



Neutral Citation Number: [2022] EWHC 2058 (Ch)

Case No: PE-2021-000014

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

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

Date: 29/07/2022

Before :

MR JUSTICE MILES

Between :

PSGS TRUST CORPORATION LIMITED

Claimant

- and -

(1) AON UK LIMITED
(2) AON CONSULTING LIMITED
(3) AON SOLUTIONS LIMITED

Defendants

Andrew Spink QC, Saul Margo & Gus Baker (instructed by **Burges Salmon LLP**) for the
Claimant

Richard Hitchcock QC & Farhaz Khan QC (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Defendants**

Hearing date: 20 July 2022

APPROVED JUDGMENT

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 29 July 2022 at 2:00pm.

Mr Justice Miles :

Introduction

1. The defendants apply for reverse summary judgment to dismiss the claims on the grounds that they are statute-barred and to strike out the claimant's case that the defendants owed and were in breach of a continuing duty of care.
2. The claimant is the current trustee of the Robert Horne Group Pension Scheme ("the scheme"). At the material times until 30 September 2015 the scheme trustee was Robert Horne Pensions Trustees Ltd ("the Trustee").
3. Robert Horne Group Limited ("RHG") was at all material times either an "Associated Employer" or the "Principal Employer" under the rules of the scheme.
4. RHG entered administration on 1 April 2015 and the scheme entered an assessment period for entry into the Pension Protection Fund pursuant to section 132 of the Pensions Act 2004.
5. The defendants provide professional services relating to pension schemes. These include legal, consultancy, actuarial and administrative services. Save as appears below, there is no need in this judgment to distinguish between the separate defendants.
6. The claimant alleges that the defendants acted as legal advisers and consultants to the Trustee and RHG and owed them duties of care. They also allege that the defendants (or individuals within them) acted as scheme actuaries and administrators of the scheme and owed duties of care in those respects.
7. The claimant sues both as the current trustee of the scheme and as the assignee of RHG's claims against the defendants. It is therefore necessary to consider the claims of the Trustee and RHG separately.
8. The claimant's case in broad terms is that the defendants acted negligently and in breach of their duties concerning two sets of amendments to the scheme referred to as "the 2003 Benefit Changes" and "the 2007 Amendments". The claimant says that the defendants gave advice concerning the two sets of amendments and were their architects and project managers.
9. The main purpose of the 2003 Benefit Changes was to close the defined benefits ("DB") section of the scheme to new members after 1 January 2003. Other changes were made which were intended to take effect from 1 April 2003. These included a change in the early retirement provisions.
10. The main purpose of the 2007 Amendments was to reduce the cost of pension provision by closing the DB section of the scheme to future accrual from 1 July 2007 and severing the link with final salaries. Members of the scheme were offered the opportunity instead to accrue pension benefits in an enhanced defined contribution section of the scheme.
11. The claimant's case is that the defendants negligently failed to advise the Trustee and RHG that the amendments could only have been implemented prospectively by deed or resolution. The claimant says that this is the consequence of the terms of the scheme's

amendment powers under rule 31 of the scheme rules, which incorporated the restrictions on amendments contained in s. 67 of the Pensions Act 1995 (“PA95”).

12. The claimant says that the defendants failed to ensure that the amendments were effectively and validly made to take effect from their intended dates and that in the run-up to the dates when the amendments were intended to take effect the defendants failed to warn the Trustee and/or RHG of the need for properly executed - and only prospective - deeds or resolutions.
13. The claimant contends that the defendants allowed the dates when the amendments were intended to take effect to pass by without any amending deed having been executed or any resolution having been made or passed. Instead the defendants subsequently advised the Trustee and RHG to implement the amendments by entering deeds with retrospective effect. The claimant says that this did not work as a matter of law.
14. The 2003 Benefit Changes were made by a definitive trust deed and rules executed on 26 March 2004 (“the 2004 deed”) which purported to make the changes with effect from 1 January 2003 and 1 April 2003 respectively.
15. The 2007 Amendments were made by deed executed on 30 June 2008 (“the 2008 deed”) which purported to effect the 2007 Amendments from 1 July 2007.
16. The claimant alleges that the defendants treated the amendments as having taken effect from their intended dates (1 January/1 April 2003 and 1 July 2007 respectively) even though no valid or effective deed of amendment or resolution had been executed or made before or on those dates. The defendants instead gave advice and carried out actuarial valuations after these dates on the footing that the relevant amendments had taken place with effect from those dates. The scheme was administered and members’ benefits were calculated and paid on the same (erroneous) footing.
17. The claimant alleges that as a result of the faulty process of implementing the amendments the scheme has incurred additional and unintended liabilities, including (most materially) the costs of rectifying the underpayment of benefits to members.
18. The claimant also alleges that the defendants were under a continuing duty to administer the scheme in accordance with the scheme rules until 2015 when its retainer ended and that the defendants failed in the performance of that duty to rectify or draw attention to the earlier defaults.
19. Leaving on one side the case based on a continuing duty of care, it is common ground that the primary limitation period running from the accrual of the cause of action has passed. The claimant however relies on section 14A of the Limitation Act 1980 (“LA80”) to postpone the running of the limitation period.
20. The claimant contends that it was not until about October 2014 that the Trustee and RHG had actual or constructive knowledge of the material facts about the damage in respect of the 2007 Amendments. It says that it was only then that the Trustee received advice from a firm of solicitors that it was unusual (because of s.67 of the PA95) to have sought to close a scheme to future accrual retrospectively.

21. A standstill agreement in respect of the 2007 Amendments was entered between the parties on 30 June 2015.
22. As to the 2003 Benefit Changes the Trustee was advised by solicitors on around 30 November 2015 that it was doubtful that those changes were effected from the intended dates as the only instrument that purported to implement such changes had been executed (retrospectively) on 26 March 2004. The claimant says that it had neither actual nor constructive knowledge of the relevant damage before then.
23. A standstill agreement in respect of the 2003 Benefit Changes was entered between the parties on 29 December 2016.
24. In the light of the standstill agreements, and in light of the alternative three-year time limit from the date of knowledge under s.14A LA80, the claimant alleges that the Trustee and RHG lacked the requisite knowledge under that section before at the earliest 29 December 2013 (for the 2003 Benefit Changes) and 30 June 2012 (for the 2007 Amendments).
25. The defendants contend that the Trustee and RHG had the knowledge required to bring an action for damages in respect of the relevant damage well before those dates.
26. They say, in broad terms, that the information and advice available to the Trustee and RHG showed that, even at the time they were being contemplated, there were real risks about the validity and effectiveness of the process by which the amendments to the rules were made. The defendants say - in light of that information – that the Trustee and RHG might reasonably have been expected to seek further legal advice about the implementation of the amendments and that such advice would have shown that they could not be made effectively without formal, prospective documentation being executed.
27. The defendants rely for this application on a number of documents: advice given by a firm of solicitors, Shoosmiths, in a letter of 13 December 2002 concerning aspects of the 2003 Benefit Changes; a letter of advice from Mayer Brown in May 2006 concerning aspects of what became the 2007 Amendments; two opinions given by the defendants to the Trustee in 2007 and 2008 concerning the 2008 deed; and an opinion given by the defendants to the Trustee on 3 March 2009 concerning some other amendments. I shall return to these below.

Legal principles: summary judgment and striking out

28. These were common ground. The overall burden of proof rests on the applicant to show that there are no reasonable prospects of success, though in practice the respondent has an evidential burden to show some reasonable prospect of success.
29. I shall follow the renowned guidance about summary judgment in *Easyair Ltd v Opal* [2009] EWHC 339 (Ch). No purpose is served by repeating it here.
30. I was also referred to *Bridging Loans Limited v Toombs* [2017] EWCA Civ 205 which shows that summary judgment may be given in any appropriate case in a dispute over the application of s.14A LA80. On such an application the defendant is entitled to take the claimant's pleading at face value.

31. The relevant power to strike out is contained in CPR 3.4(2)(a). The parties accepted that the principles were accurately digested in the commentary at paragraph 3.4.2 of the White Book and I will not repeat them here.

Legal principles: s.14A LA80

32. Section 14A states:

“(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.”

33. The section has been considered in many cases including the leading decision of the House of Lords in *Haward v Fawcetts* [2006] UKHL 9, [2006] 1 WLR 682.

34. The parties agreed for the purposes of this application to adopt the summary given by Nugee J in *Cole v Scion Limited* [2020] EWHC 1022 (Ch) at [16]:

“The section has now been in force in this form since 1986 and has unsurprisingly accumulated a fair amount of authority. As I have said there was little dispute as to the law, and I can summarise what I take from that cited to me in the present case as follows:

(1) The leading case on s. 14A is *Haward*. This was in fact a case of actual knowledge not constructive knowledge, but much of what their Lordships said is relevant to both. For a convenient summary, Mr Pooles referred me to the judgment of Tomlinson LJ in *Jacobs v Sesame Ltd* [2014] EWCA Civ 1410 ("*Jacobs*") at [26ff] where he cited the relevant passages from speeches of four of their Lordships. I do not think it necessary to set them all out, although I refer to certain points that emerge from them below.

(2) The burden of proof under s. 14A is on the claimant to establish that he brought his claim in time. It is incumbent on the defendant, as with all limitation defences, to raise the issue by pleading it, but once it has been raised, it is for the claimant to prove that he first had the requisite knowledge 3 years or less before the proceedings were brought. There was no dispute about this, and it is supported by authority at the highest level (see eg *Haward* at [23]-[24] per Lord Nicholls and at [128] per Lord Mance; see also *Jacobs* at [4] per Tomlinson LJ), although at first blush it seems a little odd. Limitation is a defence, and normally one would have thought it was for a defendant to make out a defence. I can see that there may be pragmatic reasons why it is appropriate to require the claimant to establish when he first had actual knowledge of something, as this is something which (by

definition) is peculiarly within the claimant's own knowledge and about which the defendant will usually be in the dark; but is it not clear why the same should be the case where a defendant is relying not on actual knowledge but on constructive knowledge, which is an objective question (see below). One might have thought that if a defendant wished to allege that the claimant had constructive knowledge, it would be for him to establish what a reasonable person would have known. But the authorities are clearly to the contrary, and it was common ground that the burden was on the claimant, and I will therefore proceed on this basis.

(3) There is a substantial body of authority on what "knowledge" requires. It is summarised by Lord Nicholls in *Haward* at [8]-[10]. It does not require knowing with certainty, but it requires more than suspicion:

"It means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice, and collecting evidence".

See also at [112] per Lord Mance.

(4) Not only does the claimant not need to know with certainty, he also does not need to know in detail. There are many statements to this effect, mostly in the context of attributability. As long ago as *Wilkinson v Ancliff (B.L.T.) Ltd* [1984] 1 WLR 1352, a case on the similar provisions in relation to personal injury claims in ss. 11 and 14 LA 1980 decided before the Latent Damage Act 1986 was even passed, Slade LJ said at 1365A-B that he thought that an employee who had "broad knowledge" that his injuries were due to his working conditions might well have enough knowledge of attributability to start time running:

"even though he may not yet have the knowledge sufficient to enable him or his legal advisers to draft a fully and comprehensively particularised statement of claim."

(5) Other statements to similar effect can be found collected in the speech of Lord Nicholls in *Haward* at [10], such as that a claimant needed to know "in general terms" that her complaint was capable of being attributed to an operation, or that a claimant needed to know the "essence" of the relevant act or omission, or have "in broad terms" knowledge of the facts on which the complaint is based; see also at [66] per Lord Walker referring to the "essence" or "essential thrust of the case" or facts which "distil what [the complainant] is complaining about".

(6) So far as the question of attributability under s. 14A(8)(a) is concerned, "attributable" means "capable of being attributed to" (rather than "caused by"): *Haward* at [122] per Lord Mance, approving a line of cases to this effect. What is required for a claimant to have knowledge of attributability is therefore knowledge in broad terms of: (a) the facts on which the claimant's complaint is based; (b) the defendant's acts or omissions; and (c) that there was a real possibility that those acts or omissions had been a cause of the damage.

(7) For the purposes of constructive knowledge, the test is an objective one, based on what a reasonable person with the general characteristics of the claimant would

have done: see *Gravgaard v Aldridge & Brownlee* [2004] EWCA Civ 1529 at [22] per Arden LJ:

"Section 14A(10) does not state that a person's knowledge includes knowledge "which a reasonable person might be expected to acquire" but rather that a person's knowledge includes knowledge "which he [she] might reasonably be expected to acquire" (contrast s.14A(7)). In my judgment, this choice of wording is significant. It means, in my view, that in general the court must have regard to the characteristics of a person in the position of the claimant, but not to characteristics peculiar to the claimant and made irrelevant by the objective test imposed by subs.(10)."

It is common ground that in the present case that means that one must have regard to the fact that the Claimants are professional footballers or managers, and that in assessing their constructive knowledge, what has to be considered is what knowledge a professional footballer or manager might reasonably be expected to have acquired. One does not however have regard to the particular characteristics of each individual Claimant.

(8) In this context, a reasonable person is expected to read his correspondence: *Webster v Cooper Burnett* [2000] PNLR 240 ("*Webster*") at 246C per Swinton Thomas LJ. Mr Chapman expressly accepted that that was the case here."

The summary judgment application: some general points

35. It is convenient to start with the arguments concerning s.14A LA80 and this part of the judgment therefore assumes that there was no breach of a continuing duty of care (so that the primary limitation period expired six years after the relevant damage was incurred). It is common ground that this was when the two sets of amendments were treated as made and were acted on without proper documents being executed. I will return to the issue of continuing duty after addressing the arguments about s.14A.
36. Before turning to those arguments, I should say something more at this stage about s.67 PA95. The section contains restrictions on powers to alter schemes.
37. There were two versions of s.67 in the material periods. The version as originally enacted was in force until 1 November 2005, when it was replaced by a new version enacted by the Pensions Act 2004.
38. The first version therefore applied at the time of the 2003 Benefit Changes and the second at the time of the 2007 Amendments.
39. Under the first version alterations contravening the restrictions were void; under the second offending alterations were voidable by an order of the Pensions Regulator.
40. The original version restricted the exercise of a power of amendment which would or might affect any "accrued right" of a member acquired before the power is exercised.
41. The second version was framed in the language of "subsisting rights". The second version was contained in several sections running from s.67 to s.67G.

42. It was common ground for present purposes that the combined effect of the amendment powers under r.31 of the scheme rules and s.67 of the PA95 was that the amendments made in 2003 and 2007 could only be validly made by a proper deed or resolution which had prospective effect.
43. The defendants make some general observations. The knowledge which a person might reasonably be expected to acquire for the purposes of s.14A(10) is to be determined objectively but having regard to the characteristics of a person in the position of the claimant (see *Gravgaard*). In the present case the Trustee included a professional trustee-director (Ms Wood) after March 2004. A pension scheme trustee is moreover generally required to be conversant with scheme documentation and have knowledge and understanding of the law of pension schemes and trusts. In respect of those acting through trustee companies these obligations are codified in statute and apply to each individual exercising the functions of the trustee company: see s.248 of the Pensions Act 2004.
44. The Pensions Regulator is required to publish statutory codes that apply to all trustees of occupational pension schemes for consumption by trustees. The defendants specifically drew my attention to The Pensions Regulator's Code of Practice 10: Modification of Subsisting Rights, published on 24 January 2007. I shall return to this publication below.
45. The defendants also submit that RHG was a sophisticated business and the scheme which it sponsored was a major financial and operational aspect of the business. It also contends in general terms that a number of trustees were senior employees of RHG.
46. In response to this general contention, the claimant points out that the defendants have in fact identified five individuals who were both directors of the Trustee and who also had roles within RHG. The claimant says that the overlap was limited: Mr Weselby was a sales operations manager and was not a director or executive of RHG; Mr Wiggins had no role within the Trustee or RHG at the date of the Shoosmiths letter or the 2007, 2008 or 2009 Opinions; Ms Smith was not a director of the Trustee at the time of the Shoosmiths letter or the Mayer Brown Advice; Mr Summerside was not a director of the Trustee at the times of the 2007, 2008 or 2009 Opinions and was not a director of RHG at the time of the Shoosmiths letter, the Mayer Brown advice, or the 2007, 2008 or 2009 Opinions; and Ms Osborne was not a director of the Trustee at the time of the Shoosmiths letter of the Mayer Brown Advice and is described as a member of the HR department of RHG.
47. The claimant also submits that there may be limitations on the extent to which knowledge of a person in the capacity as a director of the Trustee may properly be attributed to RHG, since trustees are under duties of confidence. I shall return to questions of attribution of knowledge to RHG below.
48. The defendants argue that the only material fact which the Trustee and RHG did not know before 2012 and 2013 was that changes to the rules could not validly be made retrospectively. They contend that the documents listed in paragraph [27] showed the Trustee and RHG that, under r.31 and s.67 PA95, a deed was required to make changes and that (since the changes affected accrued or subsisting rights) they could not be made retrospectively. The defendants say that at the least parties in the position of the Trustee and RHG would reasonably have sought independent legal advice as to whether such

changes could be made without a formal (prospective) deed - and that had they done so they would have been informed of the correct legal position.

49. The defendants base their application on the documents listed in paragraph [27] separately and in combination. They say that the documents taken alone were enough to establish constructive knowledge of the damage at the times the relevant damages were suffered. But they also say that the earlier documents have to be considered together with the later documents, including the 2009 Opinion given by the defendants. They say that, taking all the materials together the Trustee and RHG would reasonably have been expected to take further advice about the validity of the 2003 Benefit Changes and 2007 Amendments and would have done so well before the relevant statutory shut-off dates for bringing these claims.

Summary judgment: the 2003 Benefit Changes

50. I start with the relevant history. The primary facts recited below are taken from those alleged in the claimant's draft re-amended particulars of claim (which were not disputed for this hearing) and the evidence served in relation to the defendants' application.
51. The claimant alleges that in 2002, following an actuarial valuation on 31 December 2001, the defendants advised the Trustee and RHG about changes that could be made to the benefit structure of the scheme so as to reduce its costs. These became the 2003 Benefit Changes. The intended effective date of the most important of these – closing the DB section of the scheme to new members - was 1 January 2003.
52. The claimant alleges that the defendants were the architect and project manager in charge of implementing the 2003 Benefit Changes. It says that the defendants produced timetables setting out the actions required to introduce the 2003 Benefit Changes and explained the steps to the Trustee. There was a series of meetings and communications between the defendants, the Trustee and RHG to discuss these actions. The claimant alleges that the defendants were acting as (among other things) legal advisers to the Trustee and RHG in relation to the implementation of the rule changes. This is not in dispute for the purposes of this application. The main representative of the defendants dealing with legal issues was Mr Allen.
53. One of the proposed changes concerned early retirement provisions in the rules. For reasons which are not yet clear from the existing documents available to the claimant, the Trustee, with the knowledge of the defendants, sought separate advice from Shoosmiths about these changes. In instructions of 22 November 2002 written by Ms King of the defendants, the Trustee instructed Shoosmiths to provide advice relating to the early retirement provisions.
54. The claimant alleges that Shoosmiths were not expressly asked to advise upon the mechanism by which the amendment to the early retirement provisions could be introduced. Nor were Shoosmiths asked about the other proposed amendments, including closing the DB section of the scheme to new members.
55. Shoosmiths advised by a letter dated 13 November 2002. The letter started by summarising the power of amendment in r.31. It then summarised s.67 PA95. The letter said that the section provides that any amendment which would or might affect any entitlement or accrued right of any member or other beneficiary under the scheme is

only permitted if either the scheme actuary certifies that the amendment will not in his opinion adversely affect any entitlement or accrued right or all the members or beneficiaries whose entitlement or accrued rights would be so affected have consented. The letter explained that s.67 therefore protects not only pensions in payment but also the accrued right to a pension of an active member. The letter went on to say this: “the test set out in the Pensions Act for ascertaining whether an accrued right has been adversely affected by an alteration requires a comparison of the leaving service benefits of the member immediately before and after the amendment is made”.

56. There was then a heading, “Can and Should the Trustee Company Consent to the Proposed Alteration?” The letter then said:

“In my view, the terms of the power of alteration itself do not prevent the trustee company from consenting to the proposed change...

Nor do I believe that section 67 of the Pensions Act 1995 presents an obstacle to trustee consent. Any retirement is (and, I understand, has always been) subject to the consent of both the principal employer and the trustee. Whether the “leaving service benefits” test is applied as at 1st April 2003 or the earlier date when the alteration is actually made, there will be no difference in the value of a member’s accrued rights. This is because a member’s ability to take an early retirement pension is subject to consent and the value of an early retirement pension calculated on the existing basis is therefore not an accrued right.”

57. Shoosmiths had no further involvement in relation to the 2003 Benefit Changes.
58. Around the time of this letter the defendants and the Trustee and RHG continued to discuss the proposed changes.
59. Ms King shared the Shoosmiths letter with Mr Allen of the defendants in an email dated 19 December 2002, as well as sending him emails from two directors of the Trustee, Mr Godden and Mr Chesterman, recording their interpretation of the Shoosmiths Advice.
60. The claimant alleges that the defendants, including Mr Allen, advised the Trustee on the drafting of what became the 2004 Deed and Rules but took no steps to ensure that the drafting of that document was completed or that the document was executed before the dates from which it was intended that the 2003 Benefit Changes would take effect. Again this is not contested for present purposes.
61. The claimant alleges Mr Allen attended a Trustee meeting on 26 March 2004 and presented a summary of the 2003 Benefit Changes. The claimant says that the 2004 Deed (which purported to take effect from 1 January 2003 for some changes and 1 April 2003 for others) was executed without Mr Allen or the defendants more generally advising the Trustee or RHG that, contrary to what that deed purported to achieve, the 2003 Benefit Changes could only take effect in law from the date of the deed, 26 March 2004.
62. The claimant alleges (and it is not contested for present purposes) that the scheme was valued by the scheme actuary and administered by the defendants as administrators on

the basis that the 2003 Benefit Changes were effective and effected from their intended dates in 2003.

63. The defendants submit in the light of this history that it should have been apparent to the Trustee from the Shoosmiths letter that the s.67 “leaving service benefits” test was required to be applied on the intended effective date of the amendment or (if different) the date when the actual amendments were made. The defendants say that it should have been clear to the Trustee from the letter that it was not possible to make the relevant amendments retrospectively.
64. The defendants contend in the alternative that the Trustee acting reasonably should have taken further independent legal advice in light of the Shoosmiths letter: they should have realised from the statements in that letter about s.67 and r.31 that there was at least a real risk that the 2003 Benefit Changes engaged the leaving service benefit test and that there might be problems about seeking to make amendments without a prospective deed. The defendants contend that the Trustee acting reasonably would have sought separate legal advice (i.e. other than from the defendants) about this.
65. I am not persuaded that the claimant has no realistic prospect of success on this part of its case for the reasons set out below. (To avoid unnecessary repetition, where I refer below to a point being arguable I mean that the point carries the necessary degree of conviction under the summary judgment test - and not just that it is theoretically arguable in the sense that anything can be argued.)
66. In assessing the Shoosmiths letter the context counts. Part of this (not contested on this application) was that the defendants were project managing the changes to the scheme’s rules and the Trustee and RHG were looking to them for advice about the implementation of the proposed changes. At about the same time as the advice was obtained from Shoosmiths about early retirement the Trustee was in discussions with the defendants about the proposed changes. Everyone was working on the basis supposing that the main changes (including closing the DB section to new members) would take effect from 1 January 2003. It seems to me that the claimant has an arguable case that the Trustee did not look to Shoosmiths for any advice about implementation of the proposed changes and that the Trustee’s directors thought that Shoosmiths were only advising in principle about the early retirement provisions.
67. A second element of the context pleaded by the claimant (and not contested for present purposes) is that, as the Trustee knew, the defendants were involved in obtaining and reviewing the Shoosmiths advice. In my judgment the claimant has an arguable case that the Trustee was reasonably entitled to suppose that, if the letter contained anything that might be relevant to the process of implementing the proposed changes, the defendants (as their primary legal advisers) would draw this to their attention.
68. Against this background, I consider it to be arguable that, though Shoosmiths did give some general advice about s.67 and the leaving service benefits test, a reasonable recipient in the position of the Trustee would not have understood the letter to address the formal steps or actions required to amend the rules. The letter did not say in terms that r.31 only allowed prospective amendments (and nor did the rule itself). I also consider that it is arguable that a reasonable reader of Shoosmiths’ advice in the position of the Trustee would have concentrated on its substance, i.e. that s.67 did not prevent the early retirement changes. It is arguable that a reasonable reader in the position of

the Trustee would have focused on that part of the advice and not sought to draw from it general conclusions about the interplay of s.67 and r.31 or their impact on the manner in which changes had to be effected. That was a separate matter on which the defendants were acting.

69. It is therefore in my view arguable that a reasonable reader in the position of the Trustee could have read the letter and noticed the references to s.67 and r.31 but not drawn the conclusion it was legally impossible to effect amendments otherwise than by a prospective formal deed or resolution.
70. I also consider it arguable that it was reasonable in this overall context for the Trustee not to have sought separate or further legal advice from a firm other than the defendants concerning the implementation of the rule changes. It is arguable that the Trustee could reasonably have supposed that the defendants, as its legal advisers, would have raised any issues about implementation of the changes, including any arising from s.67 of PA95. The claimant has a realistic case that the Trustee was entitled to suppose that the defendants were acting properly - and that the Shoosmiths letter was not enough to alert them to the possibility that the advice they were receiving was wrong.
71. It should also be noted that the application of s.14A in the present case has an unusual feature. In most cases the claimant feels some loss or damage arising from a transaction (be it a failed investment, a crack in a wall, or a third party claim) which might provoke it to ask if the damage was (in the language of the section) attributable to an act or omission on the part of the defendant alleged to be negligent. The claimant's experience of damage from the earlier transaction is the trigger or impulse for the claimant (or putative claimant under s.14A (10)) to seek independent advice.
72. What makes the present case unusual is that if there was no time gap between the time when the claimant came to feel its loss (if any) and the time when it appreciated that the loss was attributable to the defendants' alleged negligence. They are two sides of the same coin. It was only on appreciating the (alleged negligence) that the Trustee would have twigged that it had suffered any loss. This is not therefore a case where the defendants can point to an obvious, independent, experience of loss and say that this should have prompted the Trustee (acting reasonably) to go to a separate adviser and ask whether it resulted from the defendants' acts or omissions. There is nothing like that in this case.
73. For these reasons I consider that the Trustee has an arguable case for relying on the postponed limitation period under s.14A(4)(b).
74. RHG has separate claims. The Shoosmiths letter was addressed to the Trustee, and there is no allegation or evidence that it was provided to RHG.
75. The defendants nonetheless argue in general terms that if the Trustee would reasonably have understood that the 2003 Benefit Changes required a formal, prospective, deed or resolution, RHG would also reasonably have acquired the same knowledge. The defendants advance two main arguments.
76. The defendants say, first, that some of the directors of the Trustee were also senior employees and that their knowledge is to be attributed to RHG. As to this I consider that it is arguable that the knowledge of the employees who were also directors of the

Trustee is not attributable to RHG. As already explained in paragraph [46] above, there is a difference between the parties about the position and status of the relevant persons within RHG. The claimant says that there was little overlap at a senior enough level within RHG. It also seems to me that the court at trial would need to understand the way that RHG's function as Employer under the scheme was governed (including the composition of any relevant committees). There may also be issues about the extent to which the knowledge of an individual gained in their capacity as a director of the Trustee is to be attributed to RHG as Employer.

77. So, on the defendants' first argument, I accept the claimant's submission that issues of attribution should be determined at trial on full evidence rather than summarily.
78. The defendants' second argument was on the following lines. Section 14A requires one to assume that the Trustee had the knowledge which it would reasonably have acquired. For the reasons already given, the Trustee would reasonably have acquired knowledge that the 2003 Benefit Changes could only be made by a formal, prospective, deed or resolution. If it had acquired such knowledge it would inevitably have communicated it to RHG. Therefore, by the same reasoning, RHG would have acquired the same knowledge.
79. I am unable to accept this argument. Section 14A(10) requires the court to attribute to a given claimant both actual knowledge and constructive knowledge. The constructive knowledge attributed to the claimant is a statutory deeming process (required to strike a fair balance as to the time for the running of the limitation period). It seems to me that where, as here, there are two claimants the statute requires the court to consider the position of each separately without making any assumptions about the constructive knowledge of the other. Here, the court is required to determine what RHG actually knew and might reasonably have been expected to know. The court might conclude, carrying out that exercise, that things actually known to the Trustee might reasonably have been communicated to and become known to RHG. But I do not think that the section requires the court to attribute to RHG the Trustee's constructive knowledge. That seems to me to involve the fallacy of treating the deemed constructive knowledge of the Trustee as if it had become actual knowledge of the Trustee. There is no warrant for that in the statutory wording when the court comes to consider the claims of RHG.
80. So even if I had concluded that there was a proper basis for summary dismissal of the Trustee's claims, I would not have reached the same conclusion about RHG's claims.

The 2007 Amendments

81. Again the history matters.
82. RHG, with advice from the defendants, proposed that it should close the defined benefits section of the scheme to future accrual. The initial target date for the implementation of this proposal was 1 April 2007.
83. The Trustee required separate legal advice as to whether it should agree to a proposal by RHG to close the scheme to future accrual. The defendants could not provide that advice due to its role as adviser to RHG. The Trustee therefore sought advice from Mayer Brown about the proposal.

84. The claimant's case is that the advice was about the point of principle: could it properly agree the proposal? The Trustee did not require and did not seek advice as to the mechanical process by which the amendment could be introduced. The mechanics of implementation were to be project managed by the defendants, acting as legal advisers.
85. The Trustee instructed Mayer Brown to advise it about RHG's proposal. It provided its advice in a five-page questions and answers letter dated 17 May 2006. The covering letter said that the Trustee directors should read it carefully as they were being asked to make an important and difficult decision and they needed to understand their position. The letter also said that in Mayer Brown's view RHG was making a legitimate commercial proposal but, if the Trustee was to agree, it had to be satisfied that it was acting in the best interests of members of the Scheme.
86. The Q&A section included the following passages.
- “How can the changes be made?
- Final salary benefit accrual could be stopped by amendment. The power of amendment is in Rule 31, which provides that the Principal Employer and the Trustee may jointly amend the Rules. The Trustee's agreement would therefore be needed to amend the Rules in this way.
- Can the trustee agree such an amendment?
- The terms of the amendment power would not prevent the amendment being made and changes to future service benefits are not restricted by s67 Pensions Act 1995. The question is therefore whether it would be proper for the Trustee to agree.”
87. The claimant contends that Mayer Brown did not advise the Trustee about the mechanics of amendment. It therefore did not advise that a deed closing the scheme to future accrual had to be executed by the intended effective date (then 1 April 2007) and did not advise that any deed could not operate retrospectively.
88. An edited version of the Mayer Brown advice, containing the same sections as quoted above, was provided to RHG and was emailed to Mr Allen of the defendants on 10 July 2006.
89. The claimant contends that once the Trustee and RHG had reached agreement in relation to the principle of the 2007 Amendments Mayer Brown's role ended. Thereafter the defendants were the Trustee's sole professional adviser concerning the amendments.
90. The defendants attended Trustee meetings on 27 February and 31 May 2007. The defendants did not advise the Trustee that there was any need for an amending deed to be executed by 1 July 2007. That date passed without any such deed being executed. The Trustee and the defendants nonetheless treated the changes as having occurred on 1 July 2007 without an amending deed.
91. On 3 July 2007 Ms King of the defendants wrote to the Trustee referring to the cessation of defined benefit accrual and the changes to the defined contribution section from 1

July 2007 and saying that it would be necessary “to amend the scheme Rules accordingly”. The letter gave a quote for the defendants to produce a deed of amendment and revised rules. The letter did not suggest that the changes had not already been effected but said that a deed was needed to record the changes.

92. There was then a fairly lengthy and involved process of settling the wording of an amending deed. The claimant contends that the defendants were engaged to project manage the process. It took until 30 June 2008 before the deed was executed. Mr Allen of the defendants was in charge of the drafting process.
93. Mr Allen also provided two opinions, one dated 3 December 2007 (in anticipation of an amending deed being executed) and the other dated 6 March 2008 to accompany the 2008 Deed. These opinions (“the 2007 Opinion” and “the 2008 Opinion”) were in similar terms and the differences between them do not matter for present purposes. They both stated that they related to s.67 PA95 and were being given by the defendants as a consequence of the adoption of revised Scheme rules. They said that s.67 provides that any modification to a scheme where the exercise of the modification power will make a modification of “subsisting rights”, which is a “regulated modification” (both as defined in s.67), is voidable unless the requirements of the “subsisting rights provisions” are met in advance of making the modification.
94. Both versions of the opinion noted that it was intended to amend the scheme with effect from 1 July 2007 by executing a deed of amendment. Both versions stated that in Mr Allen’s opinion none of the changes made in the revised rules modified subsisting rights in a manner which fell within the definition of a regulated modification under s.67 and that, accordingly, the scheme actuary did not need to take any further action. Both opinions recited that the intention was to amend the scheme rules with effect from 1 July 2007, i.e. a date well before each of the opinions were dated.
95. The claimant alleges (and it is not contested) that as the scheme’s actuarial adviser and administrator, the defendants valued and administered the scheme on the basis that the 2007 Amendments had taken effect from 1 July 2007.
96. Against this history I turn to the defendants’ summary judgment application.
97. The defendants contend that the Trustee must be taken to have read the Mayer Brown advice in May 2006; that this explained the effect of s.67 and, in particular, that changes to future service benefits are not restricted by s.67; and that the Trustee should have realised that the 2007 Amendments involved changes to accrued service benefits and that, to the extent the changes were retrospective, they would therefore be caught by s.67.
98. The defendants also rely in this regard on The Pensions Regulator’s Code of Practice 10, published on 24 January 2007, which says that directors of trustee companies were required to be familiar with s.67 and with this guidance.
99. The defendants also argue that by the time of the 2007 Amendments at least one of the directors of the Trustee was a professional trustee and that its knowledge should be assessed with this in mind.

100. The defendants contend that, in light of the Mayer Brown advice, the Trustee should at least have sought independent legal advice about the validity and effectiveness of the intended changes to the rules and in particular whether the amendments could be treated as effective without a formal prospective deed or resolution.
101. I have again concluded that the claimant has an arguable case for the purposes of s.14A which should go to trial.
102. Again the context counts. The claimant has an arguable case that, as far as the Trustees were concerned, it was the defendants and not Mayer Brown who were in charge of the implementation of the 2007 Amendments. There is an arguable case that the Trustee was entitled to suppose that the defendants would raise any issues about the validity and effectiveness of the changes to the rules. It is also relevant in this regard that the Trustee knew that the defendants had seen and considered the advice provided by Mayer Brown.
103. I also consider that there is an arguable case that a reasonable trustee in the position of the Trustee would have thought that Mayer Brown was advising only about the principle: could the Trustee properly agree to the proposal at all? And not on mechanics: how should any changes be implemented?
104. It is also material that Mayer Brown's advice was sought and given many months before the intended effective date of the changes.
105. It is in my view also arguable that by the dates of the 2007 Opinion (3 December 2007) and the 2008 Opinion (6 March 2008) there was no reason for the Trustee to go back and reconsider the terms of the Mayer Brown advice which had been given in May 2006. Since May 2006 the Trustee, on the advice of the defendants, had considered the 2007 Amendments and had concluded that they had been effected as from 1 July 2007. The defendants then advised the Trustee that those changes could be formalised in a retrospective deed. There was nothing in this history to cause the Trustee to stop and think that they needed to turn back to the Mayer Brown advice.
106. This is bolstered by the fact that the defendants gave advice to the Trustee and RHG that the changes had been effectively made by their intended dates even without a formal deed or resolution.
107. I also think it arguable, given the passage of time since the Mayer Brown advice, that the Trustee would not have retained in their mind its details. It concerned technical legal issues; and that there was no reason for the directors of the Trustee (acting reasonably) to have carried out a side-by-side comparison of the Mayer Brown advice and the 2007 and 2008 Opinions.
108. I also note that s.67 does not say anything in terms about the mechanics of implementation of changes in the rules of pension schemes. In the present case the Trustee (with advice from the defendants) believed that they had made effective changes as from 1 July 2007 even without an amending deed being in place. The claimant alleges that the defendants, wearing the hat of scheme actuary, took the same view and valued the scheme liabilities on the basis that the changes were effective from 1 July 2007. Hence everyone involved appears to have thought, as from 1 July 2007,

that prospective changes had been effectively (informally) made, despite the absence of a formal deed.

109. It also appears that the Trustee did not appreciate that it would not then be possible to enter into a deed which retrospectively sanctioned the earlier changes to the rules. The case advanced by the claimant (which is an arguable one) is that it relied on advice from the defendants that this could be done without infringing s.67. Overall, it seems to me that there is an arguable case that there was nothing in the Mayer Brown advice (or indeed the terms of s.67 itself) to indicate that this was not possible.
110. I also consider that the claimant has an arguable case that there was no reason for it, acting reasonably, to have sought independent legal advice to second guess the defendants' advice about implementation of the rule changes. The defendants were acting for it as legal advisers in project managing the amendments. Mayer Brown doubtless advised about s.67 in general terms. But the defendants provided specific, tailored, advice about the impact (if any) of s.67 on the amendments to the deed. I consider that the claimant has an arguable case that the Trustee would not reasonably have been expected to second guess that advice and go elsewhere: there was nothing in the history to provoke it to do so.
111. I repeat my earlier observation that this is not a case where there was an independent experience of financial damage which might have led the claimant to think twice about the quality of the advice they received. Loss and the negligence are two sides of the same coin.
112. In reaching this conclusion I have taken account of the defendants' argument that the Trustee included at least one professional director and the submissions based on The Pension Regulator's Code of Practice 10. I do not think that the first point moves the dial. It seems to me that it will be of assistance to the court to consider the evidence about the abilities and capacities of the directors in the light of all the evidence at trial.
113. As to the second point, I observe that s.67 was complicated legislation and the Pension Regulator's Code of Practice no.10 said that trustees should take legal advice about any potentially problematic changes. Paragraph 80 said that when considering an amendment which will or might affect members' subsisting rights it is important for trustees to seek appropriate advice, in particular from legal and actuarial advisers, usually those already appointed to the scheme, at an early stage in the process. Paragraph 81 said that scheme administrators may also have a valuable role to play in advising on the practical implementation of any proposed changes to benefits. It appears to me that the Trustee has an arguable case that it fulfilled these requirements by taking advice from the defendants. They were the legal advisers and administrators and they were engaged both early and throughout the implementation process. I also note that paragraph 82 of the same code said that trustees should expect their advisers to alert them to any concerns they may have about a proper modification.
114. So I reject the summary judgment application based on the Mayer Brown advice and the 2007 and 2008 Opinions.
115. RHG's claims are separate. For essentially the same reasons as given in paragraphs [76] to [79] above, if the defendants' application had succeeded against the Trustee, it would not have succeeded as against RHG.

The 2009 Opinion

116. The defendants also based their application on a further opinion produced by the defendants dated 3 March 2009 (“the 2009 Opinion”). At an earlier stage in the proceedings the parties reached the view that the 2009 Opinion was also furnished in connection with the 2007 Amendments. There is no need for present purposes to go into the question of why the parties reached that view.
117. By the time this application came before me was common ground (at least for present purposes) that the 2009 Opinion in fact related to another amendment, to the definitions of Assurable Salary and Pensionable Salary (“the Assurable Salary Deed”) which was first circulated in March 2009 but not executed until 9 November 2010.
118. The 2009 Opinion stated in terms that s.67 was not engaged by the amendments being introduced (i.e. those in the Assurable Salary Deed). In fact that was right because that Deed stated that the deed would take effect from the date of the deed.
119. The defendants rely on a difference between the wording of the 2009 Opinion and the wording of the 2007 Opinion and the 2008 Opinion. The 2009 Opinion stated that

“I note that it is intended to amend the Scheme by executing a Deed of Amendment. The changes to be made are set out in the Deed (a copy of which is attached to this Opinion) and take effect from the date the Deed is signed.”
120. The defendants contend that the Trustee should have noted that the defendants were advising about prospective changes and that this was in contrast with the earlier opinions, which referred to retrospective changes.
121. The defendants say that this difference in wording should have put the Trustee on inquiry that, by a combination of the scheme rules and s.67, only prospective changes could be effected. The Trustee should therefore have realised that there was (at least) a real risk that the earlier amendments to the rules (which had been made retrospectively) were invalid or at least problematic. The defendants say that the Trustee acting reasonably would have sought independent advice. They say specifically that the change in wording should have stimulated the minds of the directors of the Trustee (acting reasonably) to cast their minds back to the 2008 Opinion and the Mayer Brown advice and made further inquiries.
122. I have concluded that the claimant has an arguable case that the 2009 Opinion was not enough to put it on inquiry in this way.
123. First, the 2009 Opinion was produced in March 2009. This was almost two years after the Trustee had treated the 2007 Amendments as being effective and more than eight months after the 2008 Deed had been executed. It is in my view arguable that the Trustee had no reason to revisit the earlier advice (concerning different changes) at least in the absence of some striking or obvious inconsistency between this advice and earlier advice.
124. Second, the 2009 Opinion was concerned with a separate set of amendments - the Assurable Salary Deed. That deed (which was attached) stated in terms that it would be effective from the date of execution. It follows that the 2009 Opinion said nothing about

the validity or otherwise of retrospective amendments. One cannot derive from the proposition that prospective amendments are alright the proposition that retrospective ones are not. It is to my mind arguable that there was no obvious inconsistency between the wording of the 2009 Opinion and the 2007 and 2008 Opinions.

125. So I consider it arguable that the Trustee would not have had the wording of the 2007 and 2008 Opinions in mind when they received this further opinion in 2009.
126. Again I have considered the Trustee's claims first. I have concluded that it has an arguable case under s.14A. For reasons already given above, even if I had thought the claims of the Trustee should be dismissed, I would not have reached the same conclusions about the claims of RHG.

The documents in combination

127. The defendants also argued that the various events and documents addressed above should be considered cumulatively or in combination and that, taking them together, they are sufficient to fix the Trustee with the constructive knowledge for the purposes of s.14A. They contend on this basis that the claimant does not have a realistic prospect of success on limitation.
128. I am unable to accept this submission. I have already concluded that, when seen in their context, the events and documents do not establish that the Trustee might reasonably have acquired the necessary knowledge (whether directly or with such professional advice it might reasonably have been expected to seek). It seems to me that the argument based on a combination of the documents does not materially change the merits of the summary judgment application.
129. The defendants base themselves on documents generated over some years and concerned with different events (the Shoosmiths letter, the Mayer Brown advice, the 2007 and 2008 Opinions and the 2009 Opinion) and ask the court to analyse them side-by-side. The defendants appeared at times in argument to suggest that the Trustee should have done something similar at the time. The defendants say, in particular, that the Trustee should have been alive to differences of expression in these various documents and that this should have prompted them to seek independent advice.
130. This approach wrenches the documents from their context and puts them under an artificial forensic spotlight. It seems to me to ignore some basic context: the long time gaps between the various advices; that they were given for different purposes, and that the advisers other than the defendants were asked to advise on discrete points and not (at least arguably) about implementation.
131. There is a danger in summary applications of unduly foregrounding documents or events from the mass of surrounding material and presenting them as if they were continuously present to the minds of the parties. That is not the real world, where people concentrate on documents when they need to and then forget them or recall them imperfectly. One of the advantages of a trial is that the court is able to evaluate documents and their likely impact in a fuller context. It can reach a better informed view of the probabilities. This is not always a reason for refusing summary judgment but it is often a reason for caution.

132. I also repeat a point made earlier. This is not a case where the claimant can be said to have experienced a painful financial loss (the collapse in asset values, the cracked wall) which might have caused it to stand back and ask whether the defendants were responsible or had somehow got things wrong. In the present case the claimant could only have appreciated that it had suffered a loss at the same moment as it had knowledge (in the statutory language) of the other facts relevant to the current action. This is not therefore a case where the pain of appreciable financial loss from a transaction might reasonably have triggered the Trustee to review the various documents and compare them in combination or cumulatively.
133. Considering all the documents relied on by the defendants for this application together, I have concluded that the claimant has an arguable case that there was nothing to give it the necessary knowledge or to prompt it to seek independent advice about the validity and effectiveness of the amendments.
134. I have also concluded that the claims of RHG stand on a separate footing for the reasons given earlier. I do not think that they are properly amenable to summary judgment in any event.
135. So the application fails so far as it concerns the claimant's case under s.14A.

Continuing duty and the strike out application

136. The starting point here is the pleading of the claim in the draft Re-Amended Particulars of Claim ("RAPOC").
137. In paragraphs 19 to 23 the retainers of the defendants are pleaded.
138. Paragraph 24.c. alleges that at all material times between 2002 and 2015 the defendants' duties included "valuing the Scheme's liabilities and/or administering the scheme on the basis of the rules of the Scheme, as properly applied and/or implemented."
139. Paragraphs 64 and 65 allege that the defendants at all material times owed the Trustee and RHG a contractual obligation or at common law or in tort to exercise the level of care and skill reasonably to be expected of (among others) competent administrators, consultants and solicitors, with specialist expertise in pension schemes.
140. The alleged breaches of duty in paragraph 68 include failing to advise prior to the time of the 2003 Benefit Changes and 2007 Amendments that formal deeds or resolutions were required and that these needed to be prospective. Paragraph 68.o. then alleges that the defendants were in breach by "failing to advise, that any point up to the end of the retainer in 2015, that the Scheme should be administered on the basis that the amendments in the 2004 Deed and Rules and the 2008 Deed of Amendment in relation to the 2003 and 2007 Amendments took effect on the date when the instrument was executed."
141. Paragraph 77 of the RAPOC alleges:

"The Defendants were, up to 2015, under a continuing duty to administer the Scheme in accordance with its rules. It was negligent for the Defendants to administer the Scheme on the basis that the 2004 Deed and Rules and the 2008

Deed of Amendment had retrospective effect in relation to the 2003 Benefit Changes and the 2007 Amendments. If the defendants had at any point until the end of their retainer in 2015 administered the scheme in accordance with the tortious and contractual duties owed to the Trustee and RHG, doing so would have involved informing the Trustee and RHG that the 2004 Deed and Rules and the 2008 Deed of Amendment did not have retrospective effect ...”

142. The claimant’s case is therefore that the defendants were under a continuing obligation not merely to ensure that the changes were properly implemented up to the times they were made in 2004 and 2008 but also to reconsider and advise on the validity and legal effectiveness of those changes at all times up to 2015, when the retainer ended. The claimant allege that the duty arose from the position of the defendants as administrators and consultants in respect of the scheme.
143. Apart from the retainers, the claimant does not alleges any additional facts or events to allege that the defendants should have informed the Trustee or RHG that the historical amendments were wrong.
144. The defendants contend that such a legal duty is untenable in law. They rely on the decision of the Court of Appeal in *Capita (Banstead 2011) Limited v RFIB Group Limited* [2015] EWCA Civ 1310. That case involved a company engaged in providing pension services and allegations that the company had failed to advise a pension trustee and employer company of the need to make various changes by way of a formal deed of amendment having prospective effect. The case involved the provisions of an indemnity in a share sale contract but it squarely raised the question whether the company as a pensions consultant and adviser owed a continuing duty to the trustees and employers to advise them of flaws in the process by which purported amendments had been carried out. As in the present case there was a continuing retainer, which continued after the various flawed amendments to the rules had purportedly been made.
145. The majority of the Court of Appeal (Longmore and Henderson LJJ) concluded that the company was not under the alleged continuing duty. They held that this was tantamount to a duty to correct the earlier negligence. The majority concluded that though the company was under a continuing retainer there were no fresh acts of negligence after the original breaches. The original acts of negligence occurred at the time when the invalid purported amendments had occurred. At [19] Longmore LJ said that there is no continuing duty to discover earlier mistakes and put them right. At [48] to [49] Henderson LJ said that C’s obligation was to ensure that the amendments were properly made in due time and that once it had failed in that obligation it was in breach of contract. Once those breaches had occurred they remained unremedied. But in the normal way it is impossible to construct a continuing contractual obligation in the sense of one which gives rise to a fresh breach on a daily basis.
146. In my judgment the same reasoning applies to the present case. The claim in paragraph 77 concerns the obligations of the defendants to administer the scheme in accordance with its rules. Assuming that the defendants’ duties as administrators of the scheme included a duty to exercise reasonable care to ensure that changes to the scheme rules were made in accordance with the law, the defendants will have been in breach when they failed to advise the Trustee properly in relation to the amendments made in 2003/4 and 2007/8.

147. I do not think it is possible to spell out of the facts pleaded in the RAPOC a continuing duty afterwards to advise that they were in breach of contract or that the process by which the amendments had occurred was flawed. In the language of limitation it appears to me that the cause of action accrued when loss was suffered, i.e. when the Trustee acted on the (false) basis that the rules had been properly and validly made in 2003/4 and 2007/8 respectively. I do not think it can properly be said that a fresh cause of action arose after that day by day until the end of the retainer in 2015.
148. The claimant says that the precise scope of an adviser's duty is fact-specific. It says that the court at trial might benefit from expert evidence. It says that in the present case the court will have to determine whether the defendants' distinct administrative duties included noticing that the scheme should be administered on the basis that the changes could only take effect prospectively from the date of a valid deed or resolution.
149. But that point may be assumed in the claimant's favour for present purposes. The issue raised by the defendants is: if there was such a duty did it continue? I agree with the defendants that if there was such a duty the defendants would have been in breach at the time the flawed amendments were made (2003/4 and 2007/8).
150. The claimant also submits that it is not alleging a duty to look back and spot the earlier errors. But that appears to me exactly what the alleged continuing duty comes to. The claimant is saying in substance that the defendants ought at all times up to 2015 to have revisited the advice given in 2003/4 and 2007/8 that the amendments had been validly effected.
151. The claimant says that *Capita* is distinguishable. It points out that different entities within the Aon group gave the legal advice on the one hand and the administrative and valuation advice and services on the other. I do not think this is a material difference. Suppose it is arguable that the defendants as administrators were under duties of care in relation to the legal validity and effectiveness of the changes to scheme embodied the 2003 Benefit Changes or the 2007 Amendments, the issue is whether they were under a continuing duty in later periods to advise about the validity and effectiveness of those historical changes. The fact that different entities within the defendants' group provided different services (some legal and some administrative) does not appear to me to affect this question. Indeed, if anything, it weakens the claimant's case since it would require the administrators to give retrospective advice about matters which (on the claimant's own argument) more naturally fell under the aegis of legal advice.
152. The claimant referred me to the recent case of *James Cropper Plc v Aviva Life and Pensions UK Limited* [2022] EWHC 1689 (Ch) where the court considered some amendments in a case involving a defendant which among other things provided administrative services. The pleading appeared to rely on the continuing retainer of the defendant. I did not find the authority of any assistance as there does not appear to have been any argument about the viability of any claim based on the continuing retainer and the decision of the Court of Appeal in *Capita* was not cited.
153. I have concluded that the present case is indistinguishable from *Capita*. Other than a continuing retainer no further, specific, facts are alleged as the basis for saying that the defendants as administrators were under a duty to correct the earlier errors. I shall therefore strike out paragraph 77 of the RAPOC.

Conclusions

154. The application for reverse summary judgment on grounds of limitation fails.
155. The application to strike out paragraph 77 of the RAPOC concerning the alleged continuing duty of care succeeds.