[2012] EWHC 342 (Ch)
Claim No: HC11C01494

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
ON APPEAL FROM DEPUTY MASTER MATTHEWS

Date: 22 February 2012

Before :
RICHARD SHELDON QC (sitting as a Deputy Judge of the High Court)

Between :

Integral Memory plc	**Claimant and Appellant**
and	
Haines Watts	**Defendant and Respondent**

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Arfan Khan (instructed by **Quastel Midgen LLP**) for the Claimant and Appellant
Simon Howarth (instructed by **Browne Jacobson LLP**) for the Defendant and Respondent

Hearing date: 31 January 2012
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APPROVED JUDGMENT

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

Richard M Sheldon QC
22 February 2012

Richard Sheldon QC (sitting as a Deputy Judge of the High Court):

1. This is an appeal by the Claimant against the order dated 10 August 2011 of Deputy Master Matthews granting summary judgment to the Defendant under CPR Pt 24 on the basis that the claim was time-barred. Permission to appeal was granted by Mr Justice Newey on 2 November 2011.

2. The Claimant is a distributor and manufacturer of silicon memory products. The Defendant is a firm of accountants. The case concerns the Claimant's claims against the Defendant in negligence, breach of contract and misrepresentation. It arises out of the engagement of the Defendant by the Claimant to provide tax advice in connection with a discretionary bonus scheme ("the Scheme"). The purpose of the Scheme was to achieve NIC savings. It is unnecessary to go into the details of the Scheme. In summary, the Claimant was to make payments into bank accounts in ECUs; the Claimant was to assign the benefit of those accounts to the employees who could if they chose convert those accounts into tangible currency and extract the money.

3. The claim form was issued on 11 May 2011. Particulars of Claim were attached. The Particulars of Claim are somewhat confused but, in summary, they allege that:

    a. By an oral agreement between the Claimant and the Defendant, the terms of which are partly evidenced in writing, the Defendant advised the Claimant, inter alia, that (i) in the absence of a change in the law, the Scheme was soundly based in law; and (ii) the Claimant would achieve National Insurance Savings through the implementation of the Scheme unless there was a change in the law of which the Claimant would be advised by the Defendant (paragraph 4);

    b. The above advice constituted an inducement and/or representations in reliance on which the Claimant entered into two separate agreements with the Defendant in relation to the Scheme which are identified by date [which are erroneously stated: they are in fact 16 June 1997 and 4 March 1998] (paragraph 5);

    c. By virtue of Clause 5.2 of the agreement dated 17 [sic: it should be 16] June 1997, it was an express and/or implied term of the agreement that the Defendant would advise the Claimant of any change in the law (paragraph 6);

    d. Further or alternatively, it was an implied term of that agreement that the Defendant would advise the Claimant on any change in the law after having obtained final advice from Leading tax Counsel and/or specialist tax Counsel and that the Defendant would provide such advice to the Claimant for inspection (paragraph 7);

    e. It was an implied term of the agreements that the Defendant would exercise reasonable care and skill in providing advice and acting as the Claimant's tax advisors (paragraph 9);

f. In reliance on the Defendant's advice that the Scheme was soundly based in law, the Claimant undertook various steps in furtherance of the Scheme (paragraph 11);

g. There was "a change in the law in 2003 which rendered nugatory the Scheme", of which the Claimant only became aware when, at its own expense and volition, it obtained legal advice on the feasibility of the Scheme from Leading Tax Counsel on 27 August 2009, who advised that all of the NIC avoidance arrangements of this type were to fail if taken to the Commissioners in 2003 (paragraph 12);

h. The Defendant negligently and/or in breach of contract "failed to advise the Claimant of such a change in 2003 or at any time before [sic] or thereafter" until the Claimant obtained such advice. Prior to that the Defendant continued to advise that the Scheme was still soundly based in law (paragraph 13);

i. In October 2009, HMRC proceeded to levy £104,096.34 against the Claimant representing interest and Court costs as a result of the non payment of NIC "following which the Claimant's cause of action was complete. The Claimant contends that the limitation period commenced at this date since it is at this date that the Claimant sustained measurable loss and damage" (paragraph 14);

j. In February 2000, the Defendant advised the Claimant to make protective payments but failed to advise the Claimant on the need for protective payments prior to entering the Scheme and failed to advise the Claimant on the risk of interest and penalties: if the Defendant had done so "the Claimant would not have entered into the [Scheme]" (paragraphs 15 and 16);

k. The Defendant was guilty of misrepresentation in that it negligently misrepresented the Scheme to the Defendant (paragraph 17);

l. Under "Particulars of negligence and/or breach of contract", the Defendant failed to advise the Claimant of a material change in the law unequivocally or at all in 2003 "or at any time before or thereafter": a number of earlier allegations are repeated and particulars of misrepresentation are also pleaded (which principally relate to the representations already referred to);

m. As a result of the Defendant's negligence and/or breach of contract or misrepresentation, the Claimant has suffered loss and damage which are particularised as: (i) £104,096.34 representing interest and court costs as a result of the non payment of NIC pursuant to the Scheme "which the Claimant would not have incurred had there been no breach of contract and/or negligent [sic] or misrepresentation", and (ii) costs of obtaining legal advice from

Leading tax Counsel on whether the Scheme was still soundly based in law in the sum of £12,000 (paragraph 18).

4. I have described the Particulars of Claim as confusing principally because of the apparent acceptance expressed on behalf of the Claimant to me, through Mr Khan who appeared for the Claimant, that the initial advice of the Defendant in relation to the Scheme was not flawed. A number of the allegations made in the Particulars of Claim appear to be inconsistent with such acceptance. At the end of the day, any confusion thereby arising does not much matter to the issues which I have to decide. The essential thrust of the Claimant's case as put to me by Mr Khan was that the Defendant was under a continuing duty to advise the Claimant of a change in the law, which is said to have occurred in 2003, and that the Defendant negligently and/or in breach of contract failed so to advise, causing damage to the Claimant.

5. Evidence was filed on the application for summary judgment. For the Claimant there is a witness statement of Sunil Kotecha dated 29 June 2011 to which I will need to refer later in this judgment.

6. It is necessary at this stage to say a little more about the damages claimed. The Claimant does not claim the amount of NIC paid to HMRC. The sum claimed of £104,096.34 represents the amount paid by the Claimant to HMRC in October 2009 in respect of interest on unpaid NIC and court costs. The circumstances giving rise to such payment are as follows. On 31 January 2000, HMRC made demand for the payment of NIC from the Claimant, together with interest on the unpaid NIC. Formal "Notices of Decision" in respect of NIC were issued which were appealed by the Claimant (for whom the Defendant was acting). Litigation was being pursued in the courts in relation to the efficacy of related, though not identical, schemes. Against the backdrop of such litigation, which was taking time to progress through the courts, there was significant delay in dealing with HMRC's claim against the Claimant in respect of NICs. Between early 2000 and 2003, the Defendant advised the Claimant on a number of occasions to make protective payments in order to prevent ongoing exposure to interest on unpaid NIC. On 11 June 2003 HMRC issued proceedings against the Claimant in the Watford County Court claiming the unpaid NIC and interest on the unpaid NIC of £95,373 from 19 April 1998 until 29 May 2003 and interest at a daily rate of £42.86 from 30 May 2003 ("**the HMRC protective proceedings**"). These proceedings appear to have been issued for protective purposes in order to prevent the claims from being time barred: at any rate they were not progressed whilst the litigation over the related schemes were going through the courts. The matter sprang again to life in August 2008 when HMRC wrote to the Defendant (acting for the Claimant) asking whether the Claimant wished to pursue the appeal or settle the matter, and made an offer of settlement which included remission of interest. After the Claimant took advice from Leading Tax Counsel in August 2009 (who advised the Claimant that its case was "unwinnable"), the Claimant reached a settlement with HMRC on 30 October 2009 whereunder the Claimant agreed to pay the outstanding NIC together with interest of £103,296.34 and court fees of £800 (making up the total of £104,096.34 claimed against the Defendant). In agreeing this settlement HMRC were exercising their power to remit or mitigate the outstanding interest due.

The Decision of the Deputy Master

7. The Deputy Master decided that the Defendant was entitled to summary judgment on the grounds that the Claimant's claims were barred by limitation. In summary, he held that the Defendant was not under a continuing duty to advise the Claimant as to whether the Scheme was or was not effective in law, once it had been put in place: he therefore held that the contract claim was time barred. As regards the claim in tort, the Deputy Master held that this was time barred because the Claimant incurred a liability to pay interest to HMRC when it failed (by at the latest 1998) properly to account to HMRC for NIC. He held that the contingencies as to whether HMRC would pursue its claim, or remit the interest, or when and at what figure HMRC's claim would be settled, were not relevant contingencies within the principle in *Law Society v Sephton* [2006] AC 543. Accordingly, he held that the causes of action in contract and tort had accrued before May 2005, ie more than six years before the claim form was issued. Finally, he held that the Claimant had the necessary knowledge for the purposes of the Limitation Act 1980 s 14A by no later than 6 January 2003.

8. In reaching these conclusions the Deputy Master clearly had in mind the grounds for giving summary judgment against a claimant, set out under CPR R 24.2, which he quoted at paragraph 7 of his judgment, and in particular: "The court may give summary judgment against a claimant… on the whole of a claim or on a particular issue if (a) it considers that (i) the claimant has no real prospect of succeeding on the claim or issue…… and (b) there is no other compelling reason why the case or issue should be disposed of at trial".

9. It is well established that the hearing of an application for summary judgment is not a summary trial and that the proper disposal of an issue under CPR Pt 24 does not involve the court conducting a mini-trial. I bear in mind the observations of Lord Hope in *Three Rivers DC v Bank of England (No 3)* [2001] UKHL 16, [2003] 2 AC 1 at paras 94 and 95. I also bear in mind that an application for summary judgment is not appropriate to resolve complex questions of law and fact, the determination of which necessitates a trial of the issue having regard to all of the evidence; nor to resolve disputed questions of fact on evidence where the facts are apparently credible.

10. Mr Khan, who appeared for the Claimant, repeatedly complained that the Deputy Master had wrongly conducted a mini trial, and made findings in the absence of oral evidence and cross examination. I consider that many of these complaints to be without substance. As to the former, the hearing before the Deputy Master was concluded within half a day, and argument before me was completed within a day. As to the latter, I will need to consider the position as and when I come to deal with the issues, but as a general matter, in order to make good his submission Mr Khan has to show a good reason why it was not appropriate for the Deputy Master (or why it would not be appropriate for me) to decide the issues on the Defendant's application.

Grounds of Appeal

11. The Claimant challenges the findings of the Deputy Master. The Grounds of Appeal which have been pursued on the appeal may be summarised as follows:

    a. The Deputy Master erred in construing the contract and in holding that the Defendant was not under a continuous contractual duty to advise the Claimant that the Scheme had failed; he erred in holding that the claim in contract was time barred ("**the Contract Issue**");

    b. The Deputy Master was wrong not to hold that the Claimant only sustained actual damage on 30 October 2009 and wrong to hold that the claim in tort was time barred. The Claimant contends that its liability for relevant interest was contingent on HMRC succeeding in the HMRC protective proceedings or on the acceptance by the Claimant of the liability to pay; the primary limitation period in tort commenced when the Claimant accepted liability on 30 October 2009 as it was only then that it sustained actual damage ("**the Tort Damages Issue**");

    c. The Deputy Master applied the wrong test in determining whether the Claimant had relevant knowledge under the Limitation Act 1980 s 14A , was wrong to determine that issue in advance of trial, and was therefore wrong to hold that the Claimant could not take advantage of the extended limitation period provided for in s 14A ("**the Knowledge Issue**").

The Contract Issue

12. Mr Khan's starting point in his oral submissions was to rely on the relevant letters setting out the terms on which the Defendant agreed to act. There are two such letters, one dated 16 June 1997 and one dated 4 March 1998, each sent by the Defendant to the Claimant and signed by the parties. There are two letters because two payments were made under the Scheme and there is one letter for each payment (a fixed fee was charged in each case). These two letters are in all material respects in the same terms and I therefore only need to refer to the first letter, that dated 16 June 1997 ("**the letter of retainer**"). (There is a separate engagement letter dated 16 June 1997 from HW Financial Services Ltd, which is related to the Defendant, but a separate entity which Mr Khan accepted should be ignored for present purposes).

13. In support of his submission that the Defendant was under a continuous duty to advise the Claimant (whether of a material change in the law (per the Particulars of Claim) or that the Scheme had failed (per the Grounds of Appeal)), Mr Khan relied on Clause 5.2 of the letter of retainer, which provided that:

> Where it proves necessary to amend the terms of this agreement because of legislation or other changes, a revised engagement letter will be sent incorporating the changes.

Mr Khan submitted that this demonstrated that, if there were a material change in the law which affected the viability of the Scheme, the Defendant would advise the Claimant of the same in a revised engagement letter. The Deputy Master rejected Mr Khan's submission to similar effect (see paras 18 – 20 of his judgment). He drew a distinction in the letter of retainer between the "arrangements" (ie the Scheme itself) which are covered by the first page of the letter (where warnings about the efficacy of the Scheme are given) and the terms of the agreement itself which are set out on the second page of the letter. He found as a matter of construction that Clause 5.2 provided for an amendment to the terms of the agreement in the light of legislation or other changes which required the professional services offered by the Defendant to be dealt with in a different way (such as, Mr Howarth suggested, regulatory changes). I consider that the conclusion reached by the Deputy Master on this point was clearly correct. However, the matter does not end there.

14. The Claimant also complains that the Deputy Master failed to take proper account of the fact that the agreement is alleged to have been partly oral and partly in writing. Mr Khan points to legal materials which support the proposition that where the agreement is partly oral the court will look at the way the parties subsequently acted for the purposes of ascertaining what terms were agreed but not written down.

15. The difficulty with this argument is the premise on which it is based. The Claimant does not actually allege in the Particulars of Claim that any relevant terms were agreed orally which formed part of the contract. Although there is a reference to an "agreement" which was partly oral in paragraph 4 of the Particulars of Claim, what is then pleaded is not an agreement but the advice given by the Defendant which is said in paragraph 5 to have constituted an inducement or representations which the Claimant relied in entering into the two written agreements. It is not pleaded that additional terms were agreed orally. Nor does the evidence of Mr Kotecha point to any different conclusion. Accordingly it would not be appropriate to have regard to subsequent conduct in construing the terms of the written agreement.

16. In support of his argument that subsequent conduct supports the allegation of a continuing duty, in paragraph 30 of his skeleton argument Mr Khan points to a number of letters and emails sent by the Defendant from 2001 onwards which expresses views about the position of the Claimant in the light of the challenges made by HMRC to the efficacy of the Scheme and developments in the litigation concerning related schemes, and includes expressions of view by the Defendants about the continued viability of the Scheme.

17. Mr Khan submitted that it was plain from these emails and letters that the Defendant was under a continuous duty to advise the Claimant on whether the Scheme had failed in the event of a material change in the law. That was why, amongst other things, the Defendant continued to advise on the viability of the Scheme after 2001. (skeleton para 31).

18. However, the continued involvement of the Defendant as evidenced by these emails and letters does not necessarily involve an oral agreement that the Defendant, as part of its initial retainer, was under a general continuing duty to advise in the manner contended for by Mr Khan. Such an oral agreement is not pleaded. Further, such involvement was foreshadowed, in the letter of retainer (Clause 3.1) and a letter

dated 2 June 1997, whereby the Defendant had agreed to support obtaining agreement to the Scheme with correspondence or meetings with HMRC and the costs associated with subsequent negotiations with HMRC in relation to matters arising from the implementation of the Scheme were to be included within the fixed fee charged. Mr Khan candidly accepted that potential claims could have been pleaded in relation to each piece of advice given after the arrangements had been entered into arising from such dealings by the Defendant with HMRC: but no such claims are pleaded, nor is there any application for permission to amend. This was perhaps because of evident problems on limitation which would arise in relation to each piece of advice given more than the relevant 6 year period expired (and most of the advice relied upon by Mr Khan was given before May 2005). The subsequent conduct relied on by the Claimant is not pleaded but is referred to in its evidence to support its contention that the continuing duty on the Defendant to advise on a material change in the law, or that the Scheme had failed, was part of the initial retainer of the Defendant ie always formed part of the agreement. In other words, the claim is in respect of a breach of the terms of the initial retainer. But according to the pleading, the agreements in question are in writing, namely the letter of retainer and the similar letter dated 4 March 1998. Subsequent conduct is not admissible to construe agreements in writing.

19. I nevertheless proceed to consider the position on the basis that the Defendant was arguably under a continuing duty to advise the Claimant of any material change in the law or that the Scheme had failed. It is clearly alleged in the Particulars of Claim (and in the witness statement of Mr Kotecha) that this duty was breached in 2003. Mr Howarth, who appeared for the Defendant, submitted that that is when time started to run for limitation purposes in contract. There was thereafter, he submitted, at most a failure to remedy a past breach, not a further and continuing breach. He submitted that the addition of the words "or thereafter" (in paragraph 13 and in the particulars of negligence) did not allow the Claimant to circumvent the limitation defence in contract. Mr Howarth said that what was in substance being alleged was an allegation that wrong advice was given. He says that one cannot invert what is in substance an allegation of wrong advice into an allegation that there was an omission to give correct advice for the purpose of improving the position on limitation.

20. In support of his submissions, Mr Howarth relied on *Bell v Peter Browne* [1990] 2 QB 495 where solicitors who negligently failed to take steps to protect their client's interest in the proceeds of sale of a property whenever that sale occurred were not under a continuing duty to take such steps. Their duty was to take the necessary steps at the time of the transaction which they undertook on their client's behalf. Once they had failed to do so at the proper time, they had acted in breach of contract, and their failure to do so thereafter was a failure to remedy their breach. In his judgment (at p 500F – 501H) Nicholls LJ stated:

> *Clearly, all those steps needed to be taken at the time of the transfer or, in the case of lodging a caution, as soon as reasonably practicable thereafter. When the solicitor failed to take those steps in 1978 he was, thereupon, in breach of contract. This was so even though the breach, so far as it related to lodging a caution, remained remediable for many years. Indeed, it remained remediable until the plaintiff's former wife sold the house. Thus the six-year limitation period began to run from the date of the breach, in September 1978, and it expired long before the writ was issued nearly nine years later,*

in August 1987. Accordingly, in my view, Auld J. was correct in holding that the claim based on breach of contract is statute-barred.

It is, of course, true that the solicitor's breach of contract in 1978 did not discharge *his obligations. Had the plaintiff learned, a year or two later, of what had happened, he would still have been entitled to go back to his former solicitor and require him to carry out, belatedly, his contractual obligations so far as they could still be performed. For example, lodging a caution. Despite this, it was in 1978 that the breach occurred. Failure thereafter to make good the omission did not constitute a further breach. The position after 1978 was simply that, in breach of contract, the solicitor had failed to do what he ought to have done in 1978 and, year after year, that breach remained unremedied. Nor would the position have been different if in, say, 1980 the plaintiff's solicitor had been asked to remedy his breach of contract and he had failed to do so. His failure to make good his existing breach of contract on request would not have constituted a further breach of contract: it would not have set a new six-year limitation period running. Once again, the position would have been simply that the solicitor remained in breach. Nor, finally, is the position any different because, in respect of lodging a caution, the breach remained remediable until 1986 when the house was sold. A remediable breach is just as much a breach of contract when it occurs as an irremediable breach, although the practical consequences are likely to be less serious if the breach comes to light in time to take remedial action. Were the law otherwise, in any of these instances, the effect would be to frustrate the purpose of the statutes of limitation, for it would mean that breaches of contract would never become statute-barred unless the innocent party chose to accept the defaulting party's conduct as a repudiation or, perhaps, performance ceased to be possible.*

For completeness I add that the above observations are directed at the normal case where a contract provides for something to be done, and the defaulting party fails to fulfil his contractual obligation in that regard at the time when performance is due under the contract. In such a case there is a single breach of contract. By way of contrast are the exceptional cases where, on the true construction of the contract, the defaulting party's obligation is a continuing contractual obligation. In such cases the obligation is not breached once and for all, but it is a contractual obligation which arises anew for performance day after day, so that on each successive day there is a fresh breach. A familiar example of this is the usual form of repairing clause in a tenancy agreement. Non-repair for six years does not result in the repairing obligation becoming statute-barred while the tenancy still subsists. The obligation of the tenant or the landlord to keep the property in repair is broken afresh every day the property is out of repair, as Bramwell B. observed in Spoor *v.* Green *(1874) L.R. 9 Ex. 99, 111.*

We were much pressed with the decision of Oliver J. in Midland Bank Trust Co. Ltd. *v.* Hett, Stubbs & Kemp *[1979] Ch. 384. That case may be distinguishable on its facts. There the defendant firm of solicitors never treated themselves as functi officio in relation to the option. They continued to have dealings with their client in respect of the unregistered option, as summarised at p. 438d-f. The instant case stands in marked contrast. There is no suggestion that the defendants had any further contact with the plaintiff or his affairs after the conclusion of the divorce proceedings. That was more than six years before the writ was issued. The amended statement of claim, indeed, alleges that the solicitors owed a "continuing duty" to protect the plaintiff's one-sixth beneficial interest until that duty could no longer be fulfilled or the plaintiff accepted the solicitors' breach as repudiation. But this alleged continuing duty is not founded on any facts other than the initial retainer I have mentioned. This allegation takes the plaintiff's case no further.*

21. Beldam LJ also considered *Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp* in some detail. At p 507D, he said: "It was important in that case to note that it was not a case of the giving of wrong and negligent advice – where the breach of contract necessarily occurred at a fixed point in time – but of simple nonfeasance".

22. Mr Howarth also relied on the Australian case of *Winnote Pty v Page* [2006] NSWCA 287 where a firm of solicitors gave negligent advice to its client, who wished to obtain the right to exploit a deposit of peat on land owned by a third party, by failing to obtain for its client a particular government licence to extract peat. The New South Wales Court of Appeal held that the firm was not under a continuing duty to obtain the licence. It had negligently failed to obtain the licence at the point when it ought to have done, and the failure to obtain it thereafter was a failure to remedy a past breach, not a further and continuing breach. This was so even though the solicitors' retainer to represent their client's interest in the transaction extended beyond the date when the licence ought to have been procured. The following passages appear in the judgment of Mason P (with whom Tobias J agreed, Basten JA disagreeing on certain limitation issues):

> *79 In Larkin v Great Western (Nepean) Gravel Ltd [1940] HCA 37; (1940) 64 CLR 221 Dixon J said (at 236):*
>
> *If a covenantor undertakes that he will do a definite act and omits to do it within the time allowed for the purpose, he has broken his covenant finally and his continued failure to do the act is nothing but a failure to remedy his past breach and not the commission of any further breach of his covenant. His duty is not considered as persisting and, so to speak, being forever renewed until he actually does that which he promised. On the other hand, if his covenant is to maintain a state or condition of affairs, as, for instance, maintaining a building in repair, keeping the insurance of a life on foot, or affording a particular kind of lateral or vertical support to a tenement, then a further breach arises in every successive moment of time during which the state or condition is not as promised, during which, to pursue the examples, the building is out of repair, the life uninsured, or the particular support unprovided.*
>
> *The distinction may be difficult of application in a given case, but it must regarded as one depending upon the meaning of the covenant….*
>
> *85 The critical point argued for by Winnote is that so long as the solicitors were engaged to represent Winnote's interests referable to the peat deposit transaction (ie until December 1990) their duty to advise how best to secure the ongoing right to mine the peat itself continued and was breached continually. Accordingly, there were breaches after 15 November 1989 which meant that there was no limitation problem for the contract claim or for the tort claim that now focussed exclusively on loss said to have occurred in 1993..*

[After consideration of *Midland Bank Trust Co. Ltd. **v**. Hett, Stubbs & Kemp*]

> *101 The respondents submit that any failure to revisit and correct that advice in and after 1989 was a failure to remedy the existing breach, not the commission of a further breach. I agree….*
>
> *103 Three matters can be derived from the passages quoted from Midland Bank.*
>
> *104 First, to identify a **relevant** continuing duty, it must still be an aspect of the retainer at the supposed time of breach. Thus, it was always part of the solicitor's duty in Midland to register the option, but it was not part of his assumed retainer to keep asking himself whether he had earlier been negligent with a view to informing the client if he discovered that he had.*
>
> *105 Secondly, the question whether an omission is negligent has to be determined at the time when it is said to have occurred and by reference to the context at that time.*
>
> *106 Thirdly, there is a categorical difference between the giving of negligent advice, which occurs when and whenever it is provided, and the continued failure to perform a step in a transaction embarked upon on instructions….*
>
> *108 Winnote has failed to show either that the retainer embarked upon in 1988 had relevant work to do in the now critical late 1989 and 1990 time period or that it was negligent at that later time for the solicitors to have then failed to give the correct advice. The omitted advice, according to the pleadings, is the same advice as that which should have been given in 1988.*

23. Mr Khan relied on the decision in *Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp*. He pointed out, correctly, that, unlike the present case, there was no continuing relationship or conduct in *Bell v Peter Browne*. He also placed reliance on *Gaughan v Tony McDonagh & Co Ltd* [2005] EWHC 739 (Comm), although it does not seem to me that this decision is of great assistance as it turned on its own facts and does not purport to decide any new points of principle. Mr Khan submitted that there was a continuous contractual obligation to advise the Claimant that the Scheme had failed in the event of a material change in the law. He submitted that the limitation period in contract commenced in August 2009 when the Claimant obtained advice from Leading Tax Counsel rather than when the advice was given by the Defendant in 1997 or 1998.

24. I should first dispose of the last submission which I consider to be plainly wrong. On the basis that the Defendant was under a continuous contractual duty to advise of a change in the law, it is plain from the case as pleaded that such duty was first breached in 2003. It seems clear to me that the claims in contract are prima facie time barred in respect of breaches occurring before 11 May 2005. But the Claimant asserts that the Defendant was under a continuous duty to advise, and breached that duty, thereafter i.e. within the limitation period. The question I have to decide is whether this correctly characterises the claim, or whether, as Mr Howarth asserts, the relevant

breach occurred in 2003 when the Defendant failed to give the correct advice, and that thereafter there was a failure by the Defendant to remedy its breach.

25. The distinction between the parties' positions is a fine one, but I accept the submissions of Mr Howarth. It seems to me clear that the essence of the Claimant's case as pleaded is that the Defendant gave wrong advice in or about 2003 and thereafter (see Particulars of Claim para 13: "The Defendant negligently and/or in breach of contract failed to advise the Claimant of such a change in 2003 or at any time …. thereafter until [August 2009]…. Prior to that the Defendant continued to advise that the Scheme was still soundly based in law." See also para 17(i); Kotecha witness statement paras 9, 15 and 16. See also the Claimant's skeleton argument; "It is plain that the Defendant did advise the Claimant continuously on the viability of the Scheme" (para 33); ".. the Defendant was advising the Claimant that the Scheme was still soundly based in law" (para 56); "If the Scheme had failed, or was no longer sound, it was incumbent upon the Defendant to advise the Claimant to settle the dispute with HMRC" (para 62)).

26. On the Claimant's case the Defendant's contractual duty was clearly breached in or about 2003: it should have then advised that there was a material change in the law and/or that the Scheme had failed. Or as Mr Khan at one time put the Claimant's case in his submissions, the Defendant was negligent or breached its contractual duty in failing to advise the Claimant to settle with HMRC there and then. Proceedings could prima facie have been launched at that stage or at any time thereafter within the limitation period. Performance of the contractual obligation to advise was then due. The advice which the Defendant is alleged to have failed to give thereafter is the same advice which it is alleged should have been given in 2003. I consider that the relevant contractual duty was breached in 2003 and that thereafter there was a failure to remedy the existing breach, not the commission of a further breach.

27. Accordingly I find that the Deputy Master was correct in holding that the Claimant's claim for breach of contractual duty is time barred.

The Tort Damages Issue

28. The Claimant submits that the primary limitation period in tort commenced when it accepted the relevant liability to pay £104,096.34 on 30 October 2009 following HMRC's revised settlement proposal. Prior to that date, the liability for the relevant interest was, it is said, contingent on HMRC succeeding or failing in a tax tribunal, settling the litigation or on the acceptance by the Claimant of liability.

29. The cause of action for negligence in tort is not complete until the claimant incurs loss or suffers damage in respect of which the duty was owed. The Claimant's submissions confuse the question of whether loss or damage has been incurred with the quantification of loss. I consider that it is clear beyond doubt that the loss or damage had been incurred by the Claimant, for the purposes of its claims in tort, before 11 May 2005. Although dealt with succinctly by the Deputy Master in his judgment (see paras 22 – 24), I consider that he reached the correct conclusion. I

should nevertheless elaborate in the light of the arguments which were developed before me.

30. Most of the amount claimed by the Claimant by way of damages against the Defendant represents interest on unpaid NIC which was paid by it to HMRC. HMRC's claim for interest was based on the facts that the Claimant should have paid NIC by 19 April 1998 and, having failed to do so, the Claimant became liable to pay interest. The Claimant alleges that the Defendant should have advised the Claimant that the Scheme had failed (and therefore should have advised the Claimant to pay NIC which would have stopped interest running). The damages claimed by the Claimant represent for the most part such liability to pay interest. The settlement reached in October 2009 compromised such liability and quantified the amount. It is to be remembered that the settlement involved a settlement of the proceedings issued in June 2003 by HMRC to recover NIC and interest. The settlement is premised on there being an underlying liability on the part of the Claimant to pay interest to HMRC (if there were no such liability the Claimant could have no claim over against the Defendant). It is to my mind clear that the Claimant suffered loss when it incurred a liability to pay interest to HMRC, which occurred well before 11 May 2005. Mr Khan confirmed that the interest claimed related to the period after 2003 (having accepted that any claim for interest arising before 2003 could not succeed).

31. Mr Khan submitted that, until the settlement was reached in October 2009, the liability of the Claimant to HMRC was purely contingent. He referred to *Re Sutherland deceased, Winter v IRV* [1963] AC 235 where the concept of a contingent liability was considered and sought to draw an analogy on the facts with the various formulations of the meaning of a contingent liability in that case (see paragraphs 42 to 44 of his skeleton argument). Building on that argument, he then referred to *Law Society v Sephton* [2006] 2 AC 543, 554, where it was held "*the possibility of an obligation to pay money in the future is not in itself damage*"; and to *Axa Insurance v Akther & Darby Solicitors* [2009] 2 CLC 793, where Arden LJ said at 809: "*the assumption of a pure contingent liability does not cause the limitation period to start to run... the concept on which all members of the House agreed was that there had to be measurable loss before time began to be run, that is to say, loss which is additional to the incurring of a purely contingent liability... a pure contingent liability is not damage*".

32. However, the argument in my view breaks down on the premise which it is based. The Claimant's liability to pay interest on the unpaid NIC to HMRC was in no relevant sense contingent. A contingent liability is a liability which, by reason of something done by the person bound, may or may not arise depending on the happening of a future event (see *Re Sutherland deceased*). A classic example of a contingent liability is potential liability under a policy of insurance, which will only occur if an (insured) event occurs. That was not the position in the present case. There was either an actual liability to pay NIC and interest on arrears or there was not. The existence of such liability is not contingent on HMRC succeeding or failing in a tax tribunal (or a court) as submitted by Mr Khan. All the tribunal or court is deciding is whether or not there is an actual liability. Likewise a settlement of such litigation (at least in this case) for the reasons I have given is premised on there being such actual liability. The fallacy of Mr Khan's argument is demonstrated by his submission that where a debt is incurred but disputed, and court proceedings follow,

the liability is contingent until the court gives judgment in favour of the creditor (or there is a settlement). That submission is clearly wrong.

33. Mr Khan also relied on the power of HMRC to waive or remit interest (it would seem that remission of interest was the subject of an extra statutory concession which was published by HMRC: see HMRC letter dated 3 June 2004, p 2). Mr Khan sought, by analogy with *Day v Haine* [2008] IRLR 642, to argue that the existence of such discretion on the part of HMRC also showed that the liability to pay interest was contingent until the settlement was reached, in the sense that liability depended on the exercise of such discretion. But there is a clear distinction between the exercise of a discretion which creates a liability (as discussed in *Day v Haine*) and the exercise of a discretion which could mitigate or reduce an existing liability. It is clear to me that the present case falls within the latter category: the existence of HMRC's power to waive or remit interest does not prevent there being an actual liability – indeed the power if exercised would only go towards reducing what is an actual liability to pay interest.

34. Accordingly I find that the Claimant suffered loss and damage for the purposes of its claim in negligence before 11 May 2005.

35. Mr Khan contends that the Claimant is entitled in any event to recover the fees of leading tax counsel for the advice received in 2009. However, liability for these fees is claimed to arise from the same acts of negligence as are relied on for the claim to recover lost interest. In *Khan v Falvey* [2002] EWCA Civ 400, Sir Murray Stuart-Smith stated, at para 23:

> *A claimant cannot defeat the statute of limitations by claiming only in respect of damage which occurs within the limitation period, if he has suffered actual damage from the same wrongful acts outside that period*.

The claim for leading tax counsel's fees plainly falls foul of this principle, as does, for the same reasons, the claim for court costs.

36. Mr Khan conceded that a claim could have been made for a proportion of the fees paid by the Claimant to the Defendant in 1997 and 1998. That concession in itself shows that the Claimant suffered loss prior to 11 May 2005 and is fatal to its claim in tort.

37. Mr Khan accepted that, if I were against him - as I am - in respect of the claims in negligence, the claims in misrepresentation would also fall away.

38. For these reasons I find that the claims in tort advanced by the Claimant are time barred.

The Knowledge Issue

39. If the primary period of limitation has expired, as I have found, the following provisions in section 14A of the Limitation Act 1980 (as inserted by section 1 of the Latent Damage Act 1986) fall to be considered:

> *(1) This section applies to any action for damages for negligence… where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued…*
>
> *(4)That period is…..*
>
> *(b) three years from the starting date as defined by subsection (5) below…..*
>
> *(5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.*
>
> *(6) In subsection (5) above 'the knowledge required for bringing an action for damages in respect of the relevant damage' means knowledge both—(a) of the material facts about the damage in respect of which damages are claimed; and (b) of the other facts relevant to the current action mentioned in subsection (8) below.*
>
> *(7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.*
>
> *(8) The other facts referred to in subsection (6)(b) above are—(a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and (b) the identity of the defendant; and (c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.*
>
> *(9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.*
>
> *(10) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire—*
> *(a) from facts observable or ascertainable by him; or (b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek; but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.*

40. I was referred to the following passages in the judgment of the court in *Hallam-Eames* ***v*** *Merrett Syndicates Ltd* [2001] Lloyd's Rep PN 178 at p 181:

> *"In our judgment this [the judge's view of what the claimants had to know] is an over-simplification of the reasoning in Broadley* ***v*** *Guy Clapham & Co [1993] 4 Med LR*

*328 and Dobbie **v** Medway Health Authority [1994] 1 WLR 1234. If all that was necessary was that a plaintiff should have known that the damage was attributable to an act or omission of the defendant, the statute would have said so. Instead, it speaks of the damage being attributable to the act or omission which is alleged to constitute negligence. In other words, the act or omission of which the plaintiff must have knowledge must be that which is causally relevant for the purposes of an allegation of negligence. There may be many acts, omissions or states which can be said to have a causal connection with a given occurrence, but when we make causal statements in ordinary speech, we select on common sense principles the one which is relevant for our purpose. In a different context it could be said that a Name suffered losses because some member's agent took him to lunch and persuaded him to join Lloyd's. But this is not causally relevant in the context of an allegation of negligence.*

*It is this idea of causal relevance which various judges of this court have tried to express by saying the plaintiff must know the 'essence of the act or omission to which the injury is attributable' (Purchas LJ in Nash **v** Eli Lilly & Co [1993] 1 WLR 782, 799) or 'the essential thrust of the case' (Sir Thomas Bingham MR in Dobbie **v** Medway Health Authority [1994] 1 WLR 1234, 1238) or that 'one should look at the way the plaintiff puts his case, distil what he is complaining about and ask whether he had in broad terms knowledge of the facts on which that complaint is based' (Hoffmann LJ in Broadley **v** Guy Clapham & Co [1993] 4 Med LR 328, 332)…*

The plaintiff does not have to know that he has a cause of action or that the defendant's acts can be characterised in law as negligent or as falling short of some standard of professional or other behaviour. But, as Hoffmann LJ said in Broadley's case, the words 'which is alleged to constitute negligence' serve to identify the facts of which the plaintiff must have knowledge. He must have known the facts which can fairly be described as constituting the negligence of which he complains. It may be that knowledge of such facts will also serve to bring home to him the fact that the defendant has been negligent or at fault. But this is not in itself a reason for saying that he need not have known them.

41. In *Haward v Fawcetts* [2006] 1 WLR 682 the House of Lords made it clear that the knowledge requirements in s 14A must not be interpreted too strictly. I was referred to the following passages. Lord Nicholls said:

8 Two aspects of these "knowledge" provisions are comparatively straightforward. They concern the degree of certainty required before knowledge can be said to exist, and the degree of detail required before a person can be said to have knowledge of a particular matter. On both these questions courts have had no difficulty in adopting interpretations which give effect to the underlying statutory purpose.

*9 Thus, as to the degree of certainty required, Lord Donaldson of Lymington MR gave valuable guidance in Halford **v** Brookes [1991] 1 WLR 428, 443. He noted that knowledge does not mean knowing for certain and beyond possibility of contradiction. It means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice, and collecting evidence: "Suspicion, particularly if it is vague and unsupported, will indeed not be enough, but reasonable belief will normally suffice." In other words, the claimant must know enough for it to be reasonable to begin to investigate further.*

10 Questions about the degree of detail required have mostly arisen in the context of the need for a claimant to know "the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence": section 14A(8)(a). Consistently with the underlying statutory purpose, Slade LJ observed in Wilkinson ***v*** *Ancliff (BLT) Ltd [1986] 1 WLR 1352, 1365, that it is not necessary for the claimant to have knowledge sufficient to enable his legal advisers to draft a fully and comprehensively particularised statement of claim….*

12 Difficulties may sometimes arise over the interaction of these "knowledge" provisions and the statutory provision rendering "irrelevant" knowledge that, as a matter of law, an act or omission did, or did not, amount to negligence: section 14A(9). By the latter provision Parliament has drawn a distinction between facts said to constitute negligence and the legal consequence of those facts. Knowledge of the former (the facts) is needed before time begins to run, knowledge of the latter (the legal consequence of the facts) is irrelevant. As Sir Thomas Bingham MR said in the clinical negligence case of Dobbie ***v*** *Medway Health Authority [1994] 1 WLR 1234, 1242, knowledge of fault or negligence is not necessary to set time running. A claimant need not know he has a worthwhile cause of action.*

13 A linguistic point, which can give rise to confusion, should be noted here. Sometimes the essence of a claimant's case may lie in an alleged act or omission by the defendant which cannot easily be described, at least in general terms, without recourse to language suggestive of fault: for instance, that "something had gone wrong" in the conduct of the claimant's medical operation, or that the accountant's advice was "flawed". Use of such language does not mean the facts thus compendiously described have necessarily stepped outside the scope of section 14A(8)(a). In this context there can be no objection to the use of language of this character so long as this does not lead to any blurring of the boundary between the essential and the irrelevant.

Lord Brown, at para 90, said that all that is required is sufficient knowledge

to realise that there is a real possibility of his damage having been caused by some flaw or inadequacy in his advisers' investment advice, and enough therefore to start an investigation into that possibility which section 14A then gives them three years to complete.

Lord Mance said:

126 The language of section 14A thus recognises a range of different states of mind: (a) actual knowledge of the material facts about the damage and other facts relevant to the action (including therefore knowledge that the loss was capable of being attributed to an act or omission alleged to constitute negligence); (b) knowledge that a claimant might reasonably have been expected to acquire (from facts observable by himself or ascertainable by him or with the help of appropriate expert advice which it would have been reasonable for him to seek); and (c) ignorance. Actual knowledge within (a) involves knowing enough to make it reasonable to investigate whether or not there is a claim against a particular potential defendant: see para 112 above. Constructive knowledge within (b) involves a situation where, although the claimant does not yet know sufficient for (a) to apply, he knows sufficient to make it reasonable for him (by himself or with advice) to acquire further knowledge which would satisfy (a).

42. I turn to consider the facts. In so doing, I am acutely conscious that this is an application for summary judgment. Mr Khan rightly pointed out that the court should not conduct a mini trial. Where questions of knowledge are in issue there are clearly many cases where a trial will be required. On the other hand, there was no suggestion that the documents to which reference was made on this issue did not represent the parties' then state of knowledge, nor that there were other documents which might cast further light on this issue. I therefore should consider them, whilst at the same time being aware of the possibility that a trial might be necessary in order to explain what is set out in them.

43. In order to take advantage of the extended period of limitation provided for by s 14A the Claimant must show that he did not have the knowledge referred to in that section. The burden of proof is on the Claimant (see *Howard v Fawcetts*). The critical date on the issue of knowlege in these proceedings is 11 May 2008, three years before the issue of the claim form.

44. I can start with two letters from HMRC dated 31 January 2000, in which HMRC reported to the Claimant its findings following an inspection, namely that the Claimant was under a liability for NIC in respect of the payments made under the Scheme, and made demand for payment of the NIC liability and of interest on the arrears (then £35,133.26).

45. By a letter dated 14 February 2000 to the Claimant, the Defendant enclosed a copy of an appeal against the NIC ruling and reported on a judgment in related litigation in favour of HMRC. The Defendant expressed concern about the continued interest accruing on the NIC demands and recommended that NIC be paid on a "without prejudice" basis. The advice to the Claimant to make a protective NIC payment to prevent exposure to interest was repeated in a letter dated 13 November 2000.

46. On 23 November 2001, the Defendant wrote to the Claimant with an update regarding the position under the Scheme. Reference was made to the Court of Appeal having upheld the decision in the related litigation in favour of HMRC. Although that judgment did not specifically relate to NIC, the letter stated that there were common issues and that the decision would provide useful guidance (which was why the Claimant's appeals had been put on hold). The Defendant emphasised that the Scheme was soundly based in law when implemented, but stated that there had been an increasing tendency for the courts to invoke and widen the application of general anti-avoidance provisions (as reflected in the Court of Appeal decision in the related case). The Defendant said they were undertaking further research into the position. The advice to consider making protective payments was given because the Defendant considered itself obliged to warn of the adverse interest implications should the Scheme ultimately fail.

47. On 5 March 2002, the general manager of the Claimant asked, in an email to the Defendant, whether the advice which the Defendant was giving them in respect of the Scheme had been passed by Leading tax Counsel who originally advised on the Scheme and whether his opinion at that time that the Scheme was "soundly based in law" had changed. The email also raised concern about loan note losses and the

structure put in place on the Defendant's advice (a matter which is distinct from the Scheme and does not form part of the claims made in these proceedings.) The Defendant's response was contained in an email dated 15 March 2002. The email begins by dealing with the loan notes, saying that these were being dealt with at the Defendant's Farnborough office. So far as the Scheme was concerned, the email stated that instructions were awaited from "Head Office" as regards recommendations to clients who had made payments under the Scheme and that the author was not aware to what extent Leading tax Counsel originally instructed had or would be consulted in this exercise.

48. By a letter dated 18 December 2002, the Defendant responded to the Claimant's request for an update on the tax enquiries, saying there had been a delay in HMRC responding to the Defendant's letter explaining why it considered that the decision in the related case did not apply to the Scheme. It was suggested that delay might benefit the Claimant. The letter also contained a section on loan note losses (not relevant to the pleaded case in these proceedings) which was being dealt with by the Defendant's Farnborough office.

49. The Claimant's response was a letter dated 6 January 2003 (from Mr Kotecha) ("**the 6 January letter**"). Having referred to the Defendant's letter dated 18 December 2002, it stated:

> …as you know I have not been satisfied with the response of [the Defendant] for some time. It appears that the Inland Revenue is in no hurry to deal with my matters and [the Defendant] appears to do little to push things along in a timely manner, or to deal with the Revenue as such. These issues have been outstanding for a number of years.
> Please take this letter as notice that I am no longer prepared to tolerate this situation, I feel [the Defendant] has not dealt with my matters properly and I have suffered significant damages as a result.
> I am looking for [the Defendant] to reassure me on these issues before I go to my tax lawyers to take advise [sic] about proceedings against [the Defendant].

50. The Defendant responded by a letter dated 14 January 2003. An explanation was given as to why delays occurred in this type of case. Reference was made to the Defendant's Farnborough office having provided a further update as regards negotiations with HMRC, confirming that "none of the Revenue's arguments has caused Tax Counsel to alter his original opinion. This is corroborated by the change in the relevant legislation put through in the Finance Act 2002 dealing directly with the specific provisions on which the loan note losses rely…". Mr Khan placed considerable reliance on the reference to Tax Counsel's opinion, suggesting that this referred to tax counsel's opinion relating to the Scheme. However, it is clear from the context that this relates to loan notes, not only by the sentence that follows, but also by the fact that the Defendant's Farnborough office (as opposed to "head office") was dealing with this matter. In the email, the Defendant suggested that Mr Kotecha purchase personally a Certificate of Tax Deposit to mitigate the further exposure to interest if the argument on the loan notes were not to be successful. As regards the

Scheme, the email repeats the earlier advice to make protective payments to mitigate the potential interest exposure.

51. On 21 February 2003, Mr Kotecha replied, on the Claimant's headed notepaper ("**the 21 February letter**"). The heading refers to the Scheme and the loan note loss claim. The letter states:

> I cannot accept what appears to be your flippant and carefree response, as far as these types of arrangements taking a long time to bring to a conclusion; this was never indicated to me at the time advice was given. What you now say means there was a substantive omission in the advice given at the time on all the products I was sold. These products were sold as low risk soundly based in law.
>
> [There follows a complaint about the delays].
>
> [There is then a complaint about the advice given about the need to purchase Certificates of Tax Deposit in connection with the loan notes, concluding that the Defendant firm]:
>
> are in substantive omissions in this regard. I suggest [the Defendant] buys these Certificates of Tax Deposit on my behalf to mitigate any substantial claim against them.
> As far as protective payments go in respect of .. NIC again the arguments above hold and I suggest [the Defendant] makes these payments to mitigate any claim by me or [the Claimant]. This low risk soundly based in law products and your initial and ongoing advice of success and cash flow implications are contrary to needing protective payments.
> Please advise me whether you regard now and at the time of the original advice that these were low risk or high risk products.
> There are substantial other damages being incurred which will form part of a claim should you continue to take your smug and gutless attitude with someone else's money.
> I suggest a meeting with you… to discuss these matters to try to avoid full scale litigation. My Auditors Charterhouse will confirm my record on litigation as 100% wins against the toughest law firms in the world.

52. Mr Khan submitted that the threat of litigation in the last paragraph was, when read in the context of the letter as a whole and the earlier correspondence, only a threat to litigate in view of the Claimant's dissatisfaction about the delays in dealing with the matter with HMRC. I consider that this is not tenable. It is a threat to litigate about all the matters referred to in the letter, including the criticisms expressed about the Defendant's initial and ongoing advice.

53. It is unnecessary to go into the detail of subsequent correspondence. There is a letter dated 5 March 2003 from the Defendant which sets out the advice given at the time the Scheme was entered into and the inherent risks which were then pointed out to the Claimant. The Defendant expresses the view that the Scheme was and is "soundly based in law" but likely to attract challenge from HMRC. There are further complaints about the Defendant's advice in a letter dated 25 June 2004 from the

Claimant. In April 2005, at the Claimant's suggestion, consideration was being given by the Defendant to instruct tax counsel to advise on the current position as regards the Scheme. In August 2005, the Defendant put forward proposals to the Claimant in "full and final settlement of any claim you may have" to carry out certain steps provided that the Claimant accepted that the Defendant had no further commitment to the Claimant in respect of the Scheme. In August 2008 HMRC proposed a settlement of its claim for NIC and interest involving a remission or waiver of some of the interest claimed. In emails in September 2008 considering this proposal, the Defendant said that they remained reasonably confident about the technical merits of the Scheme but could not predict the outcome of a court hearing bearing in mind the trend of the courts to find ways to defeat avoidance arrangements.

54. The Deputy Master summarised some of this correspondence in his Judgment, going no further than the 6 January letter. The Deputy Master placed particular reliance on the 6 January letter and the threat of litigation therein made. Mr Khan criticised the Deputy Master's reliance on this letter on the basis that the threat of litigation was made in the light of the Claimant's complaints about delays in dealing with the matter, and does not show that the Claimant was aware that the Scheme had failed. There is force in this criticism and I accept that the threat of litigation in this letter is not of itself fatal to the Claimant on the Knowledge Issue.

55. So far as relevant to the present case, the knowledge of the requisite facts to be considered for the purposes of s 14A is first "the material facts about the damage in respect of which damages are claimed"; and secondly "that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence" (ss 14A(6) and 8(a)). It is clear to me that the Claimant had knowledge of the former in the present case well before 11 May 2008. HMRC had made a claim for interest in respect of unpaid NIC well before that date and had issued proceedings claiming such unpaid interest. Further the Defendant was advising the Claimant to make protective payments to avoid ongoing exposure to interest.

56. The dispute arises in connection with the second aspect of knowledge. Mr Khan submitted that the Claimant did not know that the Scheme had failed until August 2009 and that the Defendant in the meantime was continuing to advise that the Scheme was soundly based in law.

57. The correspondence to which I have referred, and in particular the 21 February letter, demonstrates that the Claimant:

    a. Knew by 2003 that HMRC were claiming NIC and interest;

    b. In 2003 was complaining about the initial and ongoing advice given by the Defendant as to the prospects of success in avoiding payment of NIC, in other words as to the soundness of the Scheme;

    c. Considered that "substantial damages" were being incurred in 2003 in consequence of the Defendant's conduct;

d. Was threatening, or at least contemplating, proceedings against the Defendant in 2003 (see both 6 January letter and last paragraph of the 21 February letter);

e. Was contemplating consulting his tax lawyers about proceedings against the Defendant (6 January letter, last paragraph);

f. Was considering that advice from tax counsel should be obtained about the current viability of the Scheme (see email of 5 March 2002, letter 1 April 2005)

58. It seems to me clear from the correspondence that the Claimant considered from 2003 onwards that it had cause to complain of unsoundness in the initial and ongoing advice given (or not given) by the Defendant about the viability of the Scheme. I find that the Claimant knew "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" or "knew enough for it to be reasonable to investigate further" (per Lord Nicholls in *Haward v Fawcetts).* Or in the words of Lord Brown in that case, the Claimant knew "that there was a real possibility of his damage having been caused by some flaw or inadequacy" in the Defendant's advice. Similarly I consider it clear that the Claimant's state of mind fell within (a) or (b) of Lord Mance's formulation at paragraph 126.

59. Mr Khan relied on paragraphs 64 and 65 in the judgment of Lord Walker in *Haward v Fawcetts* where Lord Walker referred to cases involving pure economic loss occurring in areas which call for specialised technical expertise. "Areas of that sort are those in which it is most likely that a claimant may know the basic facts, but not know, as an expert, what they add up to." Mr Khan submitted that this applied in the present case. However, the question of constructive knowledge within s 14A(10) was not considered in *Haward v Fawcetts* for the reasons given by Lord Mance at para 138. Mr Howarth did rely on constructive knowledge in the alternative to his submissions on actual knowledge. In view of the facts that the Claimant was himself considering consulting with his tax lawyers and/or the need to take tax counsel's advice about the continued viability of the Scheme, I consider it clear that (a) the formulations of the knowledge required referred to in paragraph 58 above, and/or (b) the test set out in s 14A(10) (knowledge which a person might reasonably have been expected to acquire…. (b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek), are clearly satisfied in this case well before 11 May 2008.

60. Mr Khan's submission that the requisite knowledge for the purposes of s 14A did not occur until August 2009 when the Claimant obtained advice from leading Counsel comes perilously close, in the circumstances of this case, to falling foul of s 14(9) i.e. that is the date when the Claimant realised that the Defendant's advice, and failure to give advice, had been negligent as a matter of law. As to his submission that the Defendant in the meantime was continuing to advise that the Scheme was soundly based in law, bearing in mind that the pleaded case is that the Defendant failed to give correct advice from 2003 onwards, once the Claimant realised that it had cause

to complain about the soundness of the advice (in 2003), it does not seem to me that the Claimant can properly rely on what, on the Claimant's case, is in substance a failure by the Defendant to disclose its own negligence.

61. Accordingly, I find that the Claimant has no real prospect of succeeding in showing that it only acquired relevant knowledge for the purposes of s 14A of the Limitation Act 1980 after 11 May 2008. I also find (essentially for the reasons given in paragraph 42 above when considered against the documents to which I have referred) that there is no other compelling reason why the Knowledge Issue should be disposed of at trial.

Conclusion

62. For these reasons, I find that the decision of the Deputy Master was correct. The appeal is dismissed.