is created by s 2 of the Act of 1835, and it is properly described I think as suing under and by virtue of the provisions of that Act. If that is so the period of limitation is now six years by reason of s.2, sub-s.1(d) of the Limitation Act 1939 which came into operation on July 1 1940. It is unnecessary to consider it more closely because, if that sub-section does not apply, the debt is a specialty covered by s.2, sub-s.3 of the Limitation Act 1939 and the period of limitation is 12 years. It is indeed agreed that if the Act of 1939 applies the plaintiff’s action is statute barred”.

28. The terms of the relevant sections of the Limitation Act 1939 are the same as the terms of sections 8(1) and 9 of the Limitation Act 1980.

29. I do not think that Brueton assists Mr Shepherd. First, Singleton J’s judgment, while obiter on the operation of the then equivalent of section 9 of the Limitation Act, seems to me to support the Respondent’s case. Second, in Central Electricity Board v Halifax Corporation [1962] AC 785, after considering Gutsell v Reeve, supra, it was held that the 1939 Act did not retain the former distinction between bringing an action on a statute and suing in respect of a cause of action given by a statute (see the headnote and the judgments of Lord Reid at p 799, and Lord Morris of Borth-y-Guest at p 803).

30. The Deputy Master’s reasoning is at paragraphs 38-39 of the judgment and again I do not consider that it is in error.

31. There was an objection raised by the Respondent to part of the amended skeleton argument on this point on the basis that it introduced a new ground of appeal; I do not agree that it introduced a new ground, but since I consider that the ground does not succeed, I will not say more about that objection.

32. Mr Shepherd’s next point was that the language of section 26 of FSMA is the language of entitlement, so that, he says, the Appellants’ claim does not fall within the exception to section 8(1) of the Limitation Act which is provided in section 9 of that Act; and also that the characteristics of section 28(7) are closely akin to the use of equitable remedies or accounting in restitution, so that, it was argued, no period of limitation applied. However, Mr Shepherd sought to introduce new arguments in his skeleton in relation to these grounds, and indeed applied for permission to amend the particulars of claim.

33. I will deal first with the arguments relating to the unamended pleading and grounds of appeal before turning to the amendment.
34. This requires consideration of a number of cases which were the subject of submission both before the Deputy Master and on the appeal.
35. In Collin v Duke of Westminster [1985] 1 Q.B. 581, the court considered the right of a tenant to purchase the freehold of a property under the Leasehold Reform Act 1967. The court held that the section which provided the obligation on the landlord to enfranchise was section 8 which provides that

“where a tenant of a house has under this Part of this Act a right to acquire the freehold and gives to the landlord written notice of his desire to have the freehold thenthe landlord shall be bound to make to the tenant and the tenant to accept (at the price and on the conditions so provided) a grant of the house and premises for an estate in fee simple absolute, subject to the tenancy and to tenant’s incumbrances, but otherwise free of incumbrances”.

36. Oliver L.J. held at 602A-B that

“it seems to me to be quite clear that in the instant case any cause of action which the applicant held derived from the statute and from the statute alone. Apart from the statute he had no claim, and it is only by virtue of the statute and the regulations made thereunder that there can be ascertained the amount of the purchase price to be paid under the statutory contract the terms of which can be gathered only from the sections of the Act and the schedule”.

37. Accordingly he held that the claim was a claim on a specialty and accordingly the limitation period was 12 years.
38. In Rahman v Sterling Credit [2001] 1 WLR 496, a lender brought proceedings seeking possession of the borrowers’ property which was subject to a legal charge in support of a loan agreement. The defendants sought to counterclaim to reopen the loan agreement as an extortionate credit bargain within section 139(1) (as it then was) of the Consumer Credit Act 1974. The issue was whether the limitation period for the counterclaim was 6 years from the date of the credit bargain, or 12 years. There had been conflicting county court decisions.

39. Section 139(1) of the Consumer Credit Act 1974 then provided as follows:

“A credit agreement may, if the court thinks just, be re-opened on the ground that the credit bargain is extortionate –(a) on an application for the purpose made by the debtor or any surety to the High Court, county court or sheriff court; or (b) at the instance of the debtor or a surety in any proceedings to which the debtor and creditor are parties, being proceedings to enforce the agreement, any security relating to it, or any linked

transaction; or (c) at the instance of the debtor or a surety in any other proceedings in any court where the amount paid or payable under the credit agreement is relevant”.

40. Mummery LJ, with whom Simon Brown J agreed, referred to what he described as a perceptive comment by Professor J L Yelland on one of conflicting county court decisions as follows:

“..there may well be cases in which the defendant has paid such a small part of the debt that a claim for repayment will not arise and the appropriate order will be to reduce the debtor’s remaining liability. In such a case section 9 would appear to be inapplicable in which case section 8 would come into play. An action upon a specialty includes an action on a statute (Collin v Duke of Westminster [1985] 1 QB 581) and the time allowed is 12 years from accrual of the cause of action. If the defendants in the present case had limited their application to relief in the form of discharge or reduction of the indebtedness they could have secured the benefits of the longer period allowed by section 8 and would not have been statute barred.”

41. After referring to the passage from Collin, supra, set out above, Mummery L.J. continued:

“That reasoning applies to the statutory right of a borrower to make application to the court under section 139. The cause of action arises out of and only out of those provisions of the 1974 Act. Apart from those provisions Mr Rahman would have no right to have the loan agreement reopened in that manner.

It follows that, in so far as Mr Rahman seeks, whether by counterclaim or by separate action, to make a claim to reopen the loan agreement under section 139, that cause of action arose in 1989, less than 12 years ago. If he is successful in his claim the court may make an order relieving him in whole or in part from the obligation to make future payments.....If, however, Mr Rahman were to claim repayment of sums of money already paid by him under the credit bargain, an objection could be raised that section 9 applies. The limitation period would be six year. Mr McDonnell stated that the counterclaim would be amended to exclude any claims for repayment of moneys”.

42. Rahman was considered in Nolan v Wright [2009] EWHC 305. In Nolan, the loan had been made on 14 November 1994, supported by a legal charge. The principal sum originally advanced was £16,000, of which £5,000 had been repaid the following year. Proceedings to recover a sum of nearly £1m were started on 7 February 2007. The defendant by his defence and counterclaim sought to set aside the loan agreement as a sham and on other grounds, and also sought to have the loan documentation set aside or reopened as an extortionate credit bargain under section 139(1) of the Consumer Credit Act 1974. There was evidence that the creditor was in the habit of letting loans remain outstanding while in default until 12 years had elapsed from the commencement of the loan, so as to accrue a limitation defence before bringing proceedings to enforce the loan.

43. It was argued that the decision in Rahman had been based on a concession by Counsel for the borrower that every claim under s 139 is a specialty and was wrongly decided. Instead

it was argued that the 1974 Act gave the court a supervisory jurisdiction, so that a claim to reopen an extortionate credit bargain was not an action for substantive relief for which one would ordinarily expect a period of limitation to apply.

44. HH Judge Hodge Q.C., sitting as a Judge of the High Court, accepted that the application of a strict limitation period to a claim to reopen an extortionate credit bargain was undesirable, particularly in the light of the evidence as to the use of the limitation period by the lender. However, he held that he was bound by the decision in Rahman to find that a claim to reopen a credit bargain constitutes a statutory cause of action within the meaning, and for the purpose, of section 8 of the 1980 Act; at paragraph 14 he said:

“In my judgment it was an integral part of the Court of Appeal’s reasoning and decision in Rahman’s case (by which I am bound) that a claim to reopen an extortionate credit bargain constitutes a statutory cause of action within the meaning of, and for the purposes, of section 8 of the 1980 Act. As such, a 12 year limitation period applies unless the claim expressly extends to the repayment of money previously paid under the credit bargain, in which event the application will be governed by s9 and subject to a 6 year limitation period accordingly”.

45. In the later case of Patel v Patel [2009] EWHC 3264, to which I will return in the context of the date from which the relevant limitation period runs, it was again conceded that a claim for relief under what was by then section 140B of the Consumer Credit Act 1974 was a specialty to which the 12 year time limit imposed by s 8 of the Limitation Act 1980 applies.

46. The Deputy Master considered the cases of Rahman, Nolan and Patel, and also paragraphs 11-003, 11-004 and 11-009 of McGee on Limitation, supra. He decided that the claims under sections 26(2) and 28(7) of FSMA are subject to a 6 year limitation period as they are a claim for recovery of money which arises only under that statute for these reasons:

“(1) The decisions in Rahman, Nolan and Patel are, I consider, applicable by analogy; there is little or no difference between s 139 and 140(B) of the Consumer Credit Act as applied in those three decisions and ss 26 and 28 of FSMA.

(2) This is supported by Professor McGee where as he puts it “There is no doubt that the underlying trend is to categorise any action based on statute as falling within section 9 and having a six-year limitation period”.

47. Mr Shepherd argued that Rahman and Nolan were decisions on different statutes, and that there was also a concession made by counsel for the borrowers in relation to the application of the 6 year period under section 9 of the Limitation Act. Mr Shepherd also argued that Nolan was wrong to say that Rahman was binding. However, Mr Chirside is not suggesting that Rahman and Nolan are binding in this case; rather that they give assistance and can be applied by analogy.

48. Mr Shepherd also submitted that it was wrong to “lean on” cases considering different statutory provisions. I do not agree. Assistance can be derived from Rahman and Nolan, and indeed Collin, on this point, in the same way that the Court of Appeal in Rahman derived assistance from how Oliver L.J had approached the question in respect of the different statute in consideration in Collin.
49. Collin and Rahman both say that the relevant question is whether the claim arises out of and only out of the statute.
50. It is of course important to consider the particular facts and the exact terms of the particular statute in question in each case; see Brueton at p 686. Looking at the statutory provisions in this case, sections 26 and 28 of FSMA set out the grounds for relief, namely that the agreement is unenforceable in the circumstances set out in section 26(1), and also set out exactly what relief the Appellants are entitled to. Under section 26(2) they are entitled to recover any money or other property paid or transferred by them under the agreement and compensation for any loss sustained by them as a result of having parted with it, and under section 28(2) the amount of compensation recoverable as a result of section 26 is either the amount agreed by the parties or, on the application of either party, the amount determined by the court. Moreover, section 28(7) refers to the person against whom the agreement is unenforceable recovering money paid or other property transferred “as a result of this section”. I have to confess to some difficulty in seeing why it is as a result of “this section” rather than “that section” that the money is said to be repayable, unless “compensation” in section 28(2) refers not only to section 26(2)(b) but also to section 26(2)(a). But it was not suggested that anything turned on that.
51. In my view, plainly the Appellants’ claim for the payment of money does arise out of and only out of the statute. If it were not for the statute, the Appellants would have no claim. The provisions of section 28 set out the consequences of section 26, and give the borrower the right to reclaim sums paid (subject to repaying sums received). The relevant claim actually made in the particulars of claim and the claim form is for “*an order for payments of the sums due to the Claimants under section 28(7) of the Financial Services and Markets Act*”. There is no other basis for a claim, and (setting aside any question of amendment) no other claim made.
52. Further, looking at the claim for payment actually made in this action, the language of section 9 (1) of the Limitation Act which refers to “*an action to recover any sum recoverable by virtue of an enactment*” and the language of section 26(2) of FSMA which provides that “*The other party is entitled to recover*”, it seems clear to me that section 9(1) of the Limitation Act applies to the Appellants’ claim for payment. It was accepted by the Respondent that the claim for a declaration fell within section 8(1) of the Limitation Act and so is subject to a 12 year limitation period.
53. Accordingly I do not consider that the Deputy Master’s decision on these points was wrong on the basis of the material and arguments before him.

54. Mr Shepherd's arguments in relation to Grounds 4 and 5 were really directed to the new point which he wished to raise. He accepted, as indicated above, that he would need permission to amend the particulars of claim.

55. The amendment put forward is as follows (with the new material underlined):

“27. The Claimants seek to recover from the Defendant under section 26(2) of the Act, the monies paid under each of the Loan Agreements as having been paid under a mistake of law such that they are entitled to repayment of the same and will repay to the Defendant the monies actually received by them under the Loan Agreement. Had the Claimants been aware that the Loan Agreements were unenforceable in law at the time they made the payments thereunder (which they were not) they would not have made such payments. Further, in the circumstances the Claimants could not with reasonable diligence have discovered their mistake on or before 6 years before the claim was issued”.

56. I pointed out to Mr Shepherd during the hearing and Mr Shepherd accepted that it would also be necessary to amend the prayer to include a claim for restitution of the moneys set out in the schedule to the Particulars of Claim, and also to amend the grounds of appeal. Mr Shepherd did not seek to formulate an amendment to the grounds of appeal.

57. The draft amendment was put forward in a letter from the Appellants' solicitors on Monday 19 April, 2 days before the hearing. No application notice was issued, and no evidence was filed in support of the application to amend, dealing either with the merits of the amendment or explaining why the amendment was made so late in the day. After an exchange during the hearing, a draft witness statement of Mr Bhattacharya was provided explaining that the Appellants had not appreciated that the loans made by the Respondent were unenforceable until they had taken legal advice in 2017. They had taken that advice following the appointment of receivers by Fern Trading Ltd, the lender which loaned the money to the Appellants which repaid the second loan from the Respondent. Judgment was obtained against that lender in their favour in March 2019. The covering letter also stated that Mr Bhattacharya was unable to sign the witness statement because he was with his wife who was ill in hospital, and said that a signed statement would be forwarded as soon as possible. Mr Shepherd also suggested that an undertaking could be given that the witness statement would be signed. Following the hearing I was sent a signed version of the witness statement.

58. Mr Shepherd's argument was that the language of entitlement in section 26(2) of FSMA did not create an entitlement but rather recorded the entitlement of a borrower under an agreement rendered unenforceable by section 26(1) to recover sums paid under an unenforceable contract which they had entered into under a mistake of law, the mistake being that the agreement was enforceable. He referred me to Kleinwort Benson Ltd v Lincoln City Council [1999] 2 AC 349.

59. Mr Shepherd also argued that the limitation period would be suspended pursuant to section 32(1)(c) of the Limitation Act which provides that where an action is for relief from the consequences of a mistake the period of limitation does not begin to run until the

claimant has discovered the mistake or could with reasonable diligence have discovered it. Mr Shepherd also submitted that in cases of mistake the date when time began to run was as set out in paragraph [186] of the judgment of Lord Reed and Lord Hodge in FII Group Test Claimants v HMRC [2020] 3 W.L.R. 1369 at 1431, namely “*not the date when the claimant knows or can establish the truth, but the date when he can recognise that a worthwhile claim arises, in Lord Brown’s formulation, or can plead a statement of claim, in the formulation preferred in the fraud cases*”. The witness statement of Mr Bhattacharya stated that the Appellants had no idea at the time the relevant loan agreements were made or when the payments were made that the loan agreements were unenforceable, that they had instructed solicitors in September 2017 and that they had no way of knowing that the agreements with the Respondent were unenforceable until such time as they had instructed solicitors.

60. Mr Chirnside objected to the raising of new grounds of appeal, and also objected to the application for an amendment. I will deal first with the application for the amendment of the particulars of claim.

61. Mr Chirnside opposed the grant of permission to make the proposed amendment on the following grounds:

- 61.1. no formal application had been made;
- 61.2. it was not clear what the case on amendment was, since it still referred to section 26(2); it was unclear whether the claim was said to be freestanding or a claim under FSMA;
- 61.3. There was no evidence but only an unsigned witness statement. He also pointed out that the witness statement did not in any event deal with when the Appellants could with reasonable diligence have discovered that they had a claim, referring me to the notes at paragraph 17.3.6 of the White Book;
- 61.4. In any event, any claim in unjust enrichment would be out of time since section 5 of the Limitation Act 1980 would apply, referring me to Aspect Contracts (Asbestos) Ltd v Higgins Construction plc [2015] 1 WLR 2961 at paragraph [25]. Accordingly CPR 17.4 applied and the claim could only be brought if it arose out of the same or substantially the same facts as a claim in respect of which the applicant has already claimed a remedy in the proceedings. Mr Chirnside submitted that since mistake was not pleaded in the existing pleadings the new cause of action plainly did not arise out of the same facts. He submitted that what the Appellants should do is issue a new claim and seek to have it heard at the same time, referring me to the notes at paragraph 17.4.2 of the White Book:

“Where there is a dispute as to whether or not a new claim sought to be raised by amendment is statute barred, the claimant must prove (i) that the defendant’s limitation defence is not reasonably arguable, or (ii) that, in any case, the amendment falls within the provisions of rr 17.4 or 19.5. If they cannot establish

either (i) or (ii) permission to amend should be refused leaving the claimant to bring fresh proceedings on the new claim (Chandra v Brooke North [2013] EWCA Civ 1559; [2014] TCLR 1, Ballinger v Mercer Ltd [2014] EWCS Civ 996; [2014] 1 W.L.R. 3597)."

62. Mr Chirnside submitted that the limitation defence his client wished to argue was plainly arguable, referring me to paragraphs 209-210 of the FII Group Claimants case above. At paragraph 210 Lord Reed and Lord Hodge said:

"for example, in cases where the claimant has made a payment on the basis of a mistaken understanding of the law which has resulted from ignorance, the mistake will normally had been discoverable immediately, by seeking legal advice".

63. Mr Shepherd did not suggest that the restitution claim based on a mistake of law was not subject to a 6 year limitation period, and indeed his proposed amendment itself raises the issues which arise under section 32(1)(c) of the Limitation Act 1980. He urged on me that the Appellants were in their 70s and in poor health; and that if the amendment was not permitted the Respondent would be able to keep some £800,000 to which they were not entitled. He pointed out that the proceedings were at a relatively early stage, and said that this case was at the end of the spectrum which meant that no injustice would be done to the Respondent if the amendment and the new arguments on appeal were permitted. Mr Chirnside on the other hand submitted that this was not a "David v Goliath" claim, and that the Appellants were wealthy and sophisticated, being an accountant and a company director respectively.

64. In my view, setting aside all the arguments about the time when this application has been made and the lack of signed evidence at the time of the hearing (though as set out above I was sent a signed version of the witness statement following the hearing), this is a case where the Appellants cannot show that the Respondent's proposed limitation defence to the claim the Appellants wish to raise by amendment is not reasonably arguable. On the basis of paragraph [210] of the FII Group Claimants case, the Respondent clearly has an arguable case that the Appellants could have discovered their mistake by taking legal advice between the dates in 2012 and 2013 on which the various payments were made and 2017, when they say they did take legal advice. I accept Mr Chirnside's submission that the new claim does not arise out of the same facts as the existing claim. Accordingly, even without all other considerations, I do not consider it to be appropriate for me to give permission to make the amendment. If the Appellants wish to bring a claim in restitution they will have to bring a fresh action and seek to have it heard at the same time as the trial of this action. This appeal is therefore not affected by the additional matters which Mr Shepherd wished to raise in relation to Grounds 4 and 5, which depend on the amendment, and I will not further comment on the merits of the proposed new claim. I should record that Mr Chirnside accepted that any such new claim would not be affected by anything decided in this judgment.

65. Accordingly it is not necessary to consider the arguments in relation to raising a new point on appeal.

Issue 3: when did the cause of action accrue?

66. This issue was raised by Grounds 7 and 8:

66.1. **Ground 7:** the Deputy Master erred in failing to find that it was arguable that time started to run from the date of judgment rather than from the date of the agreement or the date of payment;

66.2. **Ground 8:** the Deputy Master erred in failing to have regard to the purpose and policy behind sections 26 and 27 of FSMA and to adopt a broad definition of the accrual of the cause of action as had been applied in Patel v Patel [2009] EWHC 3264 at [66].

67. Ground 7 can be quickly disposed of. The contention below was that the cause of action only accrues when the court makes the declaration of unenforceability and proceeds with the accounting exercise set out in section 28 of FSMA. The Deputy Master held at paragraph 50 that that contention could not be correct because the declaration might be made at any time in the future, and this would also conflict with the legally certain position of 12 years' limitation for an action on a specialty. The Deputy Master's view that the cause of action could not accrue at some time after the action had been commenced has now been confirmed to be correct in the FII Group Test Claimants case at paragraph 213. I do not therefore consider that the Deputy Master erred in this respect.

68. In relation to Ground 8 the Deputy Master's judgment dealt with when time starts to run for the purpose of section 9 of the Limitation Act in paragraphs 45-50 and 52-53. He recorded that it was common ground that a claimant's cause of action depends on when all the material facts have come into existence which the claimant needs to support the claims, citing Coburn v Colledge [2897] 1 Q.B. 706, as cited in Patel at [66]. He decided that section 28(3) was a statutory defence which only arises if the court finds that the claimants are entitled to recover. He referred to Nolan where the court said at p 832g "*although strictly unnecessary for the purposes of this decision and without having heard any argument on the point I acknowledge that if the claim is one to recover a sum of money previously paid to the creditor, and is therefore subject to the six year limitation period prescribed by section 9, time may not begin to start running until the payment has been made*", but pointed out that this dictum was heavily caveated. The Deputy Master then held at paragraph 52 as follows:

"I have no doubt that knowledge of the fact as to payment is the operative start point. Here, that was the dates of each payment made by the claimant to the defendant under the first loan agreement, as set out in the table in Mr Rastegar's statement, as those are the payments that would, if the claimants otherwise succeeded, be caught by the operation of section 26(2) of FSMA".

69. Mr Shepherd's first submission was that there was a continuing relationship between the parties and that time started running when the relationship came to an end, so that the cause of action kept accruing during the relationship. He so argued by analogy with Patel.
70. In Patel, the court was considering what was by then section 140A to 140D of the Consumer Credit Act 1974 which replaced the provisions of sections 137-140 of the same Act which had been considered in Rahman and Nolan. Section 140B enables the court to make a range of orders in relation to a credit agreement if it determines under section 140A that the relationship between the creditor and the debtor is unfair to the debtor because of a number of matters. The matters to be taken into account include the way in which the creditor has exercised or enforced any of his rights under the relevant agreement, and any other thing done or not done by the creditor or on his behalf before or after the making of the agreement or any related agreement. Section 140A(2) requires the court to have regard to all matters it thinks relevant in making a determination under section 140A. Section 140A(4) expressly provides that a determination may be made under section 140A in relation to a relationship notwithstanding that the relationship may have ended.
71. At paragraphs 63-66 Mr George Leggatt Q.C., sitting as a deputy Judge of the High Court, said as follows:

63. What the court has to determine under s.140A is not whether the relevant credit agreement is unfair but whether the relationship arising out of the agreement is unfair; and in that context the court is specifically required by paragraphs (b) and (c) of sub-section (1) to consider as part of its assessment matters which have occurred after the making of the agreement. Some of the matters relied on by the defendant in this case as making the relationship between himself and the claimant unfair are matters which have occurred within the period of 12 years before the claim for relief was made. On any view the defendant must be entitled to raise and rely on those matters.

64. It would, however, be an artificial and unsatisfactory exercise if, in determining what is fair to the debtor, the court were permitted to have regard only to matters which occurred in the 12 years before the debtor's application was made and was required to shut its eyes to agreements between the parties and other relevant matters which occurred before that time. Such a partial enquiry into the course of the relationship between the creditor and the debtor would also be contrary to s.140A(2), which provides that the court "shall have regard to all matters it thinks relevant" (my emphasis) – impliedly without limitation in time. In my opinion the possibility of such a time-limited assessment does not arise on the proper interpretation of the statutory provisions. As I construe s.140A, the question whether the relationship between the creditor and the debtor is unfair to the debtor, upon the answer to which the power to make an order under s.140B depends, is a single question which admits of a 'yes' or 'no' answer that has to be determined as at a particular point in time. However, in determining whether, at the relevant date, the relationship is or is not unfair, the court is required to have regard to certain matters specified in s.140(A)(1) and to

all other matters it thinks relevant, whenever those matters occurred. There is no possibility, therefore, if the court is entitled to make the determination of fairness at all and is not barred by limitation from doing so, of restricting the temporal scope of the enquiry.

65. Hence the critical question is: what is the relevant date at which the fairness or otherwise of the relationship has to be determined? In principle, it seems to me that the determination should be made having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination. This means that if the relationship between the creditor and the debtor has ended, the determination should be made as at the date when the relationship ended; and if the relationship is still ongoing, the determination should be made as at the time of the trial.

66. When the debtor's cause of action accrues for the purpose of s.9 of the Limitation Act depends on when all the material facts have come into existence which the debtor needs to allege in support of an application for an order under s.140B: see e.g. Coburn v Colledge [1897] 1 QB 702, 706-7. Those facts are, first, that a credit agreement has been entered into between the creditor and the debtor and, second, that the relationship arising out of that agreement is unfair to the debtor. If I am right in my analysis of the date at which the fairness of the relationship between the creditor and the debtor falls to be assessed, the result is that the debtor's cause of action is a continuing one which accrues from day to day until the relevant relationship ends. It follows, in my view, that an application under s.140B can be made at any time during the currency of the relationship arising out of a credit agreement, based on an allegation that the relationship is unfair to the debtor at the time when the application is made, or at any later time (as s.140A(4) expressly permits) until the expiration of the applicable period of limitation after the relationship has ended. (That period is 12 years except in so far as the relief sought is the recovery of money which has been paid by the debtor, in which case the effect of s.8(2) is that the six year period prescribed by s.9(1) of the Limitation Act applies.)”

72. In support of his submission that the position under sections 26 and 28 of FSMA was analogous to the position under sections 140A and 140B of the Consumer Credit Act 1974 so that the court should apply the approach in Patel by analogy, Mr Shepherd pointed to the wording of section 28(3) of FSMA, which enables the court to consider whether it is just and equitable for the agreement to be enforced or moneys retained. He submitted that there was an overlap between issues raised by section 28(3) and issues of estoppel which were already pleaded by the defendant relating to whether there had been representations by the Appellants as to their occupancy of the property. Mr Shepherd also submitted that the court should have well in mind that the purpose of the relevant provisions of FSMA is to protect consumers, and that it was the Appellants' case that the Respondent had received and kept some £800,000 which it was not entitled to.
73. Alternatively, Mr Shepherd also submitted that the Appellants did not need to bring a claim until the time that the First Loan Agreement came to an end when the Second Loan Agreement was entered into on 27 August 2013. He said that on 9 August 2013, being the

cut-off date for limitation purposes, there was no monetary claim which the Appellants needed to or could have brought – under section 28(7)(a) they were entitled to sit on their hands. The tipping point at which a claim to recover money had to be brought was the date on which the capital repayment was made, namely 27 August 2013, and that was within the limitation period.

74. Accordingly, Mr Shepherd submitted that the Deputy Master was wrong to find that there was no reasonable prospect of success in relation to the argument that the cause of action did not accrue until the end of the First Loan Agreement, which date was less than 6 years before the commencement of proceedings.
75. Mr Chirnside submitted that the Deputy Master had impliedly dealt with the Patel point in paragraph 34 of his judgment where he held that the monies received by the Respondent under the First Loan Agreement were at the latest received on 10 July 2013, and that there was no claim for repayment of the capital which was repaid on 27 August 2013. Mr Chirnside submitted that Patel was not on point because a successful claim under section 140B of the Consumer Credit Act was based on an unfair relationship so that the court had to look at the whole of the relationship, and that Rahman and Nolan were distinguished in Patel on that ground. Mr Chirnside submitted that a claim under section 26(2) and 28(7) of FSMA does not require the court to look at the whole of the relationship; instead the question under section 26(1) of FSMA was what the facts were at the date on which the loan in question was entered into. Mr Chirnside further submitted that section 28(3) of FSMA did not assist Mr Shepherd because it was a statutory defence which did not arise unless the court held that the claimants are entitled to recover, as held by the Deputy Master at paragraph 49 of his judgment. Mr Chirnside's submission was that the cause of action in respect of each payment accrued when each payment was made. The only relevant facts which were required to plead the cause of action were, he submitted, the fact that the agreement was unenforceable and the fact of payment. The only claims pleaded here were, he said, for recovery of interest and charges paid more than 6 years before commencement of the action and there had been no application to amend.
76. I do not think that Patel is of direct assistance to Mr Shepherd in this case. The relevant statutory provisions are very different. I agree with Mr Chirnside's submission that section 28(3) is a matter which would be raised by a defendant by way of defence and not a matter which needs to be addressed by a claimant by way of claim (although it was in fact addressed in the particulars of claim in this action). Accordingly, and unlike the situation in Patel, there is no need for the claimant to plead facts arising during the currency of the agreement which go to whether it is just and equitable to permit the agreement to be enforced or money or property to be retained.
77. I take into account Mr Shepherd's submission that the relevant provisions of FSMA are to protect consumers. At the same time, there are competing policy reasons which underlie the Limitation Act; see the FII Group Claimants case at [179] and [259]. It is important therefore to look carefully at the statutory provisions and the pleadings in the particular case, as emphasised in Bruerton and in Patel.

78. The starting point for Mr Shepherd's alternative submission is section 9 of the Limitation Act, which provides that an action to recover any sum recoverable by virtue of an enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued. As the Deputy Master held, a cause of action accrues when all the facts have come into existence which "*it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court*"; see Coburn v Colledge [1897]1 Q.B. 702 at 706-7.
79. Sections 26 and 28 of FSMA do not require a borrower to bring proceedings to obtain relief. The borrower is entitled to elect not to perform the agreement: see section 28(7). Moreover, if the borrower elects not to perform the agreement, they are entitled to recover sums transferred by them under the agreement, but are required to repay sums received by them under the agreement. Accordingly, until the capital was repaid on 27 August 2013, not only was there no need for the Appellants to bring proceedings, but they could not at that stage have brought a claim for the payment of money, since the balance of the sums due from them and the sums due to them would have led to an order that the Appellants pay money to the Respondent. The relief that would have been sought in an action brought by the Appellants on 9 August 2013, the date which is 6 years before the commencement of proceedings, would have been a declaration that they were obliged to repay only £x to the Respondent, £x being the balance after taking into account the sums received and the sums paid. The critical fact which gives rise to a claim for the recovery of money is the repayment of the capital, which took place on 27 August 2013, less than 6 years before the commencement of this action.
80. It is plain from the passages from the judgment of Mummery LJ in Rahman set out in paragraphs 40 and 41 above that a claim under the Consumer Credit Act 1974 for relief from making future payments is one cause of action, to which one limitation period applies, and a claim to recover payments is a different cause of action, to which another limitation period applies. In my view it is indeed arguable that the same reasoning applies under sections 26 and 28 of FSMA. If the claim is for a declaration as to what sum the claimant is required to repay, the claim will be a claim on a specialty and section 8(1) will apply. If the claim is for the recovery of money from the defendant then the claim will be one to which section 9 will apply. Thus, since on 9 August 2013 the Appellants could not bring a claim for repayment of money, in my view it is arguable by analogy with the reasoning in Rahman that the cause of action on which they have brought their claim did not accrue until 27 August 2013 when they repaid the principal and their claim to recover money under FSMA arose.
81. Further, FSMA provides that the borrower can elect not to perform the agreement. Therefore, until 27 August 2013 the Appellants had no need to bring any claim at all, but could simply elect not to perform the agreement (though they would come under an obligation to repay the balance between sums which they had received and sums which they had paid, and would doubtless find themselves as defendants to an action brought by the Respondent). I find it illogical to consider that a cause of action has accrued when there is no need for a party to bring an action at all. This is different from the position

under the Consumer Credit Act 1974, where HH Judge Hodge QC held in Nolan at page 832d that some positive action on the part of the debtor appears to be required to re-open a credit bargain, so that any of the routes provided for in what was then section 139 of the Consumer Credit Act 1974 amounted to an “action” as defined in the Limitation Act. However, once they repaid the capital on 27 August 2013 the Appellants could only obtain repayment of sums they had paid by bringing an action, and at that time the relevant cause of action accrued.

82. As to Mr Chirnside’s point on the pleadings, the particulars of claim do in fact plead in paragraph 27 that “*The Claimants seek to recover from the Defendant under section 28(7) of the Act, the monies paid under each of the Loan Agreements and will repay to the Defendant the monies actually received by them under the Loan Agreement*”. The monetary relief sought is an order for payment of the sums due to the Claimants under section 28(7) of FSMA. It is true that paragraph 28 refers to a schedule which sets out the payments of interest and charges and does not mention the repayment of capital, but it describes that schedule as a calculation in respect of each loan agreement. It seems to me that the pleading in paragraphs 27 and 28 makes it clear that what the Appellants are claiming are the sums which they are entitled to recover having carried out the exercise of claiming the monies paid under the First Loan Agreement and repaying the sums actually received by them under the First Loan Agreement. Accordingly I do not think that any amendment is required.
83. It follows that I consider that the Deputy Master was wrong to hold that the Appellants had no real prospect of showing that the limitation defence relied on by the Respondent did not constitute a good defence. I shall therefore allow the appeal on this ground. The Respondent’s application of 16 March 2020 will therefore be dismissed.

Issues 1 and 4: Grounds 1 and 9.

84. I return to issue 1. As a result of my decision in relation to Ground 8, the issue raised by Ground 1 does not arise. Neither does the issue raised by Ground 9 (whether a declaration should be granted notwithstanding that a money claim was statute barred).

Consequential matters

85. I will hear counsel as to what consequential orders should be made.