



Neutral Citation Number: [2022] EWHC 1689 (Ch)

*PENSIONS – PROFESSIONAL NEGLIGENCE – LIMITATION - Liability of scheme administrator – Delay in closing Barber Window – Defendant’s application to strike out and for summary judgment – Claimants’ application for permission to amend particulars of claim – Limitation Act 1980, ss 14A, 14B, 32*

Case No: E30MA250

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS**  
**IN MANCHESTER**  
**BUSINESS LIST (ChD)**  
**PENSIONS**

Manchester Civil Justice Centre  
1 Bridge Street West  
Manchester M60 9DJ

Date: Friday, 8 July 2022

**Before:**

**His Honour Judge Hodge QC**  
**Sitting as a Judge of the High Court**

**Between:**

**(1) James Cropper Plc**  
**(2) Entrust Pension Limited**  
**(as trustee of the James Cropper Plc Pension Scheme)**

**Claimants**

**- and -**

**Aviva Life and Pensions UK Limited**

**Defendant**

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**Mr Richard Hitchcock QC** (instructed by **DWF Law LLP**, Manchester) for the **First Claimant**

**Mr Sebastian Allen** (instructed by **Shoosmiths LLP**, Leeds) for the **Second Claimant**

**Mr Nigel A. Burroughs** (instructed by **Eversheds Sutherland (International) LLP**, Birmingham) for the **Defendant**

The following authorities are referred to in this judgment:

*Ballinger v Mercer Ltd* [2014] EWCA Civ 996, [2014] 1 WLR 3597  
*Barber v Guardian Royal Exchange Assurance Group* [1991] Q.B. 344  
*Capita ATL Pension Trustees Ltd v Sedgwick Financial Services Ltd* [2016] EWHC 214 (Ch)  
*Diamandis v Wills* [2015] EWHC 312 (Ch)  
*Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch)  
*Hyde v Nygate* [2019] EWHC 1516 (Ch)  
*Law Society v Sephton & Co* [2006] UKHL 22, [2006] 2 AC 543

Hearing date: Friday 27 May 2022  
Draft circulated: Friday 1 July 2022  
Judgment handed down: Friday 8 July 2022

## 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.

*David R. Hodge*

HIS HONOUR JUDGE HODGE QC

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This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on the National Archives caselaw website. The date and time for hand-down is deemed to be 10.00 am on Friday, 8 July 2022.

## **His Honour Judge Hodge QC:**

### *I: Introduction*

1. This is my considered judgment on cross-applications in this professional negligence claim arising out of the administration of the James Cropper Plc Pension Scheme (**the Scheme**): (1) by the only remaining defendant (dated as long ago as 30 March 2021) to strike out the particulars of claim as disclosing no reasonable grounds for bringing the claim and/or for summary judgment against both claimants on the whole of the claim; and (b) by the claimants (as recently as 23 May 2022) to amend the particulars of claim. The focus of both applications is on issues of limitation.
2. The first claimant (**James Cropper**) is the principal employer of the Scheme, which was first established in January 1964. Since 15 November 2011 the second claimant (**Entrust**) has been the sole corporate trustee of the Scheme. From about February 1984 until (as was originally understood and pleaded by the claimants about June 2004 but in fact) about June 2008 the Scheme was administered by Friends Provident Life Office (later Friends Provident Life and Pensions Limited), whose policies, assets and liabilities have subsequently been acquired by the sole remaining defendant, Aviva Life & Pensions Limited. In this judgment I shall use the terms **Friends Life** to refer to the defendant scheme administrator and **Aviva** when I am referring solely to the third defendant.
3. The claimants' case is that Friends Life failed to provide reasonably competent advice and services in connection with the equalisation of the normal retirement dates (**NRDs**) of male and female members of the Scheme pursuant to the decision of the European Court of Justice in *Barber v Guardian Royal Exchange Assurance Group* [1991] Q.B. 344 (**Barber**). As clarified by a later ECJ decision, the effect of *Barber* is that male members of an occupational pension scheme are to be treated as having the same NRD as female members in relation to pensionable service after 17 May 1990 until the Scheme equalises their benefits. Friends Life administered the Scheme on the basis that male and female NRDs were equalised (at 65) with effect from 1 November 1995, and they advised the claimants that equalisation had occurred with effect from that date. However, Friends Life were wrong to do so because NRDs were not equalised until a deed dated 19 December 2002, and then only with effect from that later date. The result is that the Scheme's '*Barber Window*' – the period from 17 May 1990 up until the date on which NRDs were effectively equalised – did not close on 31 October 1995 (as the claimants had intended and understood) but remained open until 19 December 2002. Throughout that period, disadvantaged male members of the Scheme continued to accrue more valuable benefits than the claimants had either intended or understood because they continued to be able to do so on the basis of the female members' NRD (of 60). Because the *Barber Window* was prolonged by some seven years, the claimants assert that they have been left with substantial unintended liabilities in the Scheme. These are said to amount to some £3,500,000.
4. This judgment is divided into six sections as follows:
  - I: Introduction
  - II: Background

III: The defendant's application: submissions

IV: The claimants' amendment application: submissions

V: Analysis and conclusions

VI: Disposal

*II: Background*

5. At the time of Friends Life's appointment, the Scheme was governed by a Supplemental Deed and Rules dated 12 May 1971 (**the 1971 Rules**). The power of amendment contained in rule 40 of the 1971 Rules required a deed to be executed by the principal employer and the trustees in order to effect any alteration of the Scheme and to make new provisions. Rule 2(k) defined the NRD of a male member as his 65<sup>th</sup> birthday and of a female member as her 60<sup>th</sup> birthday. On 14 July 1995 a new trust deed and rules (drafted by Friends Life) were executed but these made no changes either to the requirement for alterations to the Scheme to be effected by a deed executed by the principal employer and the trustees or to the unequalised NRDs of 65 and 60 for male and female members respectively. It is the claimants' case that by maintaining unequal NRDs, these new rules continued the unlawful discrimination of the previous rules. Pending disclosure, it is not clear why the 1995 deed and rules failed to provide for equalised NRDs. The claimants allege that Friends Life had recognised the need for the equalisation of NRDs by about this time, or shortly thereafter, as evidenced by the minutes of a Scheme trustees' meeting in September 1995.
6. On 2 October 1995, James Cropper issued an announcement to all members of the Scheme notifying them that as from 1 November 1995 the NRDs for male and female members would be equalised at 65. The original draft of this announcement had been prepared by Friends Life although it was later amended by James Cropper before issue. James Cropper provided a copy of this announcement to Friends Life on 16 October 1995 under cover of a letter which stated: "*We have finally put to bed the question of equalisation ... I enclose a copy of the announcement to all female staff...which is different from the suggested wording of your colleagues*". James Cropper was never advised that this announcement would be of no effect in the absence of a validly executed amending deed. Despite this, Friends Life proceeded to administer the Scheme on the basis that the 1995 announcement was a valid amending instrument. It was not until 19 December 2002 that a new deed of alteration was executed, setting out a new deed and rules for the Scheme. The power of alteration was amended so that future alterations to the Scheme rules (as distinct from the provisions of the trust deed) could be effected by the consent in writing of the principal employer and by the signatures under hand of each individual trustee; and (subject to certain minor specified exceptions) the NRDs for male and female members were equalised at age 65. It is common ground that, consistently with s. 67 of the Pensions Act 1995, such equalisation only operated prospectively as from 19 December 2002 and could not operate detrimentally to affect accrued pension rights.
7. On 7 December 2017 solicitors acting for James Cropper gave Aviva preliminary notification of this claim. The claimants and Aviva entered into a standstill agreement for limitation purposes on 15 December 2017 (which terminated on 7 December

2018). This standstill agreement stopped time running after 15 December 2017 with the result that the 15-year long-stop date in s. 14B(1) of the Limitation Act 1980 (the **Limitation Act**) is 15 December 2002 and (subject to deliberate concealment for the purposes of s. 32) any claim in respect of Friends Life's negligence prior to that date is now statute-barred. A letter of claim was sent to Aviva pursuant to the pre-action protocol for professional negligence on 20 August 2018, and Aviva provided a letter of response on 6 December 2018. In the meantime, on 13 April 2018 (and solely because they had agreed a shorter standstill period than Aviva), the claimants had issued a claim form against a firm of solicitors (and its successor practice) which had formerly acted in relation to the Scheme. This claim form was amended to add Aviva as the third defendant on 7 December 2018. Following the service of notice of discontinuance dated 3 March 2021, a consent order discontinuing the claim against the first and second defendants was made on 4 March 2021; and this claim therefore proceeds against Aviva alone.

8. The breaches alleged against Aviva are set out at paragraph 43 of the existing particulars of claim. In summary, it is alleged that Friends Life:

(1) failed in 1995 and thereafter to advise the Scheme trustees and James Cropper that a deed was required to amend the provisions of the Scheme and to give effect to their decision to equalise NRDs with effect from (at the latest) 1 November 1995;

(2) drafted the 1995 Rules in terms which provided for unequalised NRDs and did so without advising the Scheme trustees and James Cropper that that provision was in breach of their obligation to provide for equal retirement and would continue to govern this aspect of the Scheme until and unless it was altered by deed;

(3) failed at any time prior to the 2002 deed and rules to provide the Scheme trustees and James Cropper with a draft trust deed which would equalise male and female NRDs;

(4) administered the Scheme in and from 1995 as though NRDs had been equalised when they had not;

(5) continued to advise the Scheme trustees and James Cropper that the Scheme's NRDs had been equalised when they had not;

(6) in about 2002 altered the Scheme's power of amendment to remove the requirement that the Scheme's rules had to be amended by deed without being instructed to do so, and without explaining that this was being done; and

(7) failed to advise in 1995, or at any time thereafter, that the failure to provide equalised benefits in 1995, or any time prior to 19 December 2002, would cause the Scheme a significant unintended additional liability.

9. The losses claimed as against Aviva are set out at paragraphs 53 (a) and (b) of the existing particulars of claim. The claimants allege that they have suffered loss and damage in the form of the additional *Barber* window liability created by the existence of unequalised NRDs between 1 November 1995 and 19 December 2002. It is claimed that Aviva should have advised after 19 December 2002 that NRDs had not been equalised until that date. If they had done so, it is said that the claimants "...

*would have suffered a less significant additional liability and could and would have taken swift action to seek recovery of losses caused by Aviva's and/or [the solicitors'] breaches of duty".*

10. By an Order made by HHJ Halliwell on 7 July 2020 Entrust was given permission to be separately represented by counsel and solicitors in this action in relation to all factual and legal issues arising in this claim and post-dating 15 November 2011 (being the date of Entrust's appointment as the sole corporate trustee of the Scheme). As a result of this Order, on these applications: (1) James Cropper is represented by Mr Richard Hitchcock QC, who has produced written skeleton arguments (a) dated 25 May, opposing Aviva's strike out and summary judgment applications, and (b) dated 26 May, in support of the claimants' amendment application; (2) Entrust is represented by Mr Sebastian Allen (of counsel), who has produced a written skeleton argument outlining Entrust's arguments in opposition to Aviva's application; and (3) Aviva is represented by Mr Nigel A. Burroughs (also of counsel), who has produced written skeleton arguments (a) dated 24 May, in support of Aviva's application, and (b) dated 26 May, in opposition to the claimants' amendment application.
11. On 30 March 2021 Aviva issued its application to strike out the particulars of claim as disclosing no reasonable grounds for bringing the claim and/or for summary judgment against both claimants on the whole of the claim. That application was first listed for hearing on 26 April 2021; but, by agreement, that hearing was vacated and re-listed for hearing on 29 September 2021, with a time estimate of one day.
12. The evidence in support of Aviva's application is contained in the witness statement, dated 30 March 2021, of its solicitor, Ms Claire Carroll. The claimants' evidence in answer is contained in the witness statements: (1) dated 21 September 2021, of Mr Lee Norman, a partner in DWF Law LLP, James Cropper's solicitors, who deals with the procedural history of the discontinued claim against the former Scheme solicitors; (2) dated 27 September 2021, of Mr John Denman, one of the Scheme trustees from around September 1996 until the appointment of Entrust as corporate trustee in November 2011, and, from 16 July 1995 until his retirement in 2014, James Cropper's former Group Finance Director; (3) dated 21 September 2021, of Ms Isabelle Maddock, since 31 July 2014 James Cropper's Chief Financial Officer and a Group Board Director; and (4) dated 21 September 2021, of Mr Patrick Colm Kennedy, a qualified pensions solicitor and the Scheme Director for Entrust.
13. In the event, the September 2021 hearing was adjourned, ultimately to Friday 27 May 2022, on the basis that the parties had engaged in further correspondence which they wished to consider prior to an adjourned hearing date. As the claimants explain in the evidence in support of their amendment application, during the course of preparing their response to Aviva's application, in the period prior to the adjourned hearing in September 2021, the claimants had disclosed additional documentation that had been located, including the letters, actuarial valuations and trustee minutes contained in an updated supplemental bundle for use at the hearing on 27 May 2022. The claimants had also identified further key provisions in the trust deeds that Friends Life had drafted which were considered to be material to its case on concealment pursuant to s. 32 of the Limitation Act. James Cropper had detailed the relevance, and the importance to the claimants' case, of that documentation, and of the further key provisions, in the skeleton argument it had filed and exchanged prior to the September 2021 hearing; but these matters had not been expressly pleaded in the existing

iteration of the particulars of claim. It is in order to ensure that the particulars of claim plead the claimants' full case, and to avoid any criticism that the current particulars of claim do not expressly plead all of the matters detailed in their original skeleton argument, that the claimants now seek permission to amend their claim.

14. In his skeleton argument on the amendment application, Mr Burroughs contends that the proposed amendments largely fall within three categories:
  - (1) amendments to delete claims against the former solicitor defendants following the discontinuance of the claims against them;
  - (2) amendments which add to, and are relied upon by the claimants in support of, their allegation that, contrary to s. 32 of the Limitation Act, Friends Life concealed facts which would have enabled the trustees and James Cropper to have obtained any necessary independent advice and taken steps to recover their losses from Friends Life; and
  - (3) new causes of action relating to Friends Life's conduct after 19 December 2002 (when the 2002 trust deed and rules were executed) and, in particular, to allege that Friends Life provided services until June 2008 (whereas the original particulars of claim only allege that services were provided until 1 June 2004).
15. Aviva does not oppose the amendments to delete the claims against the former first and second defendants; nor does it object either to the amendments relating to the claimants' case on concealment or to a number of other small, inconsequential amendments, such as those to paragraphs 1, 4, 7, 9, 13, 30, 53 and 53(b). Aviva does, however, oppose the amendments which, so they contend, raise new claims on the basis that the applicable limitation period has expired and they do not arise out of the same, or substantially the same, facts as the claims already made in the proceedings.
16. Aviva was rightly concerned that there would not be enough time for both applications to be heard in a single day. The strike out/summary judgment application was thought likely to take the whole of the day for which it was listed. Aviva considered that the amendment application would take two hours to determine, which would not have left enough time to hear Aviva's own application (which was issued on 30 March 2021 and has been adjourned twice by consent). No explanation had been provided as to why the claimants' application had not been made many months earlier, but was only made three clear days before the hearing of Aviva's application. The hearing of the claimants' recent application should not be allowed adversely to affect the hearing of Aviva's own application. Mr Burroughs was concerned that the claimants' application should only be heard after Aviva's application, so that there was no risk of the strike out and summary judgment application going part heard.
17. Aviva's concerns seemed to me to be well-founded. Given that there was no satisfactory explanation for the claimants' failure to advance any amendment application at any time during the interval of almost eight months since the date of the September listing until the week of the re-listed hearing, I indicated that, in the exercise of my case management powers, I was not prepared to allow the amendment application effectively to 'hijack' Aviva's application to strike out or for summary judgment on the claim. Mr Hitchcock indicated that he was content to resist Aviva's application on the basis of the claimants' existing particulars of claim and those

proposed amendments which were not opposed by Mr Burroughs. I therefore proceeded to hear the submissions on Aviva's application to strike out the particulars of claim and for summary judgment.

18. Due to the detailed and helpful written skeleton arguments, the extent of the pre-reading I had undertaken, and the commendable brevity of all three counsel's oral submissions, the court was able to conclude the hearing of Aviva's application (subject to judgment) with sufficient time left to spare to hear the claimants' amendment application. With the benefit of hindsight, this approach has proved beneficial for two reasons: First, my conclusions on Aviva's application have informed my conclusions on the amendment application. Secondly, because (as will appear) the burdens of persuasion on the two applications are different, the court's approach to issues of limitation is not the same on the two applications. At the end of oral submissions, I reserved judgment on both applications.
19. In this judgment, I propose to give only the briefest outline of counsel's submissions. The detail appears from the skeleton arguments; and I have refreshed my memory by re-reading these in the course of preparing this written judgment. I have also read back through my notes of the oral submissions. Nor do I propose to address all of the many legal arguments that were advanced before me unless this is necessary for the purposes of my ultimate decision. Happily, save for a dispute over whether the claimants suffered anything more than a contingent loss until late 2017 (when Entrust was first required to recognise any additional liability, and James Cropper was therefore first required to fund it), there was no real difference between counsel as to the applicable legal principles so I will defer any detailed consideration of the non-contentious legal issues to the section of my judgment headed '*Analysis and conclusions*'.

*III: The defendant's application: submissions*

*(i) Aviva*

20. For Aviva, Mr Burroughs submits that particulars of claim which are suitable for striking out under CPR 3.4(2)(a) include those claims which raise an unwinnable case, where the continuance of the proceedings is without any benefit to the claimant and would be a waste of resources for both parties. Mr Burroughs submits that this claim is irremediably statute-barred. He points out that paragraph 2 of the unamended particulars of claim pleads that Friends Life provided services to the Scheme "... *from about February 1984 until 1 June 2004*". The primary limitation period in respect of any claim for negligence up to 1 June 2004 has long since expired, and the claimants rely on s. 14A of the Limitation Act. In James Cropper's reply it is stated that the starting date for the purposes of s. 14A was in or about November 2017, while the date given in Entrust's reply is the last quarter of 2017. The standstill agreement stopped time running after 15 December 2017. Any claim in respect of Friends Life's negligence before 15 December 2002 is therefore time-barred by section 14B. This includes all of the claims relating to the 1995 deed and rules and the October 1995 announcement. Mr Burroughs submits that this also includes the claims relating to the 2002 deed and rules: Whilst these were executed on 19 December 2002, Friends Life had provided the final draft of the 2002 deed and rules to James Cropper and the trustees on 11 November 2002; and their final advice about execution was given on 14 November 2002. There is said to have been no continuing duty on Friends Life,



after this latter date, to advise as to the failure to equalise NRDs, and the need for a deed to achieve equalisation, arising out of the instructions relating to the 1995 deed and rules and the October 1995 announcement before the 2002 deed and rules were executed on 19 December 2002.

21. As for the administration of the Scheme from 1995 on the basis that NRDs had been equalised when they had not, Mr Burroughs points out that there is no specific act or omission pleaded which is alleged to have taken place between 15 December 2002 and 19 December 2002 when the 2002 deed and rules were executed and the *Barber* window was closed. Even if the claimants were to be permitted to continue with the claim for this limited and brief period, the additional liabilities they incurred would have been negligible.
22. To the extent that Friends Life continued to advise that NRDs had been equalised when they had not, no allegation is presently pleaded of any specific advice being given after 15 December 2002. However, in James Cropper's skeleton argument filed for the hearing on 29 September 2021 it was asserted that Friends Life had failed to advise that equalisation had not been effected in and from 1995, and that they negligently advised that it had been so effected. The example given is the 2003 actuarial valuation report, which was finalised on 29 March 2004. Mr Burroughs submits that, on this application, the court is only concerned with the claimants' pleaded case, and not with assertions advanced in skeleton arguments. He points out that this appears to be recognised by the claimants since they they have applied for permission to amend their particulars of claim to include allegations relating to the 2003 actuarial valuation report. This is an application which Aviva opposes on the basis that limitation has expired in respect of what it asserts is a new cause of action which does not arise out of the same, or substantially the same, facts. In any event, Mr Burroughs does not accept that Friends Life were under any duty to advise that there was any problem about the equalisation of NRDs until they had become aware of this. If Friends Life had been negligent in 1995, they had proceeded on an erroneous basis at all times thereafter; and there were no further, or later, acts of negligence (as evidenced by the lack of any specific allegations of such in the existing particulars of claim).
23. Mr Burroughs points out that the claimants also seek to get around the limitation problem by asserting that any loss was contingent until late 2017, when they were required to recognise the additional liability and James Cropper was required to fund it. Mr Burroughs submits that this approach ignores the fact that the Scheme was under an immediate, and continuing, obligation to pay men benefits based on an NRD of 60 when, since 1 November 1995, it had been intended that these should be payable calculated on an NRD of 65; and that James Cropper was liable to fund those benefits under the balance of cost provisions in clause 5 of the 1995 deed and rules. Mr Burroughs submits that it matters not that the additional liability was not recognised until 2017: the claimants nevertheless suffered a loss when NRDs were not equalised in 1995 and the *Barber* window remained open.
24. The case of *Law Society v Sephton & Co* [2006] UKHL 22, [2006] 2 AC 543 (on which the claimants rely) is said to be a very different case. There, the Law Society was required by s. 36 of the Solicitors Act 1974 to maintain a fund to make compensation payments to relieve any losses caused by dishonesty on the part of a solicitor. Under the Solicitors' Compensation Fund Rules 1995, the making of

compensation payments was wholly at the discretion of the Law Society, and no person had any right to any payment enforceable at law: see paragraph 3 of Lord Hoffmann's leading speech. The Law Society did not do anything, and the contingent liability arose as a result of the misappropriations by the dishonest solicitor and the existence of the compensation fund. Where, however, a party incurs a contingent liability as a result of entering into a transaction, Mr Burroughs submits that that liability will result in immediate damage where the party does not get what he should have got. As Lord Hoffmann put it (at paragraph 21):

If the liability is for the difference between what the plaintiff got and what he would have got if the defendant had done what he was supposed to have done, it may be relatively easy ... to infer that the plaintiff has suffered some immediate damage, simply because he did not get what he should have got.

Here, the intention of James Cropper and the trustees in 1995 had been to close the *Barber* window, and to equalise NRDs for both men and women at age 65. Due to Friends Life's alleged negligence, that did not happen; and the trustees remained under an obligation to pay benefits to men based on an NRD of 60. By the same token, James Cropper had intended to reduce its liability to contribute to the Scheme by increasing the NRD of male and female members to age 65. The October 1995 announcement had failed to achieve this, so James Cropper remained under a liability to contribute to the Scheme to fund benefits greater than it had intended. James Cropper had always been under a liability to fund these additional benefits when required to do so by the Scheme actuary; and the fact that it was not called upon to do so by the Scheme actuary until much later does not mean that it had not suffered damage in November 1995, when the October 1995 announcement had failed to achieve the intended equalisation of NRDs. Mr Burroughs submits that this was actual and immediate damage, and not merely a contingent loss, because it was an additional legal liability to which James Cropper had been subject from November 1995, albeit inchoate and unquantified until 2017. That was enough to start time running against the claimants.

25. As for the remaining allegation relating to the change to the power of amendment in the 2002 deed and rules, which is said to have been made without any instructions, Mr Burroughs submits that the claimants have not pleaded that they have suffered any loss as a result of this change and so this claim is bound to fail.
26. Mr Burroughs notes that the claimants also rely on s. 32(1)(b) of the Limitation Act to get around the primary limitation bar on the action. The only plea in support of the claim that Friends Life concealed facts relevant to the claim is paragraph 43(f) of the original particulars of claim, where it is pleaded that, without being instructed to do so, and without explaining that this was being done, Friends Life altered the Scheme's power of amendment and alteration in the 2002 deed: (1) in the knowledge that the October 1995 announcement had failed to effect equalisation; (2) in the knowledge that Friends Life had failed to advise the trustees or James Cropper of the need to effect such an amendment by deed; (3) in a misguided attempt to limit the damage occasioned to James Cropper and the trustees as a result; and (4) that Friends Life thereby sought to conceal its negligence and its effects from the trustees and James Cropper.

27. Mr Burroughs also notes that in the claimants' skeleton argument filed in advance of the hearing on 30 September 2021, reliance is placed on the recitals to the 2002 deed, which provide that the former provisions of the Scheme are "*deemed*" to have been altered in accordance with explanatory literature, and the new provisions are "*deemed*" to have come into effect from such date as specified therein. These provisions were not originally pleaded; but it is submitted that they take matters no further.
28. The burden of proof is on the claimants to establish both that Friends Life had the requisite knowledge that equalisation had not been effected in 1995, and that it deliberately concealed this fact from them. The new amendment power in the 2002 deed did not attempt to, and could not, retrospectively change the previous amendment power and retrospectively equalise the NRDs. Furthermore, Friends Life made no attempt to conceal the difference in the provisions between the 1995 and the 2002 deeds; and such changes would have been immediately obvious to the trustees when they undertook the "*in-depth review*" of the Scheme deed and rules described in a letter from Mr John Denham of the trustees to Friends Life dated 18 December 2001. Mr Burroughs submits that the change in the power of amendment gets nowhere near meeting the burden on the claimants. The deeming provision is not unusual, and a similar provision had been contained in the 1995 deed, so no adverse inference should be drawn from its inclusion in the 2002 deed. Nor can the claimants seek to stave off the strike out or summary judgment applications on the basis that disclosure has not yet taken place, and that something might be disclosed which establishes that Friends Life had the knowledge alleged. It is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the issues in the case.
29. Mr Burroughs also points out that even if the claimants should establish that Friends Life did conceal the fact that the NRDs had not been equalised, s. 32(1)(b) of the Limitation Act also requires them to establish that they could not with reasonable diligence have discovered Friends Life's concealment. As set out in paragraph 40 of Ms Carroll's witness statement, James Cropper and the trustees had sufficient knowledge to plead a viable claim, or to discover that such a claim might exist. In particular, they were advised by a third party pensions adviser (Watson Wyatt) and solicitors, who could have enabled them to discover that equalisation had not taken place.
30. So far as Entrust is concerned, it was appointed with effect from 15 November 2011 and asserts that it did not, and could not with reasonable diligence, have discovered, before 16 December 2011, the facts that: (1) equalisation had not been validly effected from 1 November 1995, (2) amendments could only be made by deed under the existing rules, and that the October 1995 announcement had not been implemented by deed, and (3) no equalisation had occurred until the 2002 trust deed and rules. Mr Burroughs submits that no doubt Entrust had carried out due diligence before accepting the appointment as sole corporate trustee from 15 November 2011, so the assertion that it only had four weeks to discover those matters does not tell the whole story. In any event, Entrust's own knowledge is irrelevant if its predecessors as trustees could have discovered those matters with reasonable diligence: see s. 14A(5) and the concluding words of s. 32(1).

31. In summary, for all these reasons, Mr Burroughs submits that this is a claim which relates to events which took place between 19 and 26 years ago. The claimants' reliance on s. 14A of the Limitation Act is bound to fail. The claim based on s. 32 is also fatally flawed, lacking any particularisation or evidence in support. The claimants are pursuing an unwinnable case, which will only consume the resources of the parties and the court if it is allowed to continue. There is no reasonable prospect of success; and there is no compelling reason why such a stale claim should be disposed of at trial. The claim should therefore be struck out, or summary judgment should be granted to Aviva.

*(ii) The claimants*

32. Mr Hitchcock began his oral submissions by emphasising that Friends Life were not just pensions advisers; they were the administrators of the Scheme, they ran it, and it was all their responsibility. It is of the very nature of the role of Scheme administrator that it should undertake such administration competently. Aviva admits in its defence that Friends Life: (1) were "*obliged to give the advice in relation to the Scheme's provisions with the accuracy to be expected of reasonably competent providers of administration, actuarial and documentation services to pension schemes*"; and (2) that "*whenever they were instructed to draft documentation to effect amendments to the Scheme, Aviva provided documentation services to be expected of reasonably competent providers of administration, actuarial and documentation services to pension schemes*".

33. Mr Hitchcock accepts that, absent concealment, the claimants must rely on negligent acts or omissions occurring, and consequential damage, on and from 16 December 2002; but he submits that from this date onwards until the end of its retainer, which (as set out in the draft amended particulars of claim) came to an end in mid-2008 rather than June 2004, Friends Life administered the Scheme on the false basis that equalisation had been effected in 1995. Accordingly, the evidence shows that Friends Life remained liable for providing its comprehensive advice and services to the Scheme until around mid-2008. At all times whilst it remained the Scheme administrator, Friends Life negligently failed to advise that equalisation has not been effected prior to 19 December 2002. Had Friends Life done so, the contingent liability caused by their negligence would have become actual damage: James Cropper and the trustees would have investigated the position; and, if necessary, they would have sued Friends Life for the loss occasioned to them. However, because Friends Life did not so advise, the liability remained a contingent one. Mr Hitchcock submits that the deeming provisions of the 2002 deed, which were drafted by Friends Life without any express instructions to do so, and without any explanation, reveal a plain attempt to rescue the previous ineffective amendments and to conceal their negligence. The claimants' case is that this was done secretly by Friends Life since the deeming provisions were placed in the recitals to the deeds, away from the operative provisions, and were never alluded to by Friends Life.

34. Further, in their 2003 actuarial valuation report produced on 29 March 2004 (within the period of the retainer pleaded in the original particulars of claim), Friends Life negligently valued the Scheme liabilities on the basis that equalisation had been effected in 1995; negligently advised that "*pension ages in the Scheme were equalised in 1995*"; and negligently advised that the Scheme's '*Benefit Structure*' includes a single NRD for pensionable service on and from 1 November 1995. Similar

misrepresentations were contained within the 2005 actuarial valuation report produced in March 2006. It was only in late 2017 that the claimants first realised that NRDs had not been equalised in 1995, or at any stage prior to 19 December 2002, resulting in a substantial additional liability in the Scheme. From the claimants' perspective, the contingent liability caused by Friends Life's negligence only became damage at about this point, as it was only then that Entrust was required to recognise the additional, and unintended, liability resulting from that negligence, and that James Cropper was called upon to contribute to the Scheme on a basis which included that additional and unintended liability.

35. Mr Hitchcock emphasises "*the Line in the Sand*" represented by the 2002 deed and rules. These were the first, and only, means by which Scheme NRDs were equalised, albeit only from 19 December 2002. They comprised a comprehensive re-statement of the governing provision of the Scheme; and Friends Life had chosen to draft them in such a way that the previous definitive provisions of the Scheme, previously contained in the 1995 trust deed and rules, were cancelled in their entirety. On and from the date of the 2002 deed, therefore, there was simply no need for future trustees, or representatives of James Cropper, or future advisers, to look back at any of the Scheme's earlier governing documentation. This made it particularly unlikely that the failed equalisation would be discovered, unless and until Friends Life came clean.
36. Mr Hitchcock submits that this matter is not suitable for summary determination although, if it were, it should be on the basis that it is the claimants, rather than Aviva, which should be granted summary judgment. Its application should therefore be dismissed.
37. Mr Hitchcock submits that Aviva's attempt to contend that the claimants had both constructive knowledge for the purposes of s. 14A of the Limitation Act, and would have discovered Aviva's concealment with reasonable diligence for the purposes of s. 32, is both untenable and, ultimately, revealing. It is said that this:
  - (1) Involves speculation about the role of other advisers.
  - (2) Attempts to ignore Friends Life's central and continuous role over every material aspect of the Scheme administration.
  - (3) Attempts to hold the claimants to a standard which would have required them to investigate matters, without any reason to do so, in circumstances where they had: (a) taken advice from Friends Life and not been advised of any concerns as to equalisation; and (b) received repeated instances of advice and services from Aviva from 1995 to at least 2004 which either negligently advised that equalisation had been effected in 1995, or were negligently predicated upon equalisation having been effected in 1995.
  - (4) Includes (at paragraph 40.5 of Ms Carroll's witness statement) an attempt to rely on a (misleadingly) "*cherry-picked*" line from a letter from James Cropper to Friends Life dated 29 November 1995 to demonstrate that "*the Claimants understood and required that [Friends Life] only provide advice in relation to amendments to the Scheme when it was specifically requested*" but which, in reality, serves only to

emphasise Friends Life's role as the author of the failure to equalise (as evidenced by the contemporaneous documents).

(5) Is revealing because the carefully selected pieces of evidence in paragraph 40 of Ms Carroll's witness statement do not include the deeming provisions in the recitals to the 2002 deed. Mr Hitchcock infers that this is because Aviva did not wish to direct the gaze of either the claimants, or the court, towards these provisions because they reveal the attempt that Friends Life made, without any explanation or advice, to validate what they must, by then, have known were previously invalid amendments purportedly made by the October 1995 announcement. This is a "*striking omission*", which is said to be explained by the fact that Friends Life inserted these provisions into the 2002 deed without instructions or explanation; and these formed part of the "*silent web of provisions*" in the 2002 deed that Friends Life inserted to try and conceal the failed equalisation in 1995.

38. Putting concealment to one side, for the reasons developed in Mr Hitchcock's written skeleton argument, and in his oral submissions, the claim is not statute-barred by s. 14B of the Limitation Act. Paragraphs 43 a, d, e and g of the original particulars of claim focus upon the continuing administration services provided by Friends Life from 1995, and throughout their tenure, in which they negligently, and repeatedly, failed to advise that equalisation had not been effected in or from 1995, and negligently advised that it had been so effected. The negligent acts and omissions (on which Aviva's arguments are focussed) did not stop with the provision of inaccurate advice, and the failure to provide appropriate advice, in relation to equalisation prior to the 2002 deed, but they continued through to the end of Friends Life's retainer, and included, for example, the 2003 actuarial valuation report, finalised by Friends Life on 29 March 2004, and the later 2005 actuarial valuation report, finalised on behalf of Friends Life by JLT Benefit Solutions Ltd, in March 2006. These further breaches of Friends Life's duties plainly caused loss because James Cropper and the trustees were unable to require Friends Life, though legal action if necessary, to indemnify them for the cost of the unintended liabilities in the Scheme.
39. Mr Hitchcock further submits, in reliance on *Sephton* and paragraph 5-066 of *Jackson & Powell on Professional Liability* (8th edn.), that the claimants suffered nothing more than a contingent loss until late 2017, when Entrust was required to recognise the additional liability and James Cropper was required to fund it.
40. Further, and in any event, the claimants rely on s. 32 of the Limitation Act. Aviva is said to have offered no explanation, let alone any credible explanation, to rebut the inferences that the claimants invite the court to draw that Friends Life concealed its earlier negligence when drafting the 2002 deed. Pending disclosure and the production of witness statements, Aviva's silence in this respect compels the claimants to rely on such inferences. However, Mr Hitchcock submits that Friends Life's concealment is apparent from three individual provisions in the 2002 Deed: the deeming provisions in the recital; the alteration to the amendment power; and the (ineffective) attempted back-dating of the equalisation of NRDs. Friends Life either introduced or altered each of these provisions without any explanation when, in each case, they had not been instructed to introduce or alter the provisions in question.
41. In summary, Mr Hitchcock submits that:

(1) The claims are not statute-barred pursuant to s. 14B because merely contingent loss had been suffered until late 2017. Further and alternatively, even viewing the acts and omissions alone, it is plain that relevant acts and omissions giving rise to loss took place after 16 December 2002, and these give rise to a strong claim, which cannot properly be characterised as a mere *'loss of chance'* claim, but is a direct claim against Aviva for negligence and breach of contract.

(2) In any event, the claimants can override Aviva's reliance on the ordinary limitation period by reliance on s. 32(1)(b). Aviva deliberately concealed relevant facts from James Cropper and the trustees, namely the facts that the Scheme had not been validly equalised in 1995 and/or that there was a risk that the Scheme had not been validly equalised in 1995, and/or that Friends Life was responsible for the same. Those facts were relevant to the claimants' cause of action against Aviva. The period of limitation did not start to run until the claimants could with reasonable diligence have discovered the concealment, which was (at the earliest) in late 2017.

*(iii) Entrust*

42. For Entrust, Mr Allen adopts the submissions of Mr Hitchcock in relation to the period prior to Entrust's appointment as the sole corporate trustee of the Scheme on 15 November 2011. That was only about a month before the date which is six years before the standstill agreement came into effect on 15 December 2017. Thus any postponement of the primary limitation period to or beyond 16 December 2011 is fatal to any limitation defence because the proceedings would be within time. Mr Allen submits that the case advanced by Aviva (at paragraph 41 of Ms Carroll's witness statement) that, as a professional trustee, Entrust was under any duty to familiarise itself with the governing provisions of the Scheme, and to have read the Scheme documentation thoroughly, such that Entrust could, with reasonable diligence, have discovered Friends Life's historic failure validly to equalise the NRDs of male and female members before 19 December 2002 during the narrow window of some four weeks between its appointment and 16 December 2011 is lacking in all reality.

43. Mr Allen submits that it would have been totally unreal to expect Entrust to have unearthed the relevant facts within just four weeks of being appointed even if:

(1) equalisation had been known to be a potential issue that required investigation when Entrust took over (which it was not); and

(2) all the historic documents had been within its possession for immediate review (which again they were not).

Even then, it would have taken any professional trustee time to "*get their feet under the desk*"; and it would have been totally unrealistic to expect even a professional trustee to be able to absorb all the documentary material relating to the Scheme (not just relating to equalisation) dating back more than 40 years, as well as to seek and obtain the relevant professional advice on that material to understand whether there was a real issue concerning the validity of equalisation, on top of the other actions that were required to ensure the smooth continuing operation of the Scheme – all within just four weeks. Mr Allen relies on paragraphs 34 and following of Mr Kennedy's witness statement.

44. For the reasons developed at paragraph 54 of Mr Allen’s written skeleton argument, he submits that it is extremely difficult to understand how, even on a balance of probabilities basis, any reasonable diligence argument could ever succeed at trial as against Entrust. It quite plainly comes nowhere near to the strike out and summary judgment threshold of being so obviously right that Entrust has only a fanciful prospect of succeeding on the point at trial. First, when Entrust took over on 15 November 2011, there was no reason at all to doubt that equalisation had been validly implemented with effect from 1 November 1995. This is what had been announced to members in the October 1995 announcement, it was what the 2002 deed and rules said in explicit terms, and it was the position consistently identified in the triennial valuations prepared by Friends Life. Secondly, whilst a professional trustee taking over the trusteeship of an occupational pension scheme has to familiarise itself with the scheme’s documentation, it is not thereby incumbent on professional trustees to undertake a full audit of all historic scheme documents (that are no longer pertinent to the Scheme’s present administration), or to set about investigating or second-guessing all previous decisions, and all prior amendments, that have been made. Any professional trustee in the position of Entrust is entitled to assume that historic professional services provided to the Scheme in preparing relevant documents have been provided competently. The concept of reasonable diligence requires some form of relevant ‘trigger event’. Here there was no relevant ‘trigger’ for any investigation, let alone within the first four weeks of Entrust’s appointment, to lead it to question whether equalisation might not have been effective; and there was no proper basis for Entrust to start a (doubtless costly) investigation into historic Scheme documents to challenge that understanding. Thirdly, even if there had been such a relevant trigger (which there was not) when Entrust took over the Scheme, a number of historic documents were missing and were not within the possession of the previous trustees, including (among others) the 1995 trust deed and rules, so that even if an investigation had been prompted immediately, it would not have been possible to cross-check the equalisation position as against the 1995 trust deed and rules; and there was no reason to think (until the 1995 documentation had been obtained) that it had not successfully implemented the equalisation set out in the October 1995 announcement. Certainly, it would have been impossible to conclude that equalisation had not been validly implemented (so as as to give rise to any cause of action against Friends Life) within as little as a month of Entrust’s appointment.

*IV: The claimants’ amendment application: submissions*

*(i) The claimants*

45. Mr Hitchcock explains that the draft amendments to the claimants’ particulars of claim arise from further disclosure and case analysis prior to the original hearing date for Aviva’s strike out application last September. Since the amendments to the claimants’ case on concealment are unopposed, they need no further consideration for the purposes of this application. The other amendments are driven by documents which James Cropper only discovered in September last year. Mr Hitchcock explains that they do two simple things: The first arises from a letter from Friends Life to James Cropper dated 23 July 2004 in which they say they are sub-contracting the “administration, documentation, actuarial and associated support” services they had been providing to the Scheme to JLT Benefit Solutions Ltd. This is said to be the only written evidence of Friends Life’s retainer that has been disclosed to date. The second



arises from the realisation, in September 2021, that Friend Life's retainer had in fact continued beyond the middle of 2004 up to about the middle of 2008. These material amendments commence at paragraph 42 of the amended particulars. The first newly pleaded document is the actuarial valuation report of the Scheme as at 1 April 2003, which was provided by Friends Life under cover of a letter dated 30 March 2004. The second newly pleaded document is the 2005 actuarial valuation report, provided by JLT (for and on behalf of Friends Life) under cover of a letter dated 31 March 2006. The existence of both these documents was disclosed to Aviva in September 2021; and the fact that Friends Life's retainer had continued until about the middle of 2008 was set out in Mr Hitchcock's skeleton argument for the original hearing of Aviva's strike out application. Mr Hitchcock submits that all this amounts to is that precisely the same claim that had originally been advanced, alleging negligence in relation to the equalisation of NRDs from 1995 to 2004, now continues up until about the middle of 2008. Of those two documents, only the 2005 report falls outside the scope of the originally pleaded retainer.

46. Aviva objects to the amendments on the basis that they are out of time. Mr Hitchcock points out that an oddity of this application is that, on Aviva's case, the entire claim is out of time. In other words, the amendments are only out of time if the claimants' arguments on s14A and concealment fail. The claimants' primary case is that their case on s.14A and concealment are strong, and certainly strong enough to dispense with Aviva's arguments against these two amendments.
47. If it is reasonably arguable that the amendments fall outside the applicable limitation period, the claimants' secondary argument is that these amendments do not add or substitute a new cause of action. The first merely evidences Friends Life's existing retainer whilst the 2004-2008 amendments just introduce two further documents evidencing their continuing negligence in just the same way as has been done already. Mr Hitchcock submits that the headline claim, being the negligent failure to advise from 1995 to the end of the retainer, is just the same, the only difference being that, as it turns out, the retainer went on for around four years longer than had previously been thought.
48. The claimants' secondary case is that the 2004-2008 amendments are each paradigms of the addition of further instances which do not amount to a distinct cause of action. He accepts that they change the optics of the case, but not substantively so. There is no material change in the breaches alleged. The proposed amendments are significant only if one were to accept Aviva's arguments on s. 14B of the Limitation Act. Mr Hitchcock submits that the reality is that if Friends Life were not negligent in failing to explain the true position to James Cropper and the trustees at or shortly prior to the point of the execution of the 2002 deed on 19 December 2002, it is difficult to see why they would nonetheless have been negligent later when they continued to administer the Scheme on the wrong basis. Including the 2004-2008 amendments would not take anything away from Aviva's limitation arguments, such as they are. On the basis that these amendments do not amount to a new cause of actions, the application should be dealt with pursuant to CPR 17.1(2)(b), and the amendments should be permitted.
49. Finally, if the court is against the claimants on their first two arguments, they accept that the success or otherwise of its application to amend must be determined in the light of CPR 17.4(2), read subject to the restriction in s. 35(5) of the Limitation Act.

The effect of these provisions is that the new claims must arise out of the same, or substantially the same, facts as were “*already in issue*”. The claimants’ tertiary argument is that the 2004-2008 amendments are simply a continuation of the narrative set out in the existing particulars of claim. The allegations of negligent administration, advice and services from 1995 to 2004 are simply continued. It is correct to say that the 2003 actuarial valuation report, while within the original period of the retainer, is a new document. The 2005 report is also a new document, outside the original claim period. But the two reports result in nothing other than an extension of precisely the same narrative that had existed since late 1995, and which has been pleaded in the existing particulars.

50. In his brief oral reply, Mr Hitchcock emphasised that the significance of the 2003 and the 2005 actuarial valuation reports lies in the fact that they contain statements that the equalisation of NRDs had taken effect from 1 November 1995. That, and not the details of the valuations themselves, is the negligence complained of; and it is simply a continuation of the existing pleaded narrative of events.
51. For these reasons, the claimants seek permission to make the entirety of their proposed amendments to the particulars of claim.
52. In answer to a question from the Bench at the end of his oral submissions in reply, Mr Hitchcock accepted that, because of the existing plea that the retainer of Friends Life ended in the middle of 2004, the court could properly reach different conclusions in relation to the amendments concerning the 2003 and the 2005 actuarial valuation reports.

(ii) *Aviva*

53. Mr Burroughs began his oral submissions by emphasising that a crucial difference between the strike out/summary judgment and the amendment applications is that the burden on issues of limitation is reversed: on the former, it is for Aviva to establish that there is no reasonable prospect of any limitation defence succeeding at trial whereas on the amendment application it is for the claimants to demonstrate that Aviva has no reasonably arguable limitation defence. In theory, it is open to the court to decide in favour of the claimants on the strike out/summary judgment application but for Aviva on the amendment application. That is because it is only appropriate to deprive a defendant of a potential limitation defence at an interim stage of the litigation if the claimant can demonstrate that such defence is not reasonably arguable.
54. Mr Burroughs reminds the court that, pursuant to CPR 17.4, permission to amend the particulars of claim can only be given to add a new claim after the limitation period has ended if the new claim arises out of the same facts, or substantially the same facts, as a claim in respect of which the claimants have already claimed a remedy in the proceedings.
55. The current particulars of claim allege (at paragraph 2) that Friends Life provided services until 1 June 2004, which is the end date for any negligence claim. Mr Burroughs accepts that there can be no objection to pleading the letter of 23 July 2004, to the extent that it merely evidences the terms of Friends Life’s already pleaded retainer. His objection is to the attempt to plead a retainer which extends beyond the middle of July 2004. The proposed amendments at paragraphs 2, 11 and

24 all allege (or support an allegation) that Friends Life provided services until 2008. Mr Burroughs submits that the claimants therefore seek to include allegations covering an additional four year period which was not the subject of the proceedings as currently constituted. He points out that the current particulars of claim only contain very general assertions about Friends Life's conduct after the 2002 deed and rules were executed on 19 December 2002 whilst the proposed amendments expressly refer to services continuing to be provided up to June 2008; and the draft amended particulars of claim contain a whole new section (at paragraphs 41-47) in which allegations are made about the conduct of Friends Life in the period 2004 to 2008. The claimants now rely on the provision of actuarial valuations as at 1 April 2003 (provided under cover of a letter dated 30 March 2004) and 1 April 2005 (provided on 31 March 2006). Mr Burroughs also points out that the proposed amendment at paragraph 48 (d) seeks to include a claim that Friends Life failed to advise that equalisation had not been carried out effectively between the date they provided the final draft of the 2002 deed and rules on 11 November 2002 and its execution on 19 December 2002.

56. Mr Burroughs points out that the primary limitation period for these new claims has clearly expired so the claimants will have to rely on ss. 14A and 32 of the Limitation Act 1980 to extend the limitation period. In their replies, the two claimants have variously alleged that the starting date for the purposes of s. 14A of the Limitation Act is November 2017 and the last quarter of 2017. Even allowing for the standstill agreement (which operated between 15 December 2017 and 7 December 2018), the extended period for bringing the new claims under s. 14A expired on 7 December 2021, so the claimants cannot rely on s. 14A. Mr Burroughs also invites the court to note, in this context, that the documents which are said to be the reason for making the new claims were located by the claimants, and were always in their possession. Further, the 15-year longstop date under s. 14B would mean that any claims pre-dating the middle of 2007 (and thus arising from both the 2003 and the 2005 actuarial valuation reports) would be statute-barred. As for s. 32 of the Limitation Act, it cannot be said that Aviva's position is not reasonably arguable.
57. When deciding whether the proposed amendments constitute a new cause of action, the court should compare the bare minimum of essential facts in the original pleading with the minimum as it would be constituted under the amended pleading. In comparing the proposed amended particulars of claim with the original pleading, Mr Burroughs submits that it is clear that the claims now being made relate to a different time period, and rely on new facts, to those which are covered by the claimants' original pleaded case.
58. As currently pleaded, the court is concerned with the actions of Friends Life up to the provision of the final draft of the 2002 deed and rules on 11 November 2002. The amendments seek to enlarge the enquiry to matters which took place after that date. They do not arise out of the same, or substantially the same, facts as the proceedings as they are currently constituted. Mr Burroughs relies upon the decision of the Court of Appeal in *Ballinger v Mercer Ltd* [2014] EWCA Civ 996, [2004] 1 WLR 3597 where the court had to consider amendments in the pensions context. In that case the original pleading alleged negligence in relation to three actuarial valuation reports in 1996, 1999 and 2001. The claimants sought to introduce amendments: (1) in respect of a valuation report prepared in 2002 (the category 4 amendments); (2) that the

defendant's errors in relation to the uniform accrual rate were negligent not only because they were in breach of the scheme rules (which had already been pleaded) but because the assumptions used were contrary to the prescribed minimum funding requirement methodology (the category 5(i) amendments); and (3) in which a new error (of pension increases) was alleged (the category 5(ii) amendments). The Court of Appeal decided that the category 4 amendments and the category 5(ii) amendments did not arise out of the same, or substantially the same, facts as currently pleaded. In relation to the category 4 amendments, Tomlinson LJ said this (at paragraph 42):

The judge regarded the introduction of the claims in respect of the 2002 valuations as analogous to the introduction permitted in the Welsh Development Agency case [1994] 1WLR 1409 of the claim in respect of ten further buildings in addition to the two units in respect of which the action had been commenced. The analogy is however unsound. All twelve units had been constructed at essentially the same time, between October 1980 and November 1981, and in reliance on the same advice from the defendant structural engineers that the floor slabs of the buildings, as opposed to other parts of the structure, did not require piled foundations. The 2002 valuations were, obviously, produced at a different time than earlier valuations, in different conditions, in different form and on the basis of different data and different assumptions. In my judgment the judge was misled by this false analogy and in consequence reached the wrong conclusion. In my judgment it is clear that the category 4 amendments do not arise out of the same or substantially the same facts as are already in issue on the existing claims and should not be permitted.

59. So far as the category 5(i) amendments were concerned, it was accepted on appeal that they arose out of substantially the same facts as already pleaded in relation to the 1996, 1999 and 2001 actuarial valuations; but Tomlinson LJ regarded the judge's decision to allow them as "*insupportable*" in relation to the 2002 valuation.
60. Mr Burroughs submits that the allegations in relation to the 2005 actuarial valuation report in the present case clearly do not arise out of substantially the same facts as the claims currently pleaded. As in relation to the category 4 amendments in Ballinger v Mercer, that report was produced at a different time and in different circumstances. The proposed amendments in relation to the extension of the period in which Friends Life provided services, concerning the 2003 actuarial valuation report, and the failure to advise between 11 November 2002 and 19 December 2002, are designed to get around the longstop date in s. 14B of the Limitation Act. They amount to new claims which do not arise out of the wholly general allegations currently made in relation to the period after 11 November 2002 and they should not be permitted.
61. In conclusion, Mr Burroughs submits that the proposed amendments which raise new causes of action should not be permitted. If the claimants wish to pursue them, they should issue fresh proceedings, where the limitation issue can be decided without the doctrine of relation back applying.
62. In answer to a question from the Bench at the end of Mr Hitchcock's oral submissions in reply, both counsel indicated that there had been no request for further information

about the details of any advice allegedly given by Friends Life after the execution of the 2002 deed and rules on 19 December 2002.

V: *Analysis and conclusions*

(i) *Strike out/ summary judgment*

63. By CPR 3.4(2)(a) the court may strike out a statement of case if it discloses no reasonable grounds for bringing the claim. By CPR 24.2 the court may give summary judgment if it considers that the claimant has no real prospect of succeeding on the claim and there is no other compelling reason why the case should be disposed of at trial. It is common ground between the parties that the defendant's application for summary judgment falls to be determined in accordance with the principles identified by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] (as approved in later decisions of the Court of Appeal) and set out at paragraph 24.2.3 of the current (2022) edition of Volume 1 of *Civil Procedure*:

- (1) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success ...
- (2) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable ...
- (3) In reaching its conclusion the court must not conduct a 'mini-trial' ...
- (4) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents ...
- (5) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial ...
- (6) 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 to or alter the evidence available to a trial judge and so affect the outcome of the case ...
- (7) On the other hand it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the

respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction ...

64. Paragraph 2 of the unamended particulars of claim pleads that Friends Life provided services to the Scheme "... *from about February 1984 until 1 June 2004*". At the time the claim form was issued, the primary limitation period in respect of any claim for negligence between 1 November 1995 and 1 June 2004 had long since expired so the claimants must rely on ss. 14A and/or 32 of the Limitation Act. I deal first with the claimants' case on s. 14A.
65. S. 14A of the Limitation Act introduces a special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual. It provides:
- (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.

66. In my judgment, the claimants have a ‘realistic’, as opposed to a ‘fanciful’, prospect of success on their contention that it was not until some time during 2017 that they first had the knowledge required for bringing an action for damages in respect of the relevant damage. Given the role of Friends Life in drafting the 1995 deed and rules (which required any amendments to the Scheme to be made by deed), their involvement in the announcement to members in October 1995 that NRDs would be equalised at age 65 from 1 November 1995, and the fact that at all times thereafter Friends Life unquestioningly administered the Scheme on the basis that the announcement had validly achieved such equalisation, I am entirely satisfied that the

claimants have a case that is very much more than merely arguable that it was not until 2017 that they first acquired the relevant knowledge for the purposes of s. 14A. The claimants have a good arguable case that they had no reason to suspect that the October 1995 announcement had not validly achieved the equalisation of NRDs.

67. In relation to the period after the execution of the 2002 deed and rules, I accept Mr Hitchcock's *'Line in the Sand'* argument. The 2002 deed and rules were the first, and the only, means by which Scheme NRDs were equalised, albeit only from 19 December 2002. They comprised a comprehensive re-statement of the governing provision of the Scheme. Because Friends Life chose to draft them in such a way that the previous definitive provisions of the Scheme, previously contained in the 1995 trust deed and rules, were cancelled in their entirety, on and from the date of the 2002 deed, there was simply no need for future trustees, or representatives of James Cropper, or future Scheme advisers, to look back at any of the Scheme's earlier governing documentation. This made it particularly unlikely that anyone would discover the failed equalisation of NRDs.
68. S. 14B introduces an overriding time limit for negligence actions not involving personal injuries. It provides:
- (1) An action for damages for negligence, other than one to which section 11 of this Act applies, shall not be brought after the expiration of fifteen years from the date (or, if more than one, from the last of the dates) on which there occurred any act or omission —
    - (a) which is alleged to constitute negligence; and
    - (b) to which the damage in respect of which damages are claimed is alleged to be attributable (in whole or in part).
  - (2) This section bars the right of action in a case to which subsection (1) above applies notwithstanding that —
    - (a) the cause of action has not yet accrued; or
    - (b) where section 14A of this Act applies to the action, the date which is for the purposes of that section the starting date for reckoning the period mentioned in subsection (4)(b) of that section has not yet occurred;
- before the end of the period of limitation prescribed by this section.
69. The standstill agreement stopped time running with effect from 15 December 2017 with the result that the 15-year long-stop date in s. 14B(1) of the Limitation Act is 15 December 2002. This means that (subject to deliberate concealment for the purposes of s. 32) any claim in respect of Friends Life's negligence before that date is now statute-barred. Inevitably, that leads to an intense focus upon events after that date to determine whether there was any seriously arguable breach of duty on the part of Friends Life after 15 December 2002.
70. Adopting observations of Proudman J in *Capita ATL Pension Trustees Ltd v Sedgwick Financial Services Ltd* [2016] EWHC 214 (Ch) at paragraphs 84 to 87, in his skeleton argument Mr Hitchcock submits that the language of s14B requires the court to "...



*identify the latest negligent act or omission in order to ascertain the point at which time starts running for the purposes of the section; the date of the last act of negligence is conceptually different from the date on which the cause of action accrues, since there is no cause of action until there is damage as well as duty and breach.”* The date from which the 15 year extended limitation period begins to run is vital. Absent concealment, Mr Hitchcock accepts that this is 16 December 2002. (I suspect that the cut-off date may actually be 15 December 2002 although I find that nothing turns on which of these two dates is correct.) The claimants must be able to identify a negligent act or omission on or after 15 (or 16) December 2002 if they are to be able to rely on the special time limit for negligence actions where facts relevant to the cause of action are not known at the date it accrued under s. 14A. If they can do so, they can, in principle, recover any loss flowing from the particular act or omission complained of.

71. I agree with Mr Burroughs that there was no specific duty on Friends Life to advise as to the failure of either the 1995 deed and rules or the October 1995 announcement to achieve the equalisation of NRDs between 15 December 2002 and the execution of the 2002 deed and rules four days later, on 19 December 2002. I also accept Mr Burroughs’s submission that the claimants have not pleaded that they suffered any loss as a result of the alteration that was made to the power of amendment by the 2002 deed so that this claim is bound to fail.
72. However, I am satisfied that the claimants have succeeded in identifying sufficiently arguable negligent acts or omissions on or after 15 (or 16) December 2002 to enable them to rely on s. 14A of the Limitation Act as a sufficiently arguable answer to Aviva’s limitation defence. The claimants’ existing pleaded case is that Friends Life’s retainer as the Scheme administrator continued until the middle of June 2004. Existing pleaded breaches of Friends Life’s common law duties at paragraph 43 include: (1) failing in 1995 and thereafter to advise the trustees and James Cropper that a deed was required to amend the provisions of the Scheme and effect their decision to equalise male and female NRDs with effect from (at the latest) 1 November 1995 (sub-paragraph a); (2) administering the Scheme in and from 1995 as though NRDs had been equalised when they had not been so equalised (sub-paragraph d); (3) continuing to advise the trustees and James Cropper that the Scheme’s NRDs had been equalised when they had not (sub-paragraph e); and (4) failing to advise in 1995 or any time thereafter that the failure to provide equalised benefits in 1995, or at any time prior to 19 December 2002, would cause the Scheme a significant, unintended additional liability (sub-paragraph g). No specific details are provided; and none were requested by way of further information pursuant to CPR 18. However, I am satisfied that misstatements in the 2003 actuarial valuation report that NRDs had been equalised in 1995, and as to early retirement entitlements, are covered by these existing pleaded breaches of duty.
73. Paragraphs 43 a, d, e and g of the original particulars of claim focus upon the continuing administration services provided by Friends Life from 1995 and throughout the course of their retainer until, as presently pleaded, the middle of 2004, in which they are alleged, negligently, and repeatedly, to have failed to advise that equalisation had not been effected in or from 1995 but rather negligently advised that it had been so effected. I accept Mr Hitchcock’s submission that the negligent acts and omissions presently pleaded against Aviva (and which form the focus of its

submissions) did not stop with the provision of inaccurate, and the failure to provide appropriate, advice in relation to equalisation prior to the 2002 deed, but they continued through to the end of Friends Life's retainer and included, for example, the 2003 actuarial valuation report, finalised by Friends Life on 29 March 2004. These further breaches of Friends Life's duties are alleged to have caused loss to the claimants because James Cropper and the trustees were unable to require Friends Life, though legal action if necessary, to indemnify them for the cost of the unintended liabilities in the Scheme.

74. In light of my decision on the applicability of s. 14A of the Limitation Act, I can deal with the remaining issues on Aviva's application more shortly.
75. Had it been necessary for me to do so, I would have rejected Mr Hitchcock's submission, in reliance on *Sephton* and paragraph 5-066 of *Jackson & Powell on Professional Liability* (8th edn.), that the claimants suffered nothing more than a contingent loss until late 2017, when Entrust was required to recognise the additional liability and James Cropper was required to fund it.
76. *Sephton* was a case decided under s. 2 of the Limitation Act. Ss. 14A and 14B were not engaged because the misappropriations had taken place between 1990 and 1996. Whilst the Law Society had discovered the solicitor's fraud in May 1996, and had then intervened in his practice, it was not until May 2002 that the Law Society had issued proceedings in negligence against the defendant certifying accountants. The issue therefore turned upon the date when the Law Society's cause of action had first accrued; and this depended upon when the Law Society had first sustained any loss or damage. As Lord Hoffmann explained (at paragraph 7):

The normal period of limitation prescribed by s. 2 of the Limitation Act 1980 for an action founded on tort is six years from the date on which the cause of action accrued. Since a cause of action may accrue without the knowledge of the injured party ... the six-year period may expire before he is able to bring proceedings. In actions for negligence in which the cause of action accrues before the potential claimant knows the relevant facts, s. 14A therefore prescribes an additional period of three years from the date on which he acquires such knowledge. But this provision is of no use to the Law Society because, if the cause of action accrued before the commencement of the six-year period, i.e. before 16 May 1996, the society knew all the relevant facts very shortly thereafter; certainly well before the commencement of the three year period on 16 May 1999. The society can therefore bring the proceedings only if the cause of action accrued after 16 May 1996.

77. In this case it is ss. 14A and 14B of the Limitation Act that are engaged so the issue is different.
78. In any event, as *Jackson & Powell* state (at paragraph 5-066) the gist of the decision in *Sephton* was that: "*Exposure to the contingency of future claims, which the claimant had a discretion whether to accept, was not itself actionable damage*" (emphasis supplied). That is very far from the present case, where the loss sustained by both claimants is a matter of legal obligation under the provisions of the Scheme

documentation, which bound both the principal employee and the trustees of the Scheme from the date of its first creation.

79. Turning to the claimants' case on concealment under s. 32 of the Limitation Act, they rely on the fact that Friends Life made changes to the powers of alteration and amendment in the 2002 deed without being instructed to do so, and without explaining that this was being done, and also on the 'deeming' provisions in the recitals to the 2002 deed, as giving rise to inferences of deliberate concealment of the facts that the Scheme had not been validly equalised in 1995, and/or that there was a risk that the Scheme had not been validly equalised in 1995, and/or that Friends Life were responsible for the same. I agree with Mr Burroughs's submission that the change to the power of amendment in the 2002 deed fails to meet the burden which rests on the claimants of establishing both that Friends Life had the requisite knowledge that equalisation had not been effected in 1995 and that it deliberately concealed this fact from them claimants. The deeming provision is not unusual, and a similar provision had been contained in the 1995 deed, so I would agree with Mr Burroughs that it is difficult to conclude that any adverse inference should be drawn from its inclusion in the 2002 deed. If the claimants' answer to the limitation defence depended on s. 32 alone, I consider that there would be considerable force in Mr Burroughs's submission that this case should not be allowed to proceed to trial in the hope that something may turn up on disclosure which would have a bearing on the issue of deliberate concealment. However, since, for the reasons I have already given, this case must proceed to trial in any event, in my judgment it would not be right to strike out the plea of deliberate concealment, at least in advance of disclosure. Nor would it be procedurally just to do so because Aviva has presented and pursued its application to strike out, and for summary judgment, on an '*all or nothing*', rather than a piecemeal, basis.
80. I accept Mr Allen's submissions, for the reasons that he gives, that it is wholly unreal to expect Entrust to have discovered the relevant facts about the failure to achieve the equalisation of NRDs for Scheme members before 19 December 2002 in the period of just over four weeks between the date of its appointment as corporate trustee of the Scheme (on 15 November 2011) and 15 December 2011 (which is the date six years before the standstill agreement came into effect). However, this is of no assistance to Entrust so long as the previous trustees could, with reasonable diligence, have discovered any alleged concealment, or they had acquired the relevant knowledge for the purposes of s. 14A, before Entrust's appointment as the corporate trustee of the Scheme.
81. In his oral submissions, Mr Allen accepted that if the applicable limitation period had started to run before the appointment of Entrust as the Scheme's sole corporate trustee, then that appointment would not have re-set the clock and started time running again. That is the clear effect: (1) in the case of s.32, of the concluding words of s. 32(1), which provide that "*references in this subsection to the defendant include references to ... to any person through whom the defendant claims and his agent*"; and (2) in the case of s.14A, of s. 14A(5) of the Limitation Act, which provides that "*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”*  
(emphasis supplied).

82. For the reasons I have given, I dismiss Aviva’s application to strike out the claim form and particulars of claim, and for summary judgment against the claimants.

(ii) *Amendment*

83. The principles governing the exercise by the court of its discretion to allow amendments to a statement of case are well-established. First, amendments ought in general to be allowed so that the real dispute between the parties can be adjudicated upon, subject to any prejudice being compensated for in costs, and subject to the public interest in the administration of justice. Secondly, an application to amend will be refused if it is clear that the proposed amendment has no real prospect of success; in this regard the test to be applied is the same as that for summary judgment under CPR 24. Thus, the court may reject an amendment seeking to raise a version of the facts which is inherently implausible, or self-contradictory, or which is not supported by contemporaneous documentation. Equally, an amendment seeking to raise a claim which is unsustainable in law will not be allowed. Thirdly, late amendments, close to the date of trial, will require particular scrutiny.

84. In his skeleton argument, Mr Hitchcock refers to the four-stage approach to amendments after the end of a relevant limitation period identified by John Kimbell QC in *Hyde v Nygate* [2019] EWHC 1516 (Ch) at paragraph 26:

(1) Is it reasonably arguable that the opposed amendments are outside the applicable limitation period? If the answer is yes, go to question 2. If the answer is no, then the amendment falls to be considered under CPR 17.1(2)(b).

(2) Do the proposed amendments seek to add or substitute a new cause of action? If the answer is yes, go to question 3; if the answer is no, then the amendment falls to be considered under CPR 17.1(2)(b).

(3) Does the new cause of action arise out of the same or substantially the same facts as are already in issue in the existing claim? If not, the court has no discretion to permit the amendment.

(4) If the answer to question 3 is yes then the court has a discretion to allow the amendment.

85. Mr Hitchcock also referred me to observations in the case of *Diamandis v Wills* [2015] EWHC 312 (Ch) where (at paragraph 48) Mr Stephen Morris QC identified a number of key principles for determining whether an amendment is properly to be characterised as a new cause of action:

(1) The ‘cause of action’ is the combination of facts which gives rise to a legal right; it is the ‘factual situation’ rather than a form of action used as a convenient description of a particular category of factual situation.

(2) Where a claim is based on a breach of duty, whether arising in contract or in tort, the question whether an amendment pleads a new cause of action requires comparison

of the unamended and amended pleading to determine (a) whether a different duty is pleaded, (b) whether the breaches pleaded differ substantially, and (c) where appropriate, the nature and extent of the damage of which complaint is made. (Where it is the same duty and the same breach, new or different loss will not be a new cause of action. But where it is a different duty or a different breach, then it is likely to be a new cause of action).

(3) The cause of action is every fact which is material to be proved to entitle the claimant to succeed. Only those facts which are material to be proved are to be taken into account; the pleading of unnecessary allegations, or the addition of further instances, does not amount to a distinct cause of action. At this stage, the selection of the material facts to define the cause of action must be made at the highest level of abstraction.

Although not cited by Mr Hitchcock, the deputy judge also made it clear that in identifying a new cause of action, the bare minimum of essential facts abstracted from the original pleading is to be compared with the minimum as it would be constituted under the amended pleading.

86. To these observations, I should add what the deputy judge had to say (at paragraph 47) as regards the first stage (whether there is an arguable limitation defence):

(1) The issue upon an application to amend is whether the defendant has an arguable limitation defence to the new claim; if he does, then the amendment cannot be allowed unless the two further stages are surmounted. The court may well not be able to decide, upon such an application, whether that limitation defence is or is not made out. In this way, the defendant is not deprived of an arguable limitation defence, as a result of the '*relation back*' effect of an amendment under s. 35(1), whilst at the same time the claimant is able to bring a fresh action, in which he is free to demonstrate that in fact there is no limitation defence. The claimant remains free to bring a separate action, and it may be advisable to do so.

(2) The burden of persuasion on this issue lies upon the claimant i.e. to show that the defendant does not have a reasonably arguable limitation defence.

(3) A new claim is not made by amendment until the pleading is amended. It follows that the relevant date for the purpose of calculating the limitation period is the date at which the amendment is actually made, which, by definition, must be no earlier than the date at which leave to make the amendment is granted.

87. The claimants have not shown, nor have they sought to show, that they are seeking to make the opposed amendments to the particulars of claim within any applicable limitation period so permission to amend cannot be granted pursuant to CPR 17.1(2)(b). Question one of the four stage inquiry must be answered in the affirmative: clearly it is much more than reasonably arguable that the opposed amendments are sought to be made outside the applicable limitation period.

88. Proceeding to the second stage of the inquiry, I have no doubt whatsoever that the amendments referring to pre-June 2004 facts and matters, including the 2003 actuarial valuation report, do not seek to add (still less substitute) any new cause of action. The existing claim is for breach of common law duties arising from the retainer of Friends

Life as the Scheme administrator during the course of a retainer which lasted until (as presently pleaded) June 2004. In my judgment, the fact that the current particulars of claim contain only very general assertions about Friends Life's conduct after the 2002 deed and rules were executed on 19 December 2002 does not mean that by seeking to amend to plead specific pre-June 2004 facts and matters, including the 2003 actuarial valuation report, the claimants are seeking to add any new cause of action to their existing claim. The claim remains one for damages for breach of duties arising under the presently pleaded retainer.

89. In my judgment, the same also applies to the proposed amendments that seek to plead a retainer continuing up until the middle of 2008, and additional specific allegations about acts or omissions of Friends Life during the period from the middle of 2004 to the middle of 2008. The claimants do not seek to allege a new retainer imposing new duties on Friends Life. Rather, they seek to allege that the old retainer continued as before for an additional period of four years, with the same duties which were owed, and which the Claimants assert were breached, in precisely the same way as before.
90. In my judgment, the analogy that Mr Burroughs seeks to draw with the category 4 amendments in *Ballinger v Mercer* is an unsound one. In that case, the particulars of claim had originally alleged negligence by the defendants in relation to three actuarial valuation reports, namely those for 1996, 1999 and 2001. The category 4 amendments sought to allege negligence in relation to a fourth such report (for 2002), albeit they sought to plead the same errors in relation to the valuations in 2002 as were already in issue in the existing claim. Reversing the decision of the lower court, the Court of Appeal held that the category 4 amendments did not arise out of the same, or substantially the same, facts as were already in issue on the existing claims; and that they should not be permitted because the 2002 valuations had been produced at a different time than the earlier valuations, in different conditions, in different form, and on the basis of different data and different assumptions.
91. The first point to note is that the decision related to stage 3, rather than stage 2, of the four-stage approach. Thus, at paragraph 16 of his leading judgment, Tomlinson LJ recorded that: "*It is likewise accepted on all sides that each of the opposed amendments raises a new cause of action and thus a new claim for the purposes of the rule.*" So the case affords no direct support for the proposition that an extension of the period covered by a pleaded retainer always raises a new cause of action, and thus a new claim for limitation purposes. Secondly, as Mr Hitchcock emphasised in his brief oral reply, the significance, in the instant case, of the 2005 actuarial valuation report (as with the 2003 report) lies in the fact that they both contain statements that the equalisation of NRDs had taken effect from 1 November 1995. That, and not the details of the valuations themselves, is the negligence complained of; and it is simply a continuation of the existing pleaded narrative of events, resulting in a continuation of the same damage.
92. In my judgment, it is always a question of fact, to be determined by reference to the particular breaches of duty alleged, whether an amendment to plead an extension of the period covered by the relevant retainer raises a new cause of action, and thus a new claim, for limitation purposes. Where the new breaches of duty relate to a further actuarial valuation of pension scheme assets and liabilities, clearly they will raise a new cause of action because the valuer will have had to take account of the then prevailing relevant circumstances, even though they may involve pleading the same

errors in relation to the later valuation as were already in issue in the existing claim. Each valuation is, or should be, an independent and freestanding exercise, even if it builds on previous work, because a proper valuation necessarily involves an assessment whether assumptions and bases of valuation adopted in the past still hold good. Here, it is not the details of the later valuation that are sought to be relied on by way of amendment but the repetition of previous erroneous statements that the equalisation of NRDs had taken effect from 1 November 1995. In adopting the assumption that NRDs had been equalised as from that date, Friends Life were clearly relying upon their previous understanding; and they did not investigate whether that understanding was correct (otherwise it should have been corrected). Whether or not that constituted an actionable breach of duty that caused further loss to the claimants are matters to be determined at trial; but in my judgment it is qualitatively different from the exercise that was involved in *Ballinger v Mercer* where, although there may have been an element of building on past work, a proper actuarial valuation necessarily involved an assessment of whether the assumptions and bases of valuation adopted in the past still held good.

93. Comparing the bare minimum of essential facts abstracted from the existing particulars in the present case with the minimum that would be constituted under the amended particulars, in my judgment, the facts which are material to be proved to entitle the claimants to succeed remain the same: no different duty is pleaded; the breaches pleaded are not substantially different; and the nature of the resulting damage of which the claimants complain is the same, although its extent is likely to be different.
94. For these reasons, in my judgment, therefore, the answer to the stage 2 inquiry is in the negative, so the amendments fall to be considered under CPR 17.1(2)(b).
95. Lest I am wrong about this, however, I go on to consider the stage 3 inquiry: Does the (assumed) new cause of action arise out of the same, or substantially the same, facts as are already in issue in the existing claim? The appropriate question is not whether the negligence sought to be raised by the amended particulars is of a similar nature to that already pleaded, but whether it will give rise to new, and distinct, inquiries as to how Friends Life dealt with this particular aspect of the Scheme's administration. In my judgment, no such inquiries are required. The question whether the (assumed) new cause of action arises out of the same, or substantially the same, facts as are already in issue in the existing claim is to be answered in the affirmative, for the reasons I have already given in answer to the stage two inquiry. Even if (contrary to my view) the amendments seek to raise a new cause of action, that cause of action arises out of the same, or substantially the same, facts as are already in issue in the existing claim. In my judgment, the proposed amendments in this case are very different from the category 4 (and also the category 5(ii)) amendments that were in issue in *Ballinger v Mercer Ltd* relied upon by Mr Burroughs.
96. Aviva does not seek to contend that, issues of limitation apart, the court should withhold permission for the proposed amendments. Applying established principles, permission to amend should be given. The amendments will enable the real dispute between the parties to be adjudicated upon, subject to any prejudice to Aviva being compensated for in costs. Aviva does not contend that the proposed amendments have no real prospect of success. The amendment application is not so late that any trial of the claim will be affected.

97. For these reasons, I allow the claimants' amendment application.

*VI: Disposal*

98. For the reasons I have given, (1) I dismiss Aviva's application to strike out the claim form and particulars of claim and for summary judgment against the claimants; and (2) I allow all of the amendments sought by the claimants on their application.
99. In the interests of proportionality, and the saving of the time and costs of a further hearing, involving further recourse to the court's scarce resources, my provisional view is that costs should follow the event in the usual way, and that the defendant should pay the claimants' costs of both applications (save that the claimants must pay the costs of and occasioned by their application to amend their particulars of claim in the usual way). If the parties cannot agree on the amount of any payment on account of costs, they should submit brief written representations on this issue when they submit the draft order for my approval.
100. My provisional view is that I should refuse any application by the defendant for permission to appeal. For the reasons I have given in this written judgment, I consider that any appeal would have no real prospects of success; and there is no other reason (still less any compelling reason) for an appeal to be heard. However, since there is to be a trial of this claim, I consider that it would be appropriate, again in the interests of proportionality, the saving of time and costs, and for reasons of good case management, to extend the time for any appeal from my decision on the amendment application until 21 days after any judgment on the trial of this claim. This will preserve Aviva's position whilst avoiding any delay to the trial of the claim and saving the costs of any separate appeal of an interim nature.