



Neutral Citation Number: [2024] EWHC 2451 (Ch)

Case No: BL-2023-BRS-00008

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS AT BRISTOL
BUSINESS LIST

Bristol Civil and Family Justice Centre
2 Redcliff Street
Bristol BS1 6GR

Date: 01/10/2024

Before:

HHJ RUSSEN KC

(Sitting as a Judge of the High Court)

Between :

ELLEN KAY

Claimant

- and -

MARTINEAU JOHNSON (A Firm)

Defendant

James Hall (instructed by **Harrison Clark Rickerbys**) for the **Claimant**
Simon Wilton KC (instructed by **Travelers Legal**) for the **Defendant**

Hearing dates: 3rd and 4th September 2024

Draft judgment circulated to the parties on 23rd September 2024

Approved Judgment

This judgment was handed down remotely at 10.00am on 1st October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HHJ RUSSEN KC

HHJ Russen KC :

Introduction

1. This judgment follows the trial of a preliminary issue in a professional negligence claim. The issue is whether or not the claim advanced by the Claimant (“**Ms Kay**”) against the Defendant (“**the Firm**”) is barred by a limitation defence. The claim was issued on 6 March 2023. It relates to damage allegedly suffered by her under the terms of a settlement of legal proceedings reached on 25 April 2008 (“**the Settlement**”) upon which the Firm (then known as Shakespeare Martineau) gave her advice.
2. Ms Kay’s claim against the Firm is in respect of its alleged professional negligence in relation to the advice it gave her in relation to her application for ancillary relief in divorce proceedings between her and her ex-husband, Mr Mahan. Ms Kay (then known as Helen Mahan) and Mr Mahan were married in 1995 and two sons were born during the marriage, in March 2000 and July 2002. However, by 2005 they were experiencing marital difficulties. Despite an attempt at reconciliation in 2006 they had separated fully by 2007 and each was petitioning for divorce.
3. The Firm acted for Ms Kay in her claim for ancillary relief, having taken over from Manches. The Firm’s retainer commenced on 10 December 2007 and ended in June 2009. Between those dates the Settlement was reached at a Financial Dispute Resolution hearing (“**FDR**”) of her ancillary relief application on 25th April 2008. The court sealed a consent order embodying the Settlement on 29 September 2008.
4. The Settlement provided that Ms Kay was to receive the net proceeds of sale of Manor Cottage (a property previously purchased as the family home) after repayment of certain mortgage payments and contributions to repair costs to be borne by Mr Mahan, a £4,000 lump sum for spousal maintenance, and 80% of any sums yielded from a claim against builders who had done work on Manor Cottage.
5. The Settlement constituted a ‘clean break’, so that she had no further rights by way of ongoing maintenance or capital or pension provision and meaning that it was unlikely she would be able to re-visit the Settlement in the future.
6. Her case in these proceedings is that the advice given by the Firm through its then partner Mrs Mary Kaye (“**Mrs Kaye**”) that she should agree a clean break was negligent advice. She also alleges that the Firm was negligent in failing to advise her, or to do so adequately, on evidence, strategy, settlement options and funding options in relation to the ancillary relief proceedings. This included a failure to advise in relation to seeking further disclosure from Mr Mahan, in connection with obtaining expert evidence (in the fields of forensic accountancy and pension-sharing), and upon the availability of an avoidance of disposition order, a pension sharing order and/or a nominal spousal maintenance order (“**NSMO**”).
7. The subtext of these complaints is that since the Settlement Mr Mahan (who is a financial adviser) has, Ms Kay believes, steadily prospered with there being obvious indications of his business success and accruing wealth. These include interests in or directorships of a large number of companies. She says that, by contrast, she has struggled to get by, with Mr Mahan paying minimal maintenance for their two children.

8. Ms Kay says the Firm's alleged negligence has caused her loss in that, properly advised, she would have sought disclosure, forensic accountancy expert evidence, a pensions report, an avoidance of disposition order in relation to a property known as Wall House, a pension sharing order and a NSMO. So advised, she would not have entered the Settlement but instead would have fought for better settlement terms from Mr Mahan alternatively would have sought orders from the Court at a final hearing. She says she lost the chance to do either, and therefore to benefit from fairer financial provision at the time in 2008. In particular, she lost the chance to obtain and later benefit from the making of a NSMO. In due course, a NSMO (assuming the term of it was long enough) would have enabled her to seek higher maintenance once Mr Mahan came into the significantly greater wealth which she believes him to have acquired.
9. Ms Kay's claim for damages against the Firm is in the region of £1.274m.
10. Ms Kay's concerns about the true extent of Mr Mahan's financial resources (for the purpose of them being properly reflected in her claim for ancillary relief) are not confined to those since the date of the Settlement. Before she instructed the Firm she had provided a so-called 'Hildebrand bundle': see *Hildebrand v Hildebrand* [1992] 1 FLR 244 in relation to what in 2008 was the position in relation to the use in divorce proceedings of a spouse's personal finance documents which the other spouse had obtained in breach of confidence. The bundle comprised what she believed to be incriminating documents which Manches had used to prepare a very substantial questionnaire about Mr Mahan's 'Form E' (his financial disclosure). The questionnaire was directed to establishing Mr Mahan's interest in Wall House; certain offshore assets and corporate structures; a trust fund set up for the children; a 'Black' American Express card; his business partnership with his brother; his Guinness Mahon SIPP; shareholdings; and various bank accounts.
11. Soon after the Settlement was reached Ms Kay once again became concerned that Mr Mahan had means and wealth which he had not previously disclosed. Accordingly, in the light of changing financial circumstances (including a fall in the value of Manor Cottage) she approached the Firm in October 2008 to inquire about the possibility of re-opening the Settlement. In November 2008, the Firm advised there was no basis for setting aside the Settlement. This advice was repeated in May 2009. In June 2009, Ms Kay dis-instructed the Firm. This was on the basis that the ancillary relief claim was settled, so the Firm's retainer had run its course, rather than because of any sense she had been badly advised. Much later, in May 2018, she obtained her file from the Firm.
12. The Firm says its advice in relation to the Settlement was perfectly reasonable having regard to Mr Mahan's disclosed financial position and the extent of his indebtedness; that there did not appear to be good reason to pursue further investigations into his assets or means, to seek different orders, or to advise against the Settlement (which was encouraged and approved by the Court). The Firm does not accept that such evidence as there is of Mr Mahan's wealth in later years demonstrates that Ms Kay ought to have received a more favourable settlement in 2008, and notes that counsel who advised her in 2020 (with accompanying informal advice which has prompted the claim against the Firm) said it was not possible to show that Mr Mahan failed to disclose substantial assets in 2007-8. The Firm therefore denies breach, causation and loss, saying there are no grounds for supposing a more favourable financial outcome for Ms Kay could have been achieved at the time.

13. On behalf of Ms Kay, Mr Hall recognises that the primary limitation period (both for the purposes of a claim in contract and in tort) expired on 25 April 2014, being 6 years from the date of the Settlement. The date of the Settlement was the latest date for a (causative of loss) breach of contract, based upon the allegations that the Firm failed properly to advise, and for the purposes of the claim in tort that was the latest date when damage accrued.
14. Ms Kay relies upon section 14A, alternatively section 32(1)(b), of the Limitation Act 1980 (“**the Act**”) to say that the claim issued on 6 March 2023 is not statute barred.
15. The merits of the claim (and of the defence) are not relevant to my determination of the preliminary issue of limitation. That said, it is clear from both statutory provisions which are central to that issue that the assumption that the Firm should have perceived Mr Mahan’s financial resources and/or future financial prospects to be greater than assumed for the purposes of the Settlement, and advised and acted accordingly, is one which permeates the limitation issue.
16. That is a very loose description of the substance of Ms Kay’s claim but it suffices for the purpose of me observing that any response to a limitation defence which invokes section 14A and/or section 32(1)(b) will inevitably require some analysis of the facts which are said to support the claim in “*negligence*” (section 14A) and the “*right of action*” (section 32) to which that defence is raised. Ms Kay’s response involves her saying that it was only much later than 2008 that she realised she should have been advised at that earlier point in time to seek, in particular, a NSMO: see the components of section 14A knowledge addressed below. She alleges in the alternative that the Firm concealed from her the fact that it had failed to give that advice: see the concept of concealment under section 32(1)(b) also addressed below.

The Preliminary Issue

17. By agreement of the parties, on 8 February 2024 District Judge Brown ordered that:

“The following preliminary issue will be tried between the Claimant and the Defendant: Whether the Claim is time barred pursuant to the provisions of the Limitation Act 1980 as detailed within the Pleadings (“the Preliminary Issue”).”
18. The limitation defence was anticipated by the Particulars of Claim which identified around 3 May 2020 both as the commencement date for the purposes of section 14A and the date when the alleged concealment for section 32(1)(b) purposes ceased to be operative. The Amended Defence and the Amended Reply engaged further with the issue; the Firm denying there had been any such concealment and saying that Ms Kay had the requisite knowledge for the 3 year limitation period under section 14A to commence by the time she dis-instructed the Firm in June 2009, alternatively by the time she recovered her file from the Firm in May 2018.
19. At the start of the trial, Mr Hall for Ms Kay and Mr Wilton KC for the Firm identified a point in relation to section 32 which is highlighted by the fact that the trial was of the

preliminary issue and not the trial of the merits of the substantive claim. As appears below (see paragraph 70) the section refers to concealment of facts which are relevant to the claimant's "*right of action*". I have just noted that the application of section 32 and section 14A cannot be divorced from consideration of the underlying cause of action.

20. Therefore, in relation to section 32, where the Firm disputes the existence of a cause of action and will defend any non-statute barred claim on its merits, counsel agreed that the preliminary issue should be refined so that the question is:

“Whether Mary Kaye on behalf of the Firm, deliberately and with intent to conceal, actively concealed or withheld from Ms Kay any of the acts or omissions alleged to amount to negligence and the corresponding possibility that she had been negligent.”

Legal Principles

21. The legal burden is upon Ms Kay to displace the primary limitation period, which expired on 25 April 2014, by reference to section 14A, alternatively section 32, of the Act. Within the argument over section 14A, at least, there is scope for this overall legal burden to embrace shifting evidential burdens between the parties; perhaps most obviously in relation to any suggestion that relevant knowledge should be attributed to her by reference to the provisions of section 14A(10).

Section 14A

22. The title to section 14A of the Act explains that it introduces a special time limit in any action for negligence where facts relevant to the cause of action are not known at the date of accrual; that date in this case being 25 April 2008. Section 14A(4)(b) provides for an alternative 3 year limitation period from a later “starting date” than the cause of action accrual date.
23. Section 14A(5) provides that the starting date is the earliest date on which the claimant “*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*”. For shorthand, I will describe this section 14A(5) knowledge as “**trigger knowledge**”.
24. Section 14A(6)(a)-(b) identifies the trigger knowledge as being that of “*the material facts about the damage in respect of which damages are claimed*” and (as mentioned in section 14A(8)) “*other facts relevant to the current action*”. These distinct (sets of) facts are described in sub-sections 14A(7) and 14A(8) respectively. In *Witcomb v Keith Park Solicitors* [2023] EWCA Civ 326; [2023] P.N.L.R. 20 the Court of Appeal referred to them as ‘material facts knowledge’ and ‘knowledge of attribution’ respectively.
25. Section 14A(7) provides that “*the material facts about 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”.

26. Section 14A(8) provides that the other relevant facts are: “(a) that the damage was attributable in whole or part to the act or omission which constitutes the negligence”; and “(b) the identity of the defendant”.
27. Section 14A further provides for the concept of constructive knowledge and what will (and, in one situation, will not) set the limitation clock running even where the claimant did not, at the starting date which such constructive knowledge supports, have actual trigger knowledge. The aim is to avoid a claimant in a negligence claim postponing the limitation period indefinitely (subject of course to a 15-year longstop under section 14B, with its own exceptions) by reference to an assertion of personal ignorance of trigger knowledge where such ongoing ignorance cannot be objectively justified. Instead, the claimant is held to a standard set by reference to the knowledge he or she might reasonably have been expected to acquire at any given stage: see section 14A(10) addressed below.
28. Section 14A(9) provides that knowledge that any acts or omissions did not, as matter of law, involve negligence is irrelevant.
29. Section 14A(10) provides that the claimant’s knowledge includes knowledge that the claimant might reasonably be expected to acquire from “(i) facts observable or ascertainable by him and (ii) from facts ascertainable with the help of appropriate expert advice which it is reasonable for him to seek”. The proviso to that is that “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”.
30. It is therefore clear from the section 14A(10) that trigger knowledge *may* be attributed to the claimant even though he has not deduced it from the facts of which he is aware or sought appropriate expert advice by reference to what he already knows. In relation to ‘material facts knowledge’, section 14A(7) fixes those facts by reference to the standards of a reasonable person in the claimant’s position (so far as he or she suffering the relevant damage is concerned).
31. In *Haward v Fawcetts* [2006] UKHL 9, [2006] 1 WLR 682, at [8]-[11], Lord Nicholls addressed the degree of knowledge (whether actual or constructive) required to constitute trigger knowledge. He noted that questions over the degree of detail required for such knowledge had mostly arisen in the context of what the Court of Appeal in *Witcomb* described as ‘knowledge of attribution’. It is clear from *Haward* that:

“[9] ...knowledge does not mean knowing for certain and beyond possibility of contradiction. It means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice, and collecting evidence: suspicion, particularly if it is vague and unsupported, will indeed not be enough, but reasonable belief will normally suffice. In other words, the claimant must know enough for it to be reasonable to begin to investigate further.

[10] ...Consistently with the underlying statutory purpose ...it is not necessary for the claimant to have knowledge sufficient for his legal advisers to draft a fully and comprehensively particularised statement of claim....Hoffmann LJ said section 14(1)(b) requires that “one should look at the way the plaintiff puts his case, distil what he is complaining about and ask whether he had, in broad terms, knowledge of the facts on which his complaint is based”...”

32. In *Witcomb*, the Court of Appeal endorsed what Bourne J at first instance had said, by reference to *Haward*, about the level (or degree) of knowledge amounting to trigger knowledge - both elements of it - in cases where the allegation is either one of giving negligent advice or of negligently omitting to give appropriate advice. Thirlwall LJ said this:

“55. Bourne J ultimately drew from *Haward* the following principles at [36] "where the essence of the allegation of negligence is the giving of wrong advice, time will not start to run under s.14A until a claimant has some reason to consider that the advice may have been wrong." Mr Troman makes no complaint about this conclusion which is plainly correct. It is also directly relevant to this case.

56. The judge continued at [37], "Similarly, where the essence of the allegation is an omission to give necessary advice, time will not start to run under s.14A until the claimant has some reason to consider that the omitted advice should have been given."

57. Mr Troman submits that the conclusion at paragraph 37 is wrong, is inconsistent with the decision in *Haward* and would lead to different outcomes under s.14A(9) depending on the way cases are pleaded. I reject that submission. In [37] the judge is not saying (by the use of "should have been given") that the claimant must know that the lawyer was under a duty to give the omitted advice. That would offend against s. 14A (9) which the judge had well in mind (see for example [86] [*sic* – *cf.* [87]] of his judgment). He is saying no more than that in a case of omission time will not start to run until a claimant has some reason to consider that the necessary advice has not been given.”

33. As I noted in *Giddens v Frost* [2022] EWHC 1022 (Comm), at [39], in *Kays Hotel Ltd v Barclays Bank Plc* [2014] EWHC 1927 (Comm), at [15], Hamblen J (as he then was) adopted the bank’s summary of the position in relation to trigger knowledge when he said of it that:

“firstly that the claimant must have actual or constructive knowledge that he suffered some damage; secondly he must have actual or constructive knowledge that that damage was suffered as a result of relying upon advice given by the defendant; thirdly he must have actual or constructive knowledge sufficient to cause him to investigate whether there was some flaw or inadequacy in the advice given; fourthly he must have actual or constructive knowledge of the flaw or the inadequacy to a high level of generality — he must know of the essence of the

claim, not all its particulars; fifthly, he does not need to know that the advice was negligent or in breach of duty or that he has a cause of action.”

34. The reference to “*knowledge of the flaw or the inadequacy to a high level of generality*” reflects what was said in *Haward* in the paragraphs quoted above (and also at [23] of the judgment): that trigger knowledge equates to sufficient knowledge of the facts giving rise to the complaint to justify investigating the possibility that the (later) defendant may have been negligent. That is the level of knowledge which provides “*some reason to consider*” (per *Witcomb*) that the relevant damage (per section 14A(5)) may have been caused by negligent advice or by a negligent omission.
35. Mr Wilton KC was correct to submit, by reference to the decision of the Court of Appeal in *Forbes v Wandsworth Health Authority* [1997] QB 402, at 412D-F, that, once acquired, such trigger knowledge obviously cannot be ignored on the basis that the individual chooses not to act upon it by investigating further. *Haward* subsequently confirmed that the relevant trigger is knowledge which justifies such investigation whether or not that is undertaken. In *Forbes v Wandsworth H.A.*, Stuart Smith LJ made the point that a party armed with trigger knowledge may at first assume that he has not been ill-served by the (later) defendant with his possible response being: “*Oh well, it is just one of those things. I expect the doctors*” – in that case – “*did their best.*” Although that may not be an unreasonable reaction, it would be equally reasonable for him, with that knowledge, to embark upon the further investigation contemplated by *Haward*. The decision not to investigate further, at that stage, reflects a choice not to act upon the trigger knowledge. It is not a basis for disowning that knowledge until a later point in time, when a decision is then made to act upon it in contemplation of legal proceedings.
36. The first component of knowledge of attribution (see section 14A(8)(a)) does therefore require knowledge of facts which is sufficient to prompt investigation into whether or not the defendant was, in effect, at fault. Although it is clear that the requisite knowledge is of *facts* which indicate flaws or inadequacy in the advice given, and (see section 14A(9)) the ability to categorise it as ‘negligent’ is irrelevant to the acquisition or absence of trigger knowledge, questions will sometimes arise about the claimant’s ignorance of an alternative course of action available to him at the time that advice was given. The receipt of apparently sound and reliable advice from the defendant might mean that it is only much later that (even by reference to the quite general level of trigger knowledge) he becomes aware that the damage he already knows about may be attributable to the defendant negligently failing to alert him, at that time, to the availability of that alternative option.
37. That is my attempt at summarising the difficult issue identified in *Haward* at [15], by Lord Nicholls, and [114]-[118] by Lord Mance. It did not fall to be determined in *Haward* given the nature of the defendant’s advice, the claimant’s reliance upon that advice and the financial consequences of that reliance (and in circumstances where constructive knowledge was not in issue). However, in *Witcomb* the issue did arise.
38. In *Witcomb* the claimant said he only reasonably began to question the legal advice given by the defendants in December 2009 (in connection with his full and final settlement of a personal injury claim) after his injuries subsequently worsened. The defendants had in 2009 referred to the possibility of them worsening when warning him

about the risk of “under-settlement”. The judge found that it was not until medical advice, in early 2017, to the effect that he should consider amputation of his lower leg, and perhaps not until subsequent legal advice, that he acquired the requisite knowledge of attribution. That was that the disadvantageous settlement could be attributed to the defendants’ omissions in not obtaining a plastic surgeon’s evidence which would have identified the need for a provisional damages award and in not advising him that he could make a claim for one. Those twin omissions formed the basis of his negligence claim commenced 10 years and one day after the settlement but within 3 years of him acquiring that knowledge.

39. The Court of Appeal upheld the judge’s decision that the claim was not time-barred, saying:

“There is no basis for an attack on the judge's findings of fact or his reasoning about their consequences and there is no complaint about the judge's findings on the law (save as I have dealt with above). The fact that the claimant's condition worsened significantly and sooner than expected might have made him think that his medical experts had got things wrong, but it did not. There was no reason in 2016, any more than there was in 2009, for him to think that he might have been wrongly advised by his lawyers about the nature of the settlement. There was nothing intrinsic to his situation to alert him to the fact that he had received flawed advice. He might, as the judge observed, have thought there were problems with the legal system which did not, as he had been told, allow for a further application for damages, but it did not follow that there might be problems with the advice he had been given. He was in the same position as a claimant would have been before 1985 when provisional damages were introduced by the Senior Courts Act 1981. He believed, as a result of what he had been told, that only a lump sum in full and final settlement was possible.”

40. Ms Kay’s awareness of the Firm’s identity as a defendant (i.e. the second component of knowledge of attribution identified in section 14A(8)(b)) is not in issue in this case. Using the labelling in *Witcomb*, the focus has instead been upon her material facts knowledge and the first component of her knowledge of attribution: “*that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence*”. The evidence of Ms Kay and Mr Richard Morgan (“**Mr Morgan**”) at the trial, and the rival submissions about the conclusions to be drawn from it, were directed to whether or not she had actual or constructive trigger knowledge, on these two aspects, before 6 March 2020. Subject to the potential wrinkle identified in paragraph 63 below (which that evidence and those submissions reveal to be in fact of no significance in this case) that is the date Ms Kay must reach in demonstrating that, until that date, she lacked trigger knowledge if she is to rely successfully upon section 14A.
41. Mr Hall’s submissions placed heavy reliance upon the decision in *Witcomb*. He said Ms Kay was in a similar position to the claimant in that case, in that it was not until she sought (through Mr Morgan) advice from counsel specialising in family law, in March 2020, that she had knowledge of attribution for the purposes of the claims now advanced and summarised in paragraph 8 above.

42. Against that submission, Mr Wilton KC relied upon the *Henderson v Temple Pier Co Ltd* [1988] 1 WLR 1540 to say that, if she did not have trigger actual knowledge by 2009 as a result of the Firm's advice that she could not reopen the Settlement, then she acquired it constructively much earlier than 2020 through the involvement of Mr Morgan with whom she began a romantic relationship in late 2017 or early 2018. Mr Morgan was a litigation solicitor (though not a practitioner in family law) and from that time onwards provided Ms Kay with pro bono assistance in relation to her contemplated challenge to the Settlement.
43. The decision of the Court of Appeal in *Henderson* in fact concerned section 14(3)(b) of the Act which contains the same language as 14A(10). It is to the effect that there may be cases where the identity of the defendant is a fact ascertainable by the claimant without the need for expert advice from a solicitor which may otherwise be required for other elements of knowledge of attribution. In such a case, if that solicitor delays in acquiring information to establish the identity of the defendant when that could be established without their expertise, then the starting date will not be postponed under section 14A(10) by reference to that delay. Bracewell J said, at 1545C:
- “Having given her solicitors general responsibility for the conduct of her claim, actions are taken and knowledge is acquired on behalf of the plaintiff. If solicitors fail to take the appropriate steps to discover the person against whom her action should she brought, she cannot take refuge under section 14(1)(c) because on the face of it [knowledge of the identity of the defendant] was knowledge she might reasonably have been expected to acquire from facts obtainable or ascertainable by her.”
44. I have already noted that that there is no issue in this case over Ms Kay's own awareness of that particular component of knowledge of attribution: s. 14A(8)(b). The Firm contends that if Mr Morgan, with his lack of expertise in family law, is not to be treated as a relevant expert in relation to its other component (s. 14A(8)(a)) the court is nevertheless entitled to treat facts ascertainable by him as well as by Ms Kay as relevant to the decision as to when she acquired knowledge to the level identified by *Haward*. The Firm says she cannot take refuge in the delay before counsel's expert advice was sought in 2020.
45. The parties were largely agreed upon the legal principles, summarised above, which govern the inquiry into this and related matters. However, Mr Hall and Mr Wilton KC made rival submissions about the degree to which constructive trigger knowledge is influenced by the personal attributes or circumstances of the claimant before the court.
46. The issue between them extended to the potential influence of such attributes or circumstances upon the question of when the claimant might reasonably be expected to obtain (and, where appropriate, act upon) appropriate expert advice for the purposes of section 14A(10)(b).
47. Mr Wilton KC relied upon my observation in *Giddens*, at [38], where I said that the objective standard underpinning the concept of constructive knowledge is informed by the actual position of the claimant and that “[T]he court must have regard to the characteristics of someone in the position of the claimant, as opposed to characteristics

peculiar to the claimant.” I made it (and also in an earlier case mentioned in that paragraph) by reference to what Arden LJ had said in *Gravgaard v Aldridge & Brownlee* [2004] EWCA Civ 1529; [2005] PNLR 19, at [20]-[23].

48. Recognising that section 14A(9) renders any familiarity the claimant may have with the law of negligence an irrelevance, section 14A identifies the claimant’s own position (including, therefore, his *knowledge* alongside any perhaps less well-founded suspicion or belief making up his state of mind) only by reference to him or her having suffered the relevant damage: see section 14A(7). Even that subsection, as already noted, holds the claimant to the standard of a “*reasonable person*” in that position and it does so for the purpose of identifying the subject matter of material facts knowledge. It is section 14A(10) which addresses the issue of constructive knowledge of (both elements of) trigger knowledge.
49. Section 14A(10) was the focus of the analysis in *Gravgaard* and the basis of the court’s observation about ignoring the claimant’s “*peculiarities*”. The subsection refers to “*knowledge which he might reasonably have been expected to acquire*” (with my emphasis through underlining, to reflect the focus given by Arden LJ).
50. Counsel’s submissions on this issue between the parties, as to what that phrase embraces in terms of the claimant’s actual circumstances or attributes, focussed upon *Gravgaard* and the decision of the Court of Appeal in *Gosden v Halliwell Landau* [2020] EWCA Civ 42.
51. As I read *Gravgaard*, still, at [20]-[24], Arden LJ (with whom Black J and May LJ agreed) concluded that the claimant is held to an objective standard under section 14A(10) which cannot, in effect, be lowered by reference to factors which were specific to the claimant at the time. That is as one would expect on an inquiry into constructive, as opposed to actual, knowledge. Even if the claimant did not have actual trigger knowledge (true ignorance of which may well of course be referable, or referable in part, to the claimant’s own personal circumstances or peculiar characteristics) he or she may nevertheless be imputed with it under section 14A(10).
52. I say this recognising that, in *Gravgaard* at [20], Arden LJ addressed the question of the court’s ability to take into account surrounding circumstances and any special characteristic or attribute of the claimant and observed that section 14(A)(10) is “*silent as to the matters which the court must take into account and leaves such matters to the courts to work out*”. I also note that, at [22], she remarked that the subsection made reference to the knowledge that the particular claimant might reasonably be expected to acquire, as opposed to that properly attributable to “*a reasonable person*” under section 14A(7). For the purpose of that observation, Arden LJ appears to have regarded section 14A(10) as introducing a measure of subjectivity which is missing from the language of the earlier subsection.
53. For my part, I read section 14A(7) (the only attribute-defining provision in the whole section, as I read it) and section 14A(10) as both supporting the conclusion in *Gravgaard*, at [24], that “*s. 14A(10) requires the court to have regard to the position of the actual claimant, not some wholly hypothetical claimant*”, so that is it is appropriate, as it was in that case, to take account of the claimant’s belief that she had a claim (against someone) in respect of the damage suffered.

54. Nevertheless, the conclusion of the Court of Appeal, at [20], was that the test is “*clearly objective*” and, at [22], that characteristics peculiar to the claimant are “*made irrelevant by the objective test imposed by subs. (10)*”.
55. In *Gravgaard* the Court of Appeal concluded that the claimant had failed to discharge the burden upon her under Section 14A. She had constructive trigger knowledge more than 3 years before the issue of proceedings. She should have taken legal advice when the damage to her (through her exposure under the legal charge in relation to which she said she had been negligently advised by the defendant) became apparent; and she had in fact done so more than 18 months before the date she contended to be the date when she could reasonably have been expected to have done so.
56. In *Gosden*, the Court of Appeal was concerned with a claim in negligence against solicitors who had failed to register a restriction at HM Land Registry to protect the claimants’ interest in the property in question. Their interest was overridden when the property was sold to a third party in October 2010.
57. The property in question had been owned and was then sold by the first claimant’s mother (whose arrangements with a view to saving Inheritance Tax had created the claimants’ registrable interest under a trust) who died in March 2013. The cause of action in negligence accrued in April 2003 when the restriction should have been registered but the judge found the claimants did not know the property had been sold (a material fact in their damages claim) until May 2015. He also found that they should not be imputed with constructive knowledge for the purposes of section 14A before February 2014. By reference to section 14A, the claim against the solicitors issued on 26 October 2016 was therefore brought in time.
58. The judge attributed the claimants’ delay in not making a Zoopla search (which revealed that the property had been sold) until April/May 2015 to the first claimant’s very significant distress, regret and anxiety caused by his lack of contact with his mother after 2008 and the impact of her death. Yet, as noted, there were grounds for imputing them with constructive trigger knowledge from February 2014. On appeal, the court upheld the claimants’ right to rely on section 14A. They had acted reasonably in reverting to the firm which had marketed the IHT scheme, using the defendant solicitors, and then instructing solicitors in relation to realising their interest under the trust. It took about 8 months for those solicitors to inform the claimants of a possible conflict in them continuing to act; and the claimants only learned of a possible claim against the defendant firm after instructing new solicitors in May 2016. Even if they had taken these steps earlier than as prompted by their discovery of the sale in May 2015, the claim issued in October 2016 would therefore still have been in time under section 14A.
59. In the Court of Appeal, Patten LJ referred to the objective test under section 14A(10). He said, at [50]:

“On the judge’s findings as to when the claimants first knew that the Property had been sold, the starting date for the alternative three-year limitation period under s.14A(4)(b) and (5) would not have been before 30 April 2015. But the knowledge required for bringing an action for damages in respect of the relevant damage within the meaning of s.14A(5) includes knowledge which the claimants might reasonably have been expected to acquire from facts obtainable or ascertainable

either by themselves or with the help of appropriate expert advice which it was reasonable for them to seek: see s.14A(10). The judge was therefore required to apply an objective test which meant that he was compelled to disregard the effect on Professor Gosden personally of his mother's death and the other surrounding factors I have referred to and instead to have asked what a reasonable person in the position of the claimants would have done.”

60. The decisions in *Gravgaard* and *Gosden* therefore confirm that factors personal to the claimant, which go beyond consideration of the position in which he finds himself or herself as a putative claimant in respect of the damage suffered, should be disregarded on the application of section 14A(10). They are consistent with the decision in *Forbes v Wandsworth H.A.*, at 414A-G, 423A-F and 425C. In that case, each member of the court expressed doubts over a statement in an earlier Court of Appeal decision, upon which the trial judge had relied, to the effect that not just the claimant's “*situation*” but also his “*character and intelligence*” were relevant to the test (under the same language in section 14(3) of the Act applicable to personal injury claims). They questioned how his individual character and intelligence could be relevant under an objective test.
61. In my judgment, all three appellate decisions make it clear that a claimant, in seeking to postpone the starting date under section 14A(10), cannot rely upon personal circumstances which would not apply to some other person in the same position (as a potential claimant in respect of the damage suffered). Any other conclusion would call into question the essential basis upon which section 14A(10) is seeking to distinguish the concept of constructive knowledge from the claimant's actual knowledge (or, more pertinently, the claimant's actual ignorance). That is not to say that the claimant's personal circumstances are in any sense “unreasonable”. Instead, it is a case of saying that those circumstances cannot *reasonably* be taken into account in resisting a conclusion which the court would otherwise reach upon the date of acquisition of “*knowledge which he might reasonably have been expected to acquire.*”
62. As in the earlier cases, the present case raises the question over the point in time when it was reasonable for Ms Kay to obtain appropriate expert advice which would have informed her trigger knowledge: section 14A(10)(b). Applying the objective test under section 14A(10) and adapting what Arden LJ said in *Gravgaard*, at [9], to the date of 6 March 2020 in the present case:

“..... Accordingly, if the court concludes that it was reasonable to seek expert advice before that date, and that she failed to take all reasonable steps to do so, the effect of subs.(10) is that the facts that she could have ascertained with the help of solicitors will be attributed to her as at that earlier date.”
63. I have taken the date of 6 March 2020 (for the purpose of assessing whether there was such a failure in the period before it) because it marks the earliest available starting date if section 14A is to assist her. Of course, the position under section 14A(10) is a little more nuanced, as Arden LJ recognised in that same paragraph by reference to the “*tailpiece*” in subsection (10). The subsection refers to taking steps to obtain expert advice. There may be some delay before the advice is received: compare *Gosden* at

[60]. In this case, Ms Kay sent instructions about the Settlement to counsel on 19 March 2020 (appropriate alternative counsel within the chambers being identified on 27 March) and says that she was alerted to possibility of a claim against the Firm on 9 May 2020. On the present facts, there is no potential for the tailpiece to provide a bit of leeway in relation to an earlier date than 6 March 2020.

64. The research of Mr Hall and Mr Wilton KC indicates there is no authority which directly addresses the significance or otherwise of a claimant's impecuniosity (so far as concerns his ability to pay for expert advice contemplated by the subsection) when the court is considering the potential impact of section 14A(10)(b). I have remarked that section 14A(7) is the only attribute-defining provision within the section and that Arden LJ in *Gravgaard*, at [22], focussed upon the more subjective language of section 14A(10). Mr Hall submitted that in relation to Ms Kay, for whom the Settlement was financially unfavourable (cf. "*the relevant damage*") and who from 2018 was reliant upon the goodwill and financial support of Mr Morgan, section 14A(10) should not operate as it might against a claimant who was financially better off (or perhaps, even if not materially better off, cannot be heard to blame the defendant for not being able to pay for expert advice).
65. Although the subsection is rather unclear on this question over the wherewithal to seek expert input, when other factors indicate it would be reasonable to do so, I am not persuaded by that submission. In my judgment, it is contrary to the general thrust of the authorities which are to the effect that the claimant's personal characteristics should be ignored. An individual claimant's financial circumstances are necessarily personal to him, or her, and it is difficult to see how they may legitimately be taken into account on the application of an objective test without significantly undermining its objectivity. So far as any causal link between the claimant's impecuniosity and the alleged negligence of the defendant is concerned, any inquiry into that would necessarily be taking place beyond (or certainly from towards the end of) the ordinary 6 year limitation period.
66. In the light of the appellate decisions, I cannot read the language of section 14A(10) as supporting an inquiry into the claimant's financial resources, or the "explanation" for them, at that distance in time. Neither does its succinct wording justify an investigation (for a judicial decision on the balance of probabilities) into such matters as his month-by-month or even year-by-year ability to pay for a certain level of expert advice (including, if possible, by borrowing the money to pay for it) which, I think it is fair to assume, will only become more costly to obtain as the years roll by.
67. In *Gravgaard*, at [21], Arden LJ made reference to the claimant's financial position, remarking that it had been found she had been struggling financially at the relevant time. She noted that made it more difficult to get legal advice, though also remarked that in principle she would at that time appear to have been eligible for legal aid. Unlike Ms Kay, the claimant did not rely upon her financial position in the argument under section 14A(10). The court went on to note that her position had since improved. Mr Wilton KC correctly observed that there is no indication in the judgment that the outcome might have been different if (like Ms Kay's situation) there had been no question of legal aid being available. What the court went on to say is at odds with any inquiry into what I think would have to be a calendar-based analysis into the claimant's ability to pay for a certain level of expert advice, at a given cost, starting many years after the cause of action accrued.

68. The happenstance behind the instruction of the expert in this case illustrates the inappropriateness of using section 14A(10) as the platform for a ‘mini-trial’ of such matters. As I explain below, Mr Morgan paid for the advice of a barrister specialising in family law in the Spring of 2020. Ms Kay and Mr Morgan became romantically involved by early 2018, though, as I also explain below, there were some ups and downs in their relationship so that, as at Christmas 2019, there was real doubt as to whether or not he would pay for it.
69. Ms Kay and Mr Morgan might never have become partners, or they might have done so much earlier than 2018. Although she did not, Ms Kay might have taken up remunerative employment in, say, 2014 and have been able to pay for expert advice herself (at whatever it would then have cost) much sooner after the expiry of the ordinary limitation period. I cannot accept that, where a claimant relies upon impecuniosity for not having sought expert advice before a certain point in time, all and any such imponderables pertaining to the claimant’s actual circumstances are matters for argument in relation to a period potentially as long as the 15 year longstop under section 14B of the Act.

Section 32

70. The material parts of section 32 of the Act for present purposes read as follows:

“32. Postponement of limitation period in case of fraud, concealment or mistake.

(1) ...where in the case of any action for which a period of limitation is prescribed by this Act...

.....

(b) any fact relevant to the plaintiff’s right of action has been deliberately concealed from him by the defendant the period of limitation shall not begin to run until the plaintiff has discovered the ...concealment...or could with reasonable diligence have discovered it.”

71. As with section 14A, the burden is upon Ms Kay to establish that the limitation period commenced later than the date of the Settlement. For these purposes, the limitation period is 6 years, so, for the claim commenced on 6 March 2023, it would be sufficient for her to push the commencement date forward from 24 April 2008 to any date after 6 May 2017 in reliance upon section 32.
72. For guidance on the interpretation and application of section 32(1)(b) the court now need not look further than the decision of the Supreme Court in *Potter v Canada Square Operations Limited* [2023] UKSC 41; [2023] 3 WLR 963.
73. This decision has greatly simplified matters for judges faced with an argument about the application of section 32(1)(b) (and indeed section 32(2)). The embellishments to the statutory test introduced by decisions in the intervening 20 years (and reflected in

the reformulation of the subsection by Lord Reed PSC at [94]) have been set aside and the Supreme Court has reverted to what, at [109], it described as the clarity and simplicity of Lord Scott's authoritative explanation in *Cave v Robinson Jarvis & Rolf* [2003] 1 AC 384:

“A claimant who proposes to invoke section 32(1)(b) in order to defeat a Limitation Act defence must prove the facts necessary to bring the case within the paragraph. He can do so if he can show that some fact relevant to his right of action has been concealed from him either by a positive act of concealment or by a withholding of relevant information, but, in either case, with the intention of concealing the fact or facts in question.”

74. Lord Reed's judgment, at [96]-[109], explains that 'concealment' is proved by showing that the defendant either took active steps to hide the relevant fact or decided to withhold information about it. A fact is 'relevant' if, without it, the claimant's cause of action is incomplete so that, without him knowing it, the claimant cannot plead his case and stop the limitation period running. There is no need to show the defendant was under a legal, moral or any other duty to communicate the information. Nor is it necessary to show that the defendant knew that the 'fact' was relevant to the claimant's right of action. For the concealment to be 'deliberate' it must be intentional. The concept does not extend to acting recklessly. Instead, it needs to be shown that the defendant must have considered whether to inform the claimant of the relevant fact and decided not to do so.
75. This analysis of the burden on the claimant meets the purpose of section 32(1)(b) which is to ensure that a defendant who deliberately ensures that the claimant who does not know the fact or facts in question, and who therefore cannot bring proceedings within the ordinary limitation period, cannot complain if he is deprived of the benefit of that period: see *Potter v Canada Square* at [105] and [108].
76. The test does mean, as Lord Reed recognised at [68] in his endorsement of the speech of Lord Scott in *Cave*, that proof of intended concealment (even on the balance of probabilities) will often be very difficult. This is especially so in what might be described, at least for present purposes, as cases of "mere negligence"; as opposed to ones involving the deliberate commission of a breach of duty (and inchoate damage, at least for limitation purposes) which are covered by section 32(2) of the Act. Many if not most negligence claims involve, by the accrual date, the defendant having acted (or having failed to act) carelessly but not with the knowledge to support a case of conscious wrongdoing within section 32(2): compare *Potter v Canada Square* at [153].
77. The present case is one of them. Ms Kay does not rely on section 32(2). Her case (see paragraph 67 of the Particulars of Claim and paragraph 50 of the Amended Reply) eschews the suggestion that the Firm knew of its negligence at the time of the Settlement and alleges that section 32(1)(b) concealment took place from November 2008, alternatively May 2009, when she approached Mrs Kaye with a view to re-opening the Settlement.

Ms Kay's Case

78. Ms Kay says that she did not acquire the requisite trigger knowledge for section 14A purposes until May 2020, so that the Claim issued on 6 March 2023 was issued within the alternative 3 year period provided for by the section.
79. This was some time after Ms Kay had, by 2017, become aware of particularly conspicuous indications of wealth on Mr Mahan's part and then began to investigate his means further. At about the end of 2017 she entered a relationship with and started to receive assistance on an informal basis from Mr Morgan.
80. On 23 April 2018 Ms Kay asked for the Firm's file in relation to her ancillary relief claim and the Firm provided it the following month. In January 2019 Mr Morgan asked the Firm to supply Mr Mahan's Form E and accompanying documentation, which he and Ms Kay say was not included in the file originally handed over. The Firm provided copies on 18 January 2019.
81. Ms Kay says she did not have actual knowledge of attribution - the (presumed) fact that the financially disadvantageous Settlement was attributable to the alleged negligence of the Firm - until she was informed by Mr Morgan in 2020 of the views expressed by Ms Victoria Edmonds. Ms Edmonds is a barrister specialising in family law. Mr Morgan had instructed Ms Edmonds on 27 March 2020 to advise on whether the Settlement could be re-opened.
82. On 3 May 2020 Ms Edmonds gave her written advice that an application to re-open the Settlement would not succeed, saying there was no clear evidence Mr Mahan had failed to disclose assets he held at the date of the Settlement such as would have led to a different outcome. Counsel's advice was provided to Mr Morgan on 9 May 2020 and he says that on or around that date he spoke to Ms Edmonds who advised there may be a claim against the Firm.
83. Ms Kay also says that she did not have constructive knowledge of attribution before Ms Edmonds advised in May 2020. She says she had no reason to suppose her losses were attributable to the Firm's acts or omissions until then as she was not aware of what could have been done by the Firm to secure a more advantageous outcome and also because in 2008-9 the Firm played down her concerns and advised against seeking to re-open the Settlement. Therefore, she had no reason to investigate further.
84. On that point, Mr Hall relied heavily upon the decision in *Witcomb* where the claimant was able to rely upon section 14A. Although his proceedings were commenced 10 years after the financially disadvantageous settlement of his personal injury claim in 2009 (on which the defendants had provided legal advice) it was found he had no constructive knowledge of attribution until he took fresh legal advice in 2017. Bourne J, who tried the preliminary issue of limitation, found that until that time he had no reason to suspect that the risk of "under-settlement" of his claim was caused by anything done or not done by the defendants: see [2021] EWHC 2038 (QB); [2021] P.N.L.R 24. As a result of the advice they had given he was ignorant (and not constructively aware) of the possibility that the significant deterioration in his medical condition in mid-2016 might have been addressed by an earlier award of provisional damages under section 32A of the Senior Courts Act 1981. It was the fresh legal advice which alerted him to

this alternative to a full and final settlement of his injury claim about which (and the attendant risk of under-settlement) the defendants had advised him.

85. The Court of Appeal upheld that decision. I have already quoted from its judgment endorsing the judge's approach in paragraph 39 above.
86. In relation to section 32, Ms Kay says the Firm deliberately concealed a fact relevant to her cause of action against itself by concealing the very breaches of duty of which she complains. She relies upon the following matters:
- i) Conversations between herself and Mrs Kaye of the Firm between 20th October and 11th November 2008. She says that Mrs Kaye had informed her of the principles governing the re-opening of divorce settlements but had broadly advised her to "*leave it*";
 - ii) the Firm's letter of 17th November 2008 providing a similar message and stating that Mr Mahan's setting up of a new business would not be a sufficient ground; and
 - iii) a telephone discussion between herself and Mrs Kaye on 5 May 2009, following Ms Kay's email of 20 March 2009 which referred to the possibility of re-opening the Settlement on the basis of financial developments after the date of it. She says Mrs Kaye was clear that she did not think that the Settlement was susceptible to being set aside.
87. Ms Kay says that these were acts of concealment because they amounted to either active steps to hide the breaches of duty or alternatively a withholding of information namely the possibility that the Settlement might have been reached as a result of negligent advice (or a negligent failure to give advice) by the Firm. She further says that these acts of concealment were deliberate in that Mrs Kaye on behalf of the Firm (and as a very experienced family law solicitor) must have come to appreciate, by the time of these communications in late 2008 and/or the first half of 2009, that the Settlement was likely to have been unfair because Mr Mahan's activities at that point suggested that he had played down his wealth and/or earning potential.
88. This in turn indicated that (a) those matters should have been investigated with more vigour before any settlement of the ancillary relief proceedings was reached and/or (b) an NSMO should always have been sought and, in the circumstances, no settlement without such an order could have been a reasonable one. Mrs Kaye knew what advice she had given (or not given), would have realised in late 2008 and/or early 2009 that the advice (or lack of advice) might well have been negligent and that it might well have caused Ms Kay loss. By putting her off seeking to reopen the Settlement and/or failing to advise her to seek independent legal advice, Mrs Kaye must have consciously chosen not to inform her that the Settlement might have transpired to be disadvantageous, and that this might well have resulted from the Firm's breach of duty.
89. If, contrary to Ms Kay's case under section 14A, I were to find that date on which she should have begun looking into a potential claim was not March 2020 but late 2017 or early 2018, then she says the previously operative concealment by the Firm until that time postponed the commencement of the 6 year limitation period. The Claim issued on 6 March 2023 would not be statute barred.

The Firm's Case

90. In respect of section 14A, the Firm contends that Ms Kay had actual trigger knowledge considerably more than 3 years before the issue of the Claim against the Firm on 6 March 2023.
91. The Firm says her actual 'material facts knowledge' and 'knowledge of attribution' is shown by her evident unhappiness with the Settlement, which she regarded as unfair and inadequate, as early as 2008-9; her perception that Mr Mahan had manipulated matters to conceal his true wealth; her belief that that would have been disclosed by further investigation of his assets; her desire to re-open the Settlement; and her state of mind generally by the time the Firm's retainer came to an end in June 2009.
92. In the alternative, in support of a case (actual or constructive) material facts knowledge and knowledge of attribution, the Firm relies upon those matters and Ms Kay's continuing perception thereafter that the Settlement was unfair and inadequate and her increasing awareness of Mr Mahan's apparent wealth as contrasted with her own financial difficulties; and hence the repeated indications that the Settlement had proved unfavourable to her and favourable to Mr Mahan. It says of all of that was sufficient (for the purposes of section 14A(10)) to prompt the need to take legal advice about the possibility of a claim against it. In the period from 2008-9 to 2017-18, Ms Kay should have investigated much earlier the possibility of re-opening the Settlement and/or whether she had a claim against the Firm. In fact, nothing was done during that period.
93. The Firm's fallback alternative case is that Ms Kay either had or is to be attributed with the requisite trigger knowledge from about May 2018 in the light of her further investigations by that stage. Mr Morgan, a solicitor, was assisting her informally from early 2018. In May 2018, Ms Kay retrieved the Firm's file and could have progressed her enquiries much more diligently. That file told her what had and had not been done. Had she acted as a reasonable person in her position would have done then she would have discovered all she needed to know long before 6 March 2020: the "not before" date (for trigger knowledge) which she must reach if she is to be able to rely successfully upon section 14A.
94. In relation to the element of constructive knowledge which is attributable to appropriate expert advice it would have been reasonable for Ms Kay to seek (section 14A(10)) the Firm again notes the involvement of Mr Morgan from 2018 onwards. Both Mr Morgan and Ms Kay have emphasised his lack of expertise in family law, or professional negligence claims connected with family law, and the informal character of the assistance he was providing to her. Therefore, Mr Morgan cannot have been an 'expert' able to provide "*appropriate expert advice*" under section 14A(10) because he lacked the expertise needed to advise Ms Kay about whether she could set aside the Settlement or whether she had a claim against the Firm. However, to the extent Ms Kay entrusted matters to Mr Morgan as a non-expert, the court is entitled to treat her as knowing facts ascertainable not just by herself but also by him: compare *Henderson*. As specialist legal advice was evidently needed, Ms Kay, with the knowledge available to Mr Morgan, was reasonably required to obtain such advice promptly.

95. The Firm says that Ms Kay’s argument under section 32(1)(b) is hopeless. There was no act of concealment. The Firm says is not clear precisely what ‘fact’ was allegedly deliberately concealed: the Particulars of Claim simply say that Mrs Kaye deliberately concealed the Firm’s negligence. Mrs Kaye on behalf of the Firm did not conceal anything or have the necessary state of mind to be guilty of deliberate concealment. When approached in 2008-9 about the possibility of re-opening the Settlement she did not think (and still does not think) that she had been negligent and her advice discouraging Ms Kay from seeking to revisit the Settlement was given in good faith. It was also plainly the correct advice. The Firm says it was in substance the same advice later given by specialist counsel (Ms Edmonds), in 2020, by reference to a much wider range of information and documentation that Ms Kay believed at that later point in time might justify the setting aside of the Settlement.

The Witnesses

Ms Kay

96. Ms Kay is evidently an intelligent woman who (expressing the point modestly) is competent in business matters. She is a graduate in design (she first met Mr Mahan while they were at university in London in the late 1980’s) and worked as an account executive in the early 1990’s. Later she obtained a master’s degree in environmental studies and, in the early 2000’s, she worked as a self-employed environmental consultant for about 18 months, earning around £75,000 a year. After the Settlement, she became responsible for pursuing the claim against the builders in respect of Manor Cottage when Mr Mahon did not provide the anticipated assistance. She has sat as a magistrate. In her evidence, Mrs Kaye described Ms Kay as being “*a very switched on lady*” at the time she came to act for her and that accords with my assessment of her.
97. The decision in *Forbes v Wandsworth H.A.* (which was obviously directed to the suggestion that a less “switched on” claimant should not be attributed with constructive trigger knowledge) confirms that these observations about Ms Kay’s astuteness are irrelevant to the issue of constructive trigger knowledge. However, they are potentially very relevant to the issue of whether and when she acquired actual trigger knowledge.
98. I found Ms Kay generally to be a truthful witness and Mr Wilton KC accepted her intention was to give helpful evidence. However, he was right to point out that there was one potentially material point on which her testimony departed from her witness statement. In the statement she had said that her parents had £100,000 from the sale of their house in 2009 which they could have lent her so that she could have paid legal fees, to cover further investigation into Mr Mahan’s financial affairs, with a view to re-opening the Settlement. However, in cross-examination she accepted that the parents fell victim to a scam, perpetrated by an acquaintance of hers, which led to them losing that money in late 2009 (and elsewhere in her statement Ms Kay referred to her pursuing the resulting legal claim on their behalf which led much later to a judgment in their favour). In testimony, Ms Kay also said she did not want to borrow her parents’ money and her evidence supports the conclusion that she could not afford to fund the challenge to the Settlement which she very quickly came to contemplate.

99. There is also force in Mr Wilton's submission that, by the time of her proceedings against the Firm, Ms Kay may well have unconsciously allowed her views about the inadequacy of the Firm's advice about the Settlement (and the 'clean break' it involved) to become distorted by reliance upon matters occurring only much later. It is clear that (at least until these proceedings) she regarded her ex-husband, and his suspected deviousness, rather than the Firm as the person responsible for an unfair financial outcome from the marriage, as she confirmed in her evidence. Although her sense of grievance on this front actually pre-dated the Settlement, I mention below how it was the trappings of his wealth, appearing much later, which ultimately led her to seek counsel's advice about the prospects of re-opening it. It is also clear that, as Mr Wilton KC put it, Ms Kay has been influenced by Mr Morgan to engage in a degree of "groupthink" so far as the Firm's perceived accountability is concerned. I return to that point below when addressing Mr Morgan's evidence.
100. Ms Kay said that the advice from Ms Edmonds in May 2020, suggesting investigation into a potential negligence claim against the Firm, marked the occasion when she had cause to consider that the Firm may have been negligent in its advice in relation to the Settlement. She said that, until that point, she had no means of knowing whether the service provided by the Firm was adequate or not. She said in her witness statement:
- "I had always assumed that the culprit was [Mr Mahan], and that there was nothing the [Firm] could have done (or that I could have afforded them to have done) to uncover the untruthful and misleading information which he had provided to the divorce court."
101. In her testimony Ms Kay stuck to this position. The thrust of her evidence was that she had always believed that Mr Mahan had not provided full disclosure of his assets, so that she felt from the outset that she did not get a fair deal under the Settlement. However, she said she had been advised it would have involved a lot of costs (beyond the significant costs she had already incurred through Manches) to investigate this further. Although it was later and apparently firmer indications of Mr Mahan's financial success which eventually led to her asking the Firm for her file in 2018 (Ms Kay said she had probably taken a photo in 2016 which revealed a number of classic cars parked outside Wall House) she said at one point: "*I've always tried to set it aside.*" Ms Kay had burned her own copy of the file of divorce papers in 2014 (necessitated by a house move) and, prompted by Mr Morgan questioning whether Mr Mahan may have misled the court about the extent of his assets at the time of the Settlement, she asked the Firm for it so that she could check what he had said.
102. Ms Kay's suspicion from the outset that Mr Mahan had not given full disclosure of his assets or income is consistent with her approaching the Firm in October 2008 and March 2009 to discuss the possibility of re-opening the Settlement; though it is important to note that, at that early stage, the idea was driven by a change in her own financial circumstances rather than her having very much greater suspicions about Mr Mahan's wealth than those she held before the Settlement. Although she had seen him driving around in a Porsche and had discovered the existence of a life insurance policy (though for the purposes of any payout it was her life assured, not his) and also that he had formed a new company within days of the Settlement, it was a worsening in her own financial position which really prompted the idea at that time. The global crash had hit

the value of Manor Cottage (which Ms Kay was renting out to pay the mortgage thereby prompting Mr Mahan's solicitors to write saying it should be sold) and the successful claim against the builder did not produce any money because he declared himself bankrupt. Ms Kay said she received £100,000 from the sale of Manor Cottage in 2011.

103. The contrasting indications of financial success of Mr Mahan which Ms Kay says, through the advice accordingly sought from counsel, only led her to have the necessary trigger knowledge were those which materialised (at least in those indications of wealth) significantly later than the date of the Settlement. Her sons had spent some time living with their father at Wall House in the autumn of 2017 and on their return to live with her they had commented on his lifestyle. She referred in cross-examination to becoming aware in 2017 of Mr Mahan's "*conspicuous signs of wealth*". The relevant matters were set out in the instructions to Ms Edmonds in March 2020. Those instructions were the final version of what was described as a briefing note which was first prepared by Ms Kay and Mr Morgan in January 2019 (*'Project Magpie v1'*, dated 13 January 2019) and which went through a number of revisions. That first draft referred to Mr Mahan's intention to buy out his brother's interest in Wall House in 2020.
104. As it was Ms Edmonds' unwritten advice, accompanying the formal advice given in response to those instructions, which Ms Kay relies upon as the source of her trigger knowledge, and she said in cross-examination that until that time she had no thought that the Firm may have been guilty of section 32 'concealment', her evidence was that Ms Edmonds' advice came "*as a real shock that someone could have done that*" (i.e. concealed the breach of duty in the way she now contends). I return to this point below in my analysis of the evidence.
105. Ms Kay referred in her evidence to a number of matters in connection with the period of time between her recovering her file from the Firm in May 2018 and instructing counsel. She said she was reliant upon Mr Morgan to compile the instructions and, as he was assisting her informally and pro bono, the work had to be fitted around his own busy professional schedule. She referred to Mr Mahan's 'Form E' in the ancillary relief proceedings not being obtained from the Firm until January 2019 (though this did not involve any delay by the Firm in acting upon her request for it).
106. Ms Kay also referred to ups and downs in her relationship with Mr Morgan, leading to periods of separation, during 2018 and 2019. She had been engaged with the steps to enforce the judgment for the recovery of her parents' £100,000 in 2018. She said 2019 was a terrible year for her. It included her being evicted from her home by her landlord (and her involving the police on the grounds of harassment) and her mother being diagnosed with Alzheimer's disease and her dog with cancer. She had to find new homes for herself and for her parents. Her sons were also taking their A-level and GCSE exams that year.
107. She also explained at length in her witness statement how her own impecuniosity meant that she was not able to instruct HCR formally and was dependent upon Mr Morgan for his pro bono assistance and his agreement to pay for Ms Edmond's advice. Her straitened circumstances were, she says, essentially attributable to the inadequacy of the Settlement, including what proved to be the relatively low sum from the sale of Manor Cottage and the cessation of Mr Mahan's child maintenance payments after

2011. The periods of separation from Mr Morgan also contributed to the delay in instructing counsel.

Mr Morgan

108. Until his retirement on 31 March 2023 Mr Morgan was the Head of Commercial Litigation at what is now Harrison Clark Rickerbys (“HCR”). He held that role from 2006 having been a litigation solicitor since qualifying in 1984. He still acts as consultant for HCR. For the greater part of his professional career he has specialised in civil and commercial litigation. He was appointed as a Deputy District Judge in 2001. Mr Morgan’s professional work did not include family law work and he has not held a family “ticket” as a DDJ.
109. Mr Morgan first met Ms Kay in connection with her parents’ claim to recover the monies of which they had been defrauded in 2009. He took over the professional conduct of their claim, through HCR, in 2014.
110. Mr Morgan gave evidence on behalf of Ms Kay. He explained how, after Ms Kay had told him about the Settlement and what she had learned from her sons in 2017 about Mr Mahan’s apparent wealth, they had agreed she should look further into the possibility of seeking to have the Settlement varied so to make it fairer to her. Mr Morgan had lent Ms Kay money as she was struggling to raise her sons in a small, rented property with no regular income.
111. It was at Mr Morgan’s suggestion that Ms Kay asked the Firm for her file in April 2018. Mr Morgan said in cross-examination that he had researched the point as to whether there was any limitation issue over the re-opening of the Settlement and concluded there was none. This assistance was given on a pro bono basis and needed to be done in his spare time, working around a busy professional practice. He explained the reasons why he did not involve HCR and colleagues within the firm with a better understanding of family law. They included Ms Kay’s concern that her financial situation should not become known more widely and his own recognition that those colleagues could not also be expected to act pro bono.
112. Mr Morgan also referred to the other matters of distraction in Ms Kay’s life, during 2018 and 2019, which she had mentioned in connection with the period which elapsed before counsel was instructed. He said that he may have had a cursory look at the file (recovered from the Firm) in 2018 but he had no recollection of studying it in detail before 2019. Only when he did so did he realised that Mr Mahan’s Form E was not within it and needed to be obtained from the Firm in January 2019. Mr Morgan was responsible for instructing Ms Edmonds, again on an informal basis as between himself and Ms Kay. He paid for counsel’s advice. In cross-examination, he explained that his relationship with Ms Kay had broken down at Christmas 2019 and it was only after a reconciliation that he decided he would pay for counsel to advise.
113. Mr Morgan said that, before sending her written advice upon the prospects of re-opening the Settlement, Ms Edmonds contacted him to say that (although it would not be included in her written advice) she considered the Firm’s service had been poor and may have amounted to negligence. This was in early May 2020. Mr Morgan confirmed

that he was following up this conversation when he sent Ms Edmonds an email on 1 June 2020 asking: “*Do you think there is a case in negligence against Martineau for the failure to pursue any pension claim against [sic] H?*”

114. Mr Morgan’s position in this case is not without its complications. He became romantically involved with Ms Kay in late 2017 or early 2018 and, allowing for what he described as some volatility in their relationship (including around Christmas 2019 which was shortly before his decision to pay for the specialist advice of Ms Edmonds) they began living together, in Mr Morgan’s home, in April 2022. In 2018 and 2019, Mr Morgan provided Ms Kay with informal advice and assistance in relation to a contemplated application to set aside the Settlement. In that personal capacity he is also a witness in the case on a substantive issue (namely the preliminary issue).
115. HCR were formally instructed by Ms Kay in October 2021 and they issued the Claim Form on her behalf on 6 March 2023. The complications arise because Mr Morgan has since that date been the partner in the firm with the professional conduct of her case. His witness statement (explaining how, after Ms Edmonds gave her advice in May 2020, there was a need for Ms Kay to refer a dispute with the insurer to the Financial Ombudsman Service on two separate occasions and the second of which was not resolved until September 2021) said that it was agreed with Ms Kay’s legal expenses insurer, NatWest, that Ms Kay could retain HCR, rather than a panel solicitor, on the basis that the work he had already done on her behalf would achieve an overall cost saving.
116. When I came to appreciate Mr Morgan’s dual role during my reading before the trial, and as I observed during the course of his evidence, my thoughts then immediately turned to the rule (as I vaguely recalled it to be) that a solicitor should generally avoid acting professionally in litigation in which he is likely to be a witness of fact. I made this observation after Mr Wilton KC had suggested as much to Mr Morgan in cross-examination. My own brief research by reference to *Cordery on Legal Services* before the hearing had led me to the decision of Fraser J (as he then was) in *SRCL v The National Health Commissioning Board* [2018] EWHC 1985 (TCC) where, at [75]-[76], the judge referred to the potential conflict of interests which arises in such a situation. Mr Wilton’s closing submissions revealed that he had also identified the same case, which was in the bundle of authorities. My brief pre-trial research also alerted me to the point that the concept ‘Indicative Behaviour’ identified in Chapter 5 of the Solicitors Code of Conduct (v. 19, dated 1 October 2017) quoted by Fraser J in that case – and stating, at para. 5.6, that a solicitor should not act in litigation if it is clear he (or anyone within his firm) will be called as a witness unless satisfied it will not prejudice his independence as a litigator or the interests of the client or the interests of justice – no longer appears in the “new” 2019 Code of Conduct published by the SRA. It seems the current Code does not provide guidance or examples as to how the standards set by the SRA are to be met. Mr Wilton KC confirmed as much in his closing submissions.
117. Nevertheless, despite that change, Mr Morgan’s testimony in this case has highlighted the reason why it is generally not appropriate for a solicitor to act professionally in a case in which he will be called as a witness to give evidence as a witness on factual matters going to the merits of the claim or defence.
118. During the course of his cross-examination Mr Morgan accepted:

- i) that an untrue statement was made in HCR's letter dated 12 May 2022 (and of which he was the author) which said "[T]his firm's family law department were consulted by our client in January 2019, to investigate the possibility of an appeal from our application to set aside the [Settlement] on the basis of further information then available. That instruction eventually led to the instruction of counsel to advise on the prospect of the divorce courts setting aside the original order by consent." In fact, in 2019, Mr Morgan was assisting Ms Kay informally and his witness statement explained the nature of what he described as his pro bono assistance (with him acting rather than any colleague in the firm's family department) before HCR were formally instructed in October 2021. The statement also gave four reasons why this was the position before Ms Edmonds was instructed, in March 2020, and why he chose not to involve others at his firm who would have had a better knowledge of family law matters. In cross-examination, Mr Morgan could not explain why HCR's letter had made those untrue statements;
 - ii) that a similar untrue statement was made in HCR's letter dated 22 June 2022 to the effect that Ms Kay's file was reconstructed in 2019 and, once that was done, "the file was considered by HCR's family law department, who concluded that there were significant issues with an application to set aside, and that advice should be sought from specialist family law counsel." Again, in his testimony, Mr Morgan could not explain that statement; and
 - iii) that he had prepared the first draft of Ms Kay's witness statement addressing the preliminary issue which, necessarily, involved her speaking about matters concerning his involvement. As already noted in connection with Mr Wilton's point about the "cross-contamination" of her evidence, parts of Ms Kay's and Mr Morgan's witness statements (engaging with points made in identified paragraphs in the Firm's Amended Defence) were expressed in materially identical terms.
119. The potential hazard in a solicitor acting both in a professional capacity and as witness of fact in the case lies in the risk that the due administration of justice, which a degree of professional detachment and attendant duties as an officer of the court are aimed at supporting, is prejudiced. Mr Wilton KC said the untrue statements in the letters were designed at putting the Firm off the scent in its pursuit of the limitation point even though they did not succeed in doing so. As I indicated at the hearing, I think it is inconceivable that the evident cross-contamination of the two witness statements would have occurred if they had been separately prepared with the involvement of independent solicitors (such as an insurer's panel solicitor) in accordance with the Statement of Best Practice embodied in Practice Direction 57AC.
120. Mr Hall submitted that, although Mr Morgan's decision to represent Ms Kay in her claim might be viewed in hindsight as a mistake, this was an after-the-event development which did not and should not impact upon the merits of her case on the limitation issue by reference to events prior to its commencement in March 2023. The difficulty with that submission is that the three (or two) matters highlighted above have an impact upon the court's assessment of the evidence on that issue.
121. In addressing Mr Morgan's credibility as a witness, Mr Wilton KC described Mr Morgan's position as absolutely extraordinary. He extended that observation beyond

the matters mentioned above so as to include what he said was Mr Morgan's financial interest in the outcome of Ms Kay's claim. This was a reference to the fact that Mr Morgan had said he had lent money to Ms Kay (he also paid for Ms Edmond's advice and some £5,000 for a 50th birthday party for Ms Kay) and paid the outgoings in the home which she and her sons shared with him.

122. Mr Morgan said he did not stand to make any direct financial gain if Ms Kay's claim against the Firm succeeds. I accept that his support of Ms Kay in this litigation is not motivated by his own financial considerations. It instead springs from his support for her as his partner which, materially for present purposes, was of a personal rather than financial nature before the decision to fund Ms Edmond's advice was made. However, it is their personal relationship and Mr Morgan's resulting involvement in the period prior to the instruction of counsel which underpins his seriously mistaken approach to his own role in the claim.
123. In my analysis of the evidence below I address the reasons given by Ms Kay and Mr Morgan for not instructing Ms Edmonds earlier than March 2020. For the moment, I simply observe that the misleading statements in HCR's letters of 12 May and 22 June 2022 themselves appear to recognise that the period between May 2018 and March 2020 should properly be categorised as one of "delay".
124. I regret to say that I treat any explanation for that delay given by Mr Morgan or (because of the cross-contamination) by Ms Kay with a degree of caution. I see no other option when Mr Morgan, who did not challenge Mr Wilton's description of them as "lies", could offer no explanation for what can only have been intended in those letters to be a smokescreen to conceal the true position.

Mrs Kaye

125. Mrs Kaye joined the Firm as a partner in 2007 and left it in April 2022 to become a partner in another firm. Before qualifying as a solicitor in 1998 she worked as a legal executive, becoming a Fellow of the (now Chartered) Institute of Legal Executives in 1996 after 10 years as such. As a solicitor, her practice has focused on all types of private family law related matters.
126. I found Mrs Kaye to be a straightforward and truthful witness. Mr Hall recognised that, in 2008, she was an experienced solicitor who appears to have adopted an almost maternalistic stance towards her client Ms Kay.
127. Nevertheless, Mr Hall submitted that there were some inconsistencies within Mrs Kaye's evidence and that, as Ms Kay's matter was just one of those on which she was professionally engaged, whereas the Settlement was a life-defining event for Ms Kay, I should approach it with some caution on certain points.
128. Of course, the risk of memory failure in a witness is high when the relevant events in the case took place some 16 years ago. It is the correspondingly significant risk that a defendant may not be able fairly to defend the claim by reference to evidence based upon much fresher recollections which underpins the ordinary limitation period and its consequences for stale claims. Subject to Ms Kay's case that the Firm (acting by Mrs

Kaye) has been guilty of section 32 concealment, between April 2014 and March 2023 Mrs Kaye was entitled to assume (if she ever put her mind to it) that there would never be a reason for her to revisit the advice she gave in relation to the Settlement.

129. In fact, the inconsistencies suggested by Mr Hall were not widespread and did not so much involve a clash with the evidence of Ms Kay as opposed to instances of Mrs Kaye's evidence being at variance with contemporaneous attendance notes. For example, Mr Hall said that two attendance notes of the meeting with Ms Kay on 12 December 2007 (one made by the Firm's trainee and the other by Mrs Kaye) revealed uncertainty as to whether or not Ms Kay had expressed a preference for a clean break with Mr Mahan. He also submitted that the terms of her attendance note of the FDA on 14 December 2007 did not support her recollection that the District Judge had gone through Ms Kay's questionnaire (to Mr Mahan) and expressed concern about particular aspects of it.
130. Mr Hall also noted that Mrs Kaye accepted in evidence that she may not have given specific advice about the availability of an NSMO as opposed to a clean break which was at odds with one. In her testimony, Mrs Kaye said that, if the ancillary relief claim had gone to a final hearing, it was likely that an NSMO would have been made. She had referred to "*extraordinary amount of debt*" on the part of Mr Mahan when she first advised Ms Kay and noticed that he was paying outgoings by credit card. She explained that under an NSMO the initial maintenance was £0 but (depending on whether the order was of indefinite duration or for a defined term or expressed by reference to the minority of a child) provides the opportunity to come back to court in the event of a later change in circumstances. She said that would not necessarily be the best outcome for Ms Kay in circumstances where having to bring Mr Mahan back to court was "*not the position she wanted to be in*".
131. These matters which were covered in evidence relate directly to the merits of Ms Kay's negligence claim should it be found not to be statute barred. At any trial, Ms Kay would have to engage with a key point made by Mrs Kaye which is that at that time, aged 40 and wishing to become an independent person, she wanted to sever her reliance upon Mr Mahan whom she clearly distrusted. Both attendance notes of 12 December 2007 appear to contemplate the possibility of a clean break subject to provision for child maintenance. When Mrs Kaye later advised in May 2009 about the difficulty in re-opening the Settlement, she referred to the powers of the Magistrates court to enforce the Child Support Agency payments due from Mr Mahan (which Ms Kay said he was not paying). In her evidence, Mrs Kaye drew attention to this in relation to what she said was the shared perception of the difficulties involved in holding Mr Mahan accountable in the divorce proceedings.
132. However, Mrs Kaye's evidence on these matters obviously bears upon Ms Kay's case under section 32 of the Act. As the formulation of the issue in paragraph 20 above reveals, there is inevitably some overlap between her case on concealment and the underlying merits of her case.
133. As to that, Mrs Kaye's evidence was that the Settlement was reached in circumstances where Ms Kay had a mind of her own which she expressed in clear terms. The contemporaneous attendance notes (and the existence of the Hildebrand bundle which she had compiled for her previous solicitors) support that observation.

134. Mrs Kaye said Ms Kay listened to her advice, and trusted it, but it was “*very much a team approach.*” She explained that, although it had appeared from the outset that Ms Kay wanted to be financially independent in a way that would be served by a clean break with Mr Mahan, she (Mrs Kaye) was initially sceptical about the sufficiency of his assets to support that. Her evidence was that the District Judge at the FDR indicated that Ms Kay’s pre-FDR opening offer was too high and that Mr Mahan’s offer on the day was the more realistic offer. She said that Ms Kay was aware at the time of the Settlement that Mr Mahan had not answered all of the questions raised in Ms Kay’s questionnaire and that she would have taken instructions before agreeing to withdraw certain questions. She said that, had the matter instead gone to a final hearing, there would have been further questions to be asked of him by reference to the questionnaire.
135. Mrs Kaye’s described the Settlement as “*a very good outcome*” and she thought at the time that Ms Kay had been very satisfied with her work.
136. Mrs Kaye told me she had not been accused before of concealing matters in a professional context.
137. There being a first for most things, that does not mean of course she was not guilty of it in the present case. However, I found her to be an honest witness and, whatever the merits of Ms Kay’s claim might ultimately be found to be, it is clearly not an open-and-shut case where it might be said that the alleged negligence was soon clear for all (including Mrs Kaye) to appreciate. That the present claim appears really to be driven not by reference to the early change in Ms Kay’s financial position post-Settlement but instead her ex-husband’s significantly contrasting fortunes beyond the ordinary limitation period – which might indicate an element of ‘reverse engineering’ in the construction of a negligence claim against the Firm based upon the clean break with him – suffices to illustrate that point.
138. Mrs Kaye said the allegation of concealment has had a profound impact upon her and that, although she understood Ms Kay’s overall sense of grievance about the unfairness of the financial outcome between herself and Mr Mahan, the allegation of concealment meant that, for herself, “*it’s not about money*”.

Analysis and application of the evidence

139. The evidence of Ms Kay and Mr Morgan goes to the issues under section 14A. the evidence of Mrs Kaye touches upon that issue (at least in relation to the Firm’s advice in 2008-9 about the nature of the Settlement and the difficulty in the way of an application to set it aside) but in the main it goes to the issue under section 32.

Section 14A

140. I am satisfied on the evidence, including her own, that Ms Kay had actual trigger knowledge by no later than the end of 2009. If she did not have actual knowledge by that stage then she should be attributed with constructive trigger knowledge.

141. Even if that had not been the case then my finding would have been one of constructive trigger knowledge by no later than the end of 2018.
142. Either way, a claim issued in March 2023 cannot be justified by reference to section 14A.
143. Ms Kay's evidence was to the effect that she had never been satisfied with the Settlement: she had "*always tried to set it aside*". By June 2009, following the termination of the Firm's retainer after it had repeated the negative advice on that front previously given within a couple of months of the court order embodying it, she was equipped with the level of knowledge identified in *Haward*.
144. It must by then have been obvious to Ms Kay that, on her case in these proceedings, something must have gone wrong in the advancement of her ancillary relief claim. As I have mentioned, the negligence claim seems to involve an element of 'reverse engineering', and application of hindsight, so that a trial of her negligence claim against the Firm would *appear* to involve it being held to an element of foresight about Mr Mahan's increased wealth many years later. However, for present purposes I assume that the Firm was negligent in not attempting, at least, to secure for Ms Kay a term of the Settlement which would have enabled her to seek further financial provision by reference to that later wealth, as opposed to one which gave him the defence of a clean break. The focus has been on a NSMO which Mrs Kaye said would likely have been made if the matter had gone to a full hearing (though, again, its likely term – i.e. its duration – would no doubt be the subject matter of argument at a trial of this claim).
145. On that assumption, by the time the Firm ceased to act for her in June 2009, Ms Kay knew enough to cause her to investigate the possibility that the lack of recourse to Mr Mahan may have been attributable to fault on the part of the Firm. Using the language in *Witcomb*, she had some reason to consider that may have been the case. In my judgment, that is obvious when one considers the position she found herself at the time. Allowing for the fact that the early 2008-9 inquiry about re-visiting the ancillary relief claim was driven as much if not more by her own post-Settlement impoverishment than by Mr Mahan's apparent financial position at that time, she would or should have asked herself: "*How is it that, with the supposed benefit of legal advice, I have found myself in this position?*"
146. In putting it like that, I accept that Ms Kay should not be attributed with knowledge in 2009 that there was such a thing as a NSMO. Mrs Kaye accepted that she may not have referred to one as such. But Ms Kay did know that the Settlement gave Mr Mahan a "defence" based upon the clean break. The clean break was at odds with any ongoing maintenance entitlement, whether one initially fixed at zero but potentially subject to later review, or otherwise.
147. I therefore do not accept Mr Hall's submission that Ms Kay's ignorance of the availability of a NSMO puts her in the same position as the claimant in *Witcomb*. The post-settlement developments in that case were such that they revealed what, in effect, had been (at the date of settlement 8 years previously) the existence of a further, latent damages claim in respect of his personal injuries. I put it like that, recognising that such phraseology would quite possibly not pass muster with personal injury lawyers, to contrast that overlooked claim in *Witcomb* (one that could have been addressed by the settlement, at least in terms of a provisional remedy for it, when the factual basis for

one arising was expressly contemplated by the lawyers) with Ms Kay's position in 2008. Ms Kay's claim was a single, non-composite one and, by its very nature, any compromise of it would reflect the position of both parties (but most materially Mr Mahan) at the time of compromise.

148. For the purposes of knowledge of attribution, therefore, there was no overlooked claim of a kind that only materialised and came to Ms Kay's attention much later. If an aspect of her single ancillary relief claim was overlooked by the Settlement, because the terms of it should instead or in addition have anticipated that Mr Mahan's financial position might improve significantly over time, then that oversight was obvious to Ms Kay by June 2009. By that time she had been advised that there was no scope for further recourse to Mr Mahan and appreciated the full impact of a clean break. It precluded her going back to him for maintenance payments. For these purposes, a claim for ancillary relief following a divorce perhaps does not sit comfortably alongside the analysis of other factual scenarios underpinning professional negligence claims against professionals arising out of injury to the person. However, in my judgment, Ms Kay's position in 2009 was closer to the situation envisaged in *Forbes v Wandsworth H.A.* Knowing what she did she was then at the stage of deciding whether to conclude the finality of the Settlement was just one of those things, which she had to accept, or instead to investigate whether she was in that position because something had gone wrong with the legal advice she had received.
149. Mr Hall submitted that a finding that Ms Kay had actual trigger knowledge by the time the Firm's retainer came to end in June 2009 would be at odds with the advice given to her after the date of the Settlement. He said that the effect of that advice in October 2008 and May 2009 was to dissuade her from considering matters further. However, for the purposes of section 14A (I address section 32 below) this detracts from the need to focus upon what that unchallenged later advice revealed about the earlier advice which is the basis of her claim. The very nature of the later advice (discouraging as it was in relation the likelihood of success on any attempt to re-visit the Settlement) was such that it raised a suspicion about the soundness of the earlier advice. Her then realisation that she was probably stuck with the terms of the Settlement (the "*relevant damage*" for section 14A purposes) gave her cause to consider that the reason for her predicament might lie in the negligence of the Firm which she now alleges. Her position was akin to the patient in *Forbes v Wandsworth H.A.* who knows the medical treatment has gone wrong. She knew enough for her to begin investigating whether or not the Firm was at fault.
150. In my judgment, to suggest that such investigation was not prompted by what she then knew, because she was not aware of the option of something called a NSMO, is to rely upon a point of detail within the wider point that there could be no further recourse to Mr Mahan (on any basis). That level of detail is not what the test in *Haward* requires. To my mind, the suggestion also comes close to saying that because Ms Kay did not know about NSMO's she did not then know the true nature of the Firm's negligence. Again, section 14A(9) makes it clear that this is irrelevant to trigger knowledge.
151. As I mention below in relation to what would have been my finding in the absence of trigger knowledge in 2009, the unwritten and informal nature of the advice which Mr Morgan says was given to him by Ms Edmonds, about the Firm being potentially liable, in my judgment illustrates the point that knowledge that the Settlement could not be re-

opened is inextricably bound up with the relevant trigger knowledge under section 14A. The advice later obtained in 2020 confirms that the second was the corollary of the first.

152. As to that alternative finding, even if Ms Kay had not acquired trigger knowledge by the end of 2009 then in my judgment she had done so by no later than the end of 2018.
153. As this alternative finding rests upon the hypothesis that she did not have actual or constructive trigger knowledge at the earlier point in time identified in my primary finding, and as this alternative one is informed by what Ms Kay did do (though only in March 2020) as a result of her own and Mr Morgan's further investigations in relation to the Settlement in 2018, I would rest this alternative finding on the basis of constructive trigger knowledge. It rests essentially upon the application of section 14A(10), as at the end of 2018, by reference to what in fact transpired when expert advice was sought some 15 months later. There were in fact the earlier developments which prompted Ms Kay to think again about the unfairness of the Settlement (I refer to the 2016 photo of the cars at Wall House and what her sons had said in 2017 about their father's standard of living) and a date of the end of 2018 reflects the most generous postponement of the commencement date.
154. In support of the Firm's fallback position that trigger knowledge, actual or constructive, had been acquired by 2018-2019, Mr Wilton KC submitted that Mr Morgan's involvement during that period had impacted adversely for Ms Kay on the limitation issue. Given that Mr Morgan was then providing what he and Ms Kay believed to be the value of his pro bono assistance, I regret to say that I agree.
155. It is clear that, from the early part of 2018, Mr Morgan began to provide that assistance. Although he said he did not study the file until late 2018, the file obtained from the Firm in May 2018 was then available for further consideration. Mr Morgan said that, when he did study it, he noted that Ms Kay should request a copy of Mr Mahan's Form E from the Firm, which she did in January 2019. Of course, this was part of evidence gathering for the purpose of considering an application to re-open the Settlement rather than preliminary steps taken towards the formulation of a potential claim against the Firm. Yet events show that when expert advice was ultimately sought in March 2020, about the first of those possibilities, the mention of the second, by expert counsel accompanied the advice upon the first. As I say, mention of the Firm's possible negligence was the corollary of the pessimistic advice on the actual subject matter of her instruction. Seeking expert advice about Ms Kay's ability to re-open the Settlement, either by reference to Mr Mahan's alleged prior concealment or his subsequent increased wealth, would and did (given the negativity of that advice) prompt investigation into the potentially flawed advice given by the Firm.
156. It would certainly not be correct to approach the substantive merits of Ms Kay's claim against the Firm on the basis that the flip-side of the conclusion that the Settlement probably could not be re-opened (on whatever grounds) is that the Firm was negligent. However, events show that the two matters are sufficiently connected for the court to conclude that a reasonable person in Ms Kay's position would have considered the consequence of that advice to be sufficiently serious to justify looking to recover damages from the Firm: compare section 14A(7)-(9). I note that, having received that advice, neither Ms Kay nor Mr Morgan have suggested that they acquired any further or better knowledge of the facts pertaining to the consequential (for present purposes) negligence claim during the period May 2020 and March 2023.

157. I note also that in *Gravgaard*, at [19], Arden LJ rejected a submission to the effect that section 14A(10) was not wide enough to cover a case where “*the existence of claim B is discovered in the course of investigation of claim A.*” The focus is instead upon “*the facts*” ascertainable by the claimant with the help of appropriate expert advice. The (unwritten) advice of Ms Edmonds relied upon by Ms Kay produced actual knowledge of attribution (to the level identified by *Haward* and *Witcomb*).
158. Ms Kay’s own case appears to be consistent with my approach on this aspect. Engaging with the Firm’s point that she acquired constructive knowledge of attribution when she obtained the informal advice of Mr Morgan in relation to her “financial issues”, the Amended Reply (paragraph 51) states:
- “As to paragraph 53(b), it is in the nature of concealment of a failure to advise that the putative claimant cannot discover the concealment until alerted to the possibility of breach of duty, which is why the indication from Ms Edmonds of 3 May 2020 is relevant.”
159. In my judgment, counsel’s expert advice should have been obtained a lot sooner than May 2020. I have already noted that the false statements in HCR’s letters dated 12 May and 22 June 2022 (though not explained by him) provide a reasonably clear indication that Mr Morgan would agree. Mr Wilton KC said their falsity indicated a “*bad conscience*” on his part on this aspect of the case.
160. There was no reason why the advice sought in March 2020 could not have been sought and obtained (that exercise in 2020 took a couple of months) by the end of 2018. There is no excuse for the delay on Ms Kay’s part during the second half of 2018 and the whole of 2019. The personal reasons she relied upon are irrelevant: see paragraphs 61 and 66 to 69 above.
161. In that earlier section of my judgment I outlined Mr Hall’s argument that Ms Kay’s very limited financial resources during the period provide a good reason for her not acting sooner. His argument was that the relative impecuniosity of a claimant, for the purpose of assessing the ability to pay for “*appropriate expert advice*” within the meaning of section 14A(10), may mean that the claimant cannot *reasonably* have been expected to acquire knowledge with the help of such advice; and that it cannot be said it was “*reasonable for him to seek*” it. Mr Hall said the case for ignoring what might otherwise be the impact of section 14A(10)(b) is even stronger where the impecuniosity is said to have been caused by the defendant’s alleged negligence.
162. I have already explained that it was Mr Morgan who in fact paid for counsel’s advice in 2020. He also paid £5,000 for her 50th birthday celebrations in early 2018. The birthday party money might have been used instead to pay for counsel’s advice at some point in 2018 or 2019. Of course, she may never have met Mr Morgan or come across any alternative way of paying for the expert assistance. On the other hand, she might in other circumstances have resumed her financially rewarding work as an environmental consultant or otherwise come into enough money to instruct counsel. I am prepared to assume that Ms Kay had no ‘claim’, or even expectation, that Mr Morgan would pay for either the party or the advice and also that her own financial resources were

throughout the 15 years from April 2008 (the longstop period) as stretched as she says they were in 2018 and 2019.

163. However, as I have said in addressing the effect of section 14A above, in my judgment there is no place for a corresponding assumption that even now (in 2024 and 16 years after the Settlement which she says is the cause of her financial position) she might, but for Mr Morgan's assistance and having since hit the section 14B longstop, still be in the position of saying that this limb of the sub-section should not be held against her. Such conjecture about the vicissitudes in a claimant's financial position over a potential period of 15 years provides a clear indication that her wherewithal, or lack of it, is irrelevant to the inquiry under section 14A.
164. I therefore accept Mr Wilton's submission to the effect that, had I not found Ms Kay had actual trigger knowledge from an earlier point in time, Mr Morgan's involvement in 2018 and 2019 would have prejudiced her position on the limitation issue. Together, by the summer of 2018, they had begun to investigate the possibility of applying to re-open the Settlement. To that end he had researched the position in relation to limitation. That end was not the same as that contemplated by the House of Lords in *Haward*, at [9] – quoted in paragraph 31 above – but, as explained, acting with greater promptness in those investigations would have led Ms Kay to acquire knowledge of attribution (and also material facts knowledge) much sooner than May 2020.
165. In my judgment, Mr Wilton KC was also correct in observing that Ms Kay cannot rely upon the proviso to section 14A(10) by reference to the assistance given by Mr Morgan between May 2018, when she recovered her file from the Firm, and the instruction of Ms Edmonds in March 2020. Both she and Mr Morgan were at pains to point out that he was not capable of giving the expert advice needed in relation to the possibility of re-opening the Settlement and the corollary of a negligence claim against the Firm. Ms Kay therefore cannot be heard to say that her acquisition of constructive trigger knowledge was somehow postponed during that period because she had taken reasonable steps to obtain advice which took almost 2 years to bear fruit (again, the false picture created by the statements in the two HCR letters in relation to much of the period).
166. That is not to say the position is the same as in *Henderson*. In that case, there could be no reliance upon the equivalent statutory proviso because the delay on the part of the solicitors, whose expert advice had been sought, was in unearthing a relevant fact which the claimant was capable of discovering without their expert input. Mr Morgan was neither an expert nor a formally instructed solicitor with “*general responsibility for the conduct of her claim*” in the *Henderson* sense. Instead, it is a case where Ms Kay's and Mr Morgan's combined investigation into the Settlement put her in the position of knowing enough to realise there was a need to seek appropriate expert advice. The proviso does not apply because a claimant who is prompted and assisted in acquiring such knowledge (in this case by someone who is a solicitor and, as such, knows that specialist advice is required) cannot be heard to say “*all reasonable steps*” have been taken to obtain expert advice when there is unjustified delay in seeking it. I have found there to be no objective justification for that delay.

Section 32(1)(b)

167. In my judgment, there is no evidence to support the case that Mrs Kaye, on behalf of the Firm, had the premonitory state of mind that (per *Potter v Canada Square*) is the stuff of section 32(1)(b) of the Act. That section cannot save the claim.
168. I have mentioned above that Ms Kay's own evidence points to the conclusion that her approach to this issue has been that the Firm was guilty of a breach of duty in 2008 and, *therefore*, it was guilty of concealing facts relevant to her claim over a period of time commensurate with her own (suggested) ignorance of the breach. Even if the Firm was negligent, that conclusion does not necessarily follow for the reason identified in paragraph 76 above.
169. In my judgment, there is simply no evidence to support a case that the Firm, through Mrs Kaye, was guilty of intentional concealment. Whatever a trial of Ms Kay's claim on its merits might have revealed in relation to the suggested shortcomings in the Firm's advice (an issue which likely to have focussed upon the availability of a NSMO) it is obvious from Mrs Kaye's evidence, which I accept without any reservation, that it did not occur to her, either in 2008, 2009 or at any time until the negligence claim was formulated, that the Firm was somehow exposed. At the time, and still, she considered the Settlement to be a good result for her client.
170. In the circumstances, a conclusion that the Firm had decided not to inform Ms Kay of a fact relevant to her claim would not only be at odds with my primary finding on the section 14A issue but also completely at odds with my assessment of Mrs Kaye as a witness.

Disposal

171. It therefore follows that the preliminary issue is to be decided in favour of the Firm. Ms Kay's claim is barred by the Act.
172. This judgment has been handed down remotely without attendance of the parties. I will hear the parties further in relation to any consequential matters which are not agreed. The time for filing an appellant's notice will be set by my order addressing the outcome under this judgment and those consequential matters and the handing down is therefore adjourned for the purpose of preserving the time for appealing, pending that further order.